Documentation

EU DISABILITY LAW AND THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

SEMINAR FOR MEMBERS OF THE JUDICIARY: FOCUS ON CIVIL AND EMPLOYMENT PROCEEDINGS

413DV06 Cracow, 3-4 September 2013

Background Documentation

A. Primary legislation

1.	Articles 2, 3, 6 and 19 of the Treaty on European Union (TEU)	
2.	Articles 10, 19 and 267 of the Treaty on the Functioning of the European Union (TFEU, ex EC Treaty)	
3.	Articles 20, 21, 22, 25, 26 of the EU Charter of Fundamental Rights of the European Union.	

B. European Disability Strategy 2010-2020

4.	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions - European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, Brussels, 15.11.2010. COM(2010) 636 final	

C. UNCRPD and the EU

5.	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	
6.	Optional Protocol	
7.	Information Note from the European Commission on progress in implementing the UN Convention on the Rights of Persons with Disabilities to the EPSCO Council, Brussels, 7 June 2011	
8.	Fifth Disability High Level Group Report on Implementation of the UN Convention on the Rights of Persons with Disabilities	

D. Non-discrimination

	Council Directive 2000/78	
9.	Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation	
	Jurisprudence of the CJEU	
10.	Judgment of the Court of 6 December 2012, Case C-152/11, *Johann Odar v Baxter Deutschland GmbH*	

11.	Judgment of the Court of 4 July 2013, Case C-312/11, *European Commission v Italian Republic* (only available in French)	
12.	Judgment of the Court of 11 April 2013, Cases C-335/11 and C-337/11, *Jette Ring v Dansk almennyttigt Boligselskab DAB (C-335/11) and Lone Skouboe Werge v Dansk Arbejdsgiverforening* (C-337/11)	
13.	Opinion of the Advocate General of 6 December 2012, Case C-335/11, *Jette Ring v Dansk almennyttigt Boligselskab DAB*	
14.	Judgment of the Court of 17 July 2008, Case C-303/06, *S. Coleman v Attridge Law and Steve Law*	
15.	Judgment of the Court of 11 July 2006, Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades SA*	
	Jurisprudence of the European Court of Human Rights	
16.	*Case of Lashin v. Russia* (Application no. 33117/02) Judgment of the Court (First Section) of 22 January 2013	
17.	Case of *Sykora v. Czech Republic* (Application no. 23419/07) Judgment of the Court (Fifth Section) of 22 November 2012	
18.	Case of *Bureš v. Czech Republic* (Application no. 37679/08) Judgment of the Court (Fifth Section) of 18 October 2012	
19.	Case of *D.D. v. Lithuania* (Application no. 13469/06) Judgment of the Court (Second Section) of 14 February 2012	
20.	Case of *Stanev v. Bulgaria* (Application no. 36760/06) Judgment of the Court (Grand Chamber) of 17 January 2012	
	Proposal for a new Directive	
21.	Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. COM(2008) 426 final. Brussels, 2.7.2008	
	Code of Good Practice	
22.	Code of good Practice for the employment of people with Disabilities, Bureau Decision of 22 June 2005	

E. Transport

		Page
23.	Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004	

24.	Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004	
25.	Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations	
26.	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	
27.	Communication from the Commission Communication on the cope of the liability of air carriers and airports in the event of destroyed, damaged or lost mobility equipment of passengers with reduced mobility when travelling by air. COM/2008/0510 final	
28.	Evaluation of Regulation 1107/2006 Final report Main report and Appendices A-B June 2010 – Executive Summary	

F. Telecommunication

29.	Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the regions - "Towards an accessible information society" COM/2008/0804 final.	
30.	Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee and the Committee of the Regions - eAccessibility [SEC(2005)1095] COM/2005/0425 final.	

G. Other

31.	List of secondary legislation relevant to "disability"	
32.	Information note on references from national courts for a preliminary ruling	
33.	Judgment of the High Court of Ireland, [2011 No. 9548P], M.X. [APUM] v Health Service Executive and by order the Attorney General	

H. Documents added during or after conference

	Legislative Measures	
34	Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings	
35	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 (recast)	
36	Council 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	
37	Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin	
	Jurisprudence of the CJEU	
38	Judgment of the Court of 19 April 2012, Case C-415/10, *Galina Meister v Speech Design Carrier Systems GmbH*	
39	Judgment of the Court of 21 July 2011, Case C-104/10, *Patrick Kelly v National University of Ireland*	
40	Judgment of the Court of 8 March 2011, Case C-240/09, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*	
41	Judgment of the Court of 19 January 2010, Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG*	
42	Judgment of the Court of 10 July 2008, Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*	
43	Judgment of the Court of 26 June 2001, Case C-381/99, *Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG*	
	Jurisprudence of the European Court of Human Rights	
44	*Case of Horváth and Kiss v. Hungary* (Application no. 11146/11) Judgment of the Court (Second Section) of 29 April 2013	
45	*Case of Z.H. v. Hungary* (Application no. 28973/11) Judgment of the Court (Second Section) of 8 February 2013	
46	*Case of Kędzior v. Poland* (Application no. 45026/07) Judgment of the Court (Fourth section) of 16 January 2013	
47	*Case of Shtukaturov v. Russia* (Application no. 44009/05) Judgment of the Court (First Section) of 27 June 2008	

48	*Case of D.H. and Others v. the Czech Republic* (Application no. 57325/00) Judgment of the Court (Second Section) of 13 November 2007	
	Decisions of the CRPD Committee	
49	*Case of Nyusti and Takacs v Hungary* (CRPD/C/9/D/1/2010; Committee on the Rights of Persons with Disabilities, 2013)	
50	*Case of H.M. v. Sweden* (CRPD/C/7/D/3/2011; Committee on the Rights of Persons with Disabilities, 2011)	
	Other judicial decisions	
51	*Case of Burnip v Birmingham City Council & Anor* (Rev 1) [2012] EWCA Civ 629 of 15 May 2012 (Court of Appeal of England and Wales)	
52	R. v. D.A.I. (2012 SCC 5, [2012] 1 S.C.R. 149; Supreme Court of Canada)	
53	*MDAC v Bulgaria* (European Committee of Social Rights, 2008, Complaint No. 41/2007)	
54	*Autism - Europe v France* (European Committee of Social Rights, 2003, Complaint No. 13/2002)	

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.

1. The Union shall establish an economic and monetary union whose currency is the euro.
2. 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.

3. 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.

1. 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.
2. 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.

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered
by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:
(a) rule on actions brought by a Member State, an institution or a natural or legal person;
(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
(c) rule in other cases provided for in the Treaties.

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.

Article 267
(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay

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, 15.11.2010
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

TABLE OF CONTENTS

1. INTRODUCTION

One in six people in the European Union (EU) has a disability[1] 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 average[2] partly due to limited access to employment.

Over a third of people aged over 75 have disabilities that restrict them to some extent, and over 20% are considerably restricted[3]. 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 EU[4]. 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[5]. 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, CZ, DK, DE, ES, FR, IT, LV, 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.

5 Council Resolutions (SOC 375 of 2 June 2010) and 2008/C 75/01 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 strategy[6] 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 billion[7]) 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 mechanisms[8] 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 barriers[9]. 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 5% of public websites comply fully with web accessibility standards, though more are partially accessible. Many television broadcasters still provide few subtitled and audio-described programmes[10].

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 US[11]). 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 508 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 copyright[12].

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 EU[13]. 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/EC[14] 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 50%[15]. 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 Regulation[16] 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.

5 — Education and training

In the 16-19 age group the rate of non-participation in education is 37% for considerably restricted people, and 25% for those restricted to some extent, against 17% for those not restricted[17]. 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

15 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 training[18], 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.

7 — 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 disabilities[19]; and work to prevent those risks.

[18] Council conclusions of 12 May 2009 on ET 2020 **(**OJ C 119, 28.5.2009, 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.

8 — 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 Regulation[20], 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. 25).

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 Disabilities[21]. 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 35 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 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 medical 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.

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 Report[1] 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 ESPSCO 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 State[5] 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 2008[7] 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 UNCRPD, 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 Point[9]. 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 UNCPRD.

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.

FIFTH DISABILITY HIGH LEVEL GROUP REPORT
ON THE IMPLEMENTATION OF THE UN CONVENTION
ON THE RIGHTS OF PERSONS WITH DISABILITIES

(May 2012)

Disclaimer

This report has only been very partially edited.

A large part of this document is based on contributions written in English mainly by non native authors. The Commission did not have the time or sufficient translating resources to correct linguistic imperfections. This linguistic reservation applies even more to most parts of the report dealing with Belgium and France. Parts of these contributions have been included in the report in the original French version.

The Report takes account of developments until approximately 1 April 2012.

TABLE OF CONTENTS

INTRODUCTION

This Report gives an overview of progress made in ratifying and implementing the UN Convention on the Rights of Persons with Disabilities in the EU and its Member States. It is prepared on the basis of replies to questionnaires and updates received from 27 Member States and various non governmental stakeholders. The Report can be particularly useful in helping to identify good practices.

It provides an update of developments in the national and EU implementation of the Convention, with detailed reference to the governance structures required by Article 33 of the UNCRPD. The report of this year also examines the legal and regulatory framework for accessibility, and changes introduced as a consequence of UNCRPD implementation.

The first chapter summarises the updated information on the process of signature and ratification of the Convention and its Optional Protocol by the Member States and the EU, as well as on reservations and declarations. The second chapter focuses on progress in the national implementation and monitoring of the UNCRPD. The third chapter provides an overview of accessibility legislation, regulations and standards implementing Article 9 of the UN Convention – which stipulates that "State 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 […] and to other facilities and services open or provided to the public".

These three chapters are complemented by three annexes with practical information. Annex 1 presents, in a table, the state of signatures, reporting and ratifications/formal confirmation of the UNCRPD and the Optional Protocol by the Member States and the Union. Annex 2 lists details of identified responsible authorities, focal points, coordination mechanisms and contact points. Annex 3 provides links to websites where more information on the UNCRPD can be found, including national translations of the text of the UNCRPD and the Optional Protocol.

1. STATE OF PLAY ON SIGNATURE AND RATIFICATION OF THE CONVENTION AND OPTIONAL PROTOCOL IN THE EU AND THE MEMBER STATES

On 30 March 2007, the day of opening for signature, the UN Convention on the Rights of Persons with Disabilities was signed by the European Community and twenty two Member States. Seventeen of those Member States also signed the Optional Protocol.

As of March 2012 the UN CRPD has been signed by the European Community (now the European Union) and all its Member States. The Optional Protocol has been signed by 22 Member States.

The EU deposited the instruments of conclusion/formal confirmation at the UN the 23 December 2010 so the Convention entered into force for the EU on 22 January 2011. Twenty Members States have ratified the UN CRPD: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Germany, Denmark, Spain, France, Hungary, Italy, Lithuania, Luxembourg, Latvia, Portugal, Romania, Slovenia, Sweden, Slovakia, United Kingdom. The Optional Protocol has been ratified by sixteen Member States: Austria, Belgium, France, Cyprus, Germany, Hungary, Italy, Latvia, Lithuania, Portugal, Slovakia, Slovenia, Spain, Sweden, UK.

Ratifications

The ratification procedures are in most cases complicated and provide for various stages involving several institutions.

Austria signed the UN Disability Rights Convention and the Optional Protocol on 30 March 2007 in New York. The Convention and the Protocol were ratified on 6 August 2008 and entered into force on 26 October 2008. There has been a translation of the Convention and the Protocol into German language and into an easy-to-read version for people with learning disabilities.

In Belgium the statement of the reasons (Exposé des Motifs) was finalised on 21 March 2008. It was presented to the meeting of the Council of Ministers (Conseil des Ministres) by mid 2008. The Council of Ministers addressed it to the State Council (Conseil d'Etat) before presenting the file to the Parliament for a vote. The same procedure was followed at eight various levels of competent authority (federal state, the Communities and the Regions). Belgium ratified the Convention and the Optional Protocol on 2 July 2009. They became executive on 1 August 2009.

Bulgaria ratified the Convention on 26.01.2012. Bulgaria also signed the Optional Protocol on 18.12.2008. The UN Convention has been translated and will be published in Bulgarian language. The UN Convention entered into force in Republic of Bulgaria on 21 April 2012.

In Cyprus, the ratification of the UNCRPD and the Protocol were enabled by Law 8(III)/2011 of 4 March 2011. The instruments of ratification were deposited at the UN on 27 June 2011 and the Convention and the Protocol entered into force in the Republic of Cyprus on 27 July 2011.

The Czech Republic ratified the Convention on the Rights of Persons with Disabilities in September 2009. That important event influenced the preparation and form of a new National Plan in the field of disability, i.e. National Plan for Promoting Equal Opportunities for Persons with Disabilities 2010–2014 approved by Resolution of the Government of the Czech Republic No 253 of 29 March 2010. The Czech Republic has not ratified the Optional Protocol yet, however, the National Plan for the Creation of Equal Opportunities for Persons with Disabilities 2010–2014[1] takes into account the preparation of a draft for its ratification by the end of 2012.

Denmark launched a comprehensive consultation process in the autumn of 2008, encompassing all ministries, organisations and the general public and aimed at assessing any legal and financial preconditions for and implications of ratifying the UN Convention on the Rights of Persons with Disabilities. The comprehensive consultation process formed the basis of the government's continued work. As the coordinating ministry of disability aspects, the Ministry of Social Welfare[2], established an inter-ministerial working group in autumn 2008 tasked with identifying implications and preconditions for Denmark's ratification of the UN Convention. The inter-ministerial working group held its first meeting on 4 September 2008. The meeting reviewed the obligations of the Convention and concluded that it needed, in particular, to study the scope of obligations inherent in the non-discrimination provisions under Article 5, obligations under the provisions of accessibility under Article 9 and obligations under the provision of education under Article 24. This conclusion led to the set up of three subgroups each charged with performing a detailed analysis of one of the mentioned problem areas. The Ministry of Social Welfare headed up the subgroups on non-discrimination provisions and accessibility, while the Ministry of Education was in charge of the subgroup on education. The subgroups on anti-discrimination and accessibility held two meetings, supplemented by several written consultation rounds. Concurrently with the work in the inter-ministerial working group, Denmark adopted Act no. 1347 of 19 December 2008 amending the Parliamentary Election Act, the Danish European Parliament Elections Act and the Local and Regional Government Election Act. The amended Act ensures that Denmark meet the provisions of Article 29 of the Convention, which require state parties to guarantee persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. In addition to the amendments made to the elections legislation, the inter-ministerial working group concluded that no further legislation was needed before Denmark could ratify the Convention. The analyses carried out by the subgroups and the inter-ministerial working group were presented to the Government on 11 March 2009 and constituted the basis for preparing a motion for resolution to ratify the Convention. The draft motion for resolution underwent an external consultation round and was uploaded to the public consultation portal, www.borger.dk, on 23 March 2009, the deadline for comments being 6 April 2009. Stakeholder organisations were able to monitor the ratification process constantly at the Ministry of Social Welfare website and later at the Ministry of the Interior and Social Affairs website and were also able throughout the process to contact the Ministry directly. The final resolution was presented in the Danish parliament on 22 April 2009 and adopted on 28 May 2009. In close cooperation with the Ministry of Foreign Affairs, the Ministry of the Interior and Social Affairs subsequently launched the preparation of the ratification instruments for the formal ratification of the UN Disability Convention. The

[1] Approved by Resolution of the Government of the Czech Republic on 29 March 2010 No. 253.

[2] The ministry has changed name three times since then: first to the Ministry of the Interior and Social Affairs, then to the Ministry of Social Affairs, and latest to the Ministry of Social Affairs and Integration.

ratification instrument was deposited on 23 July 2009. The Convention has formally been in force for Denmark since 23 August 2009. The ministry regularly briefed the organisations for people with disabilities in Denmark throughout the entire ratification process. Additionally, four meetings were held with these organisations in Denmark, at which the Convention and the ratification process were discussed and reviewed.

Estonia: The Parliament of Estonia has adopted the Act of ratification of the UNCRPD and endorsed the accession to the Optional Protocol in March 2012. The President of Estonia has proclaimed the Act. The instrument of ratification is prepared but not deposited yet and ratification has not entered into force (May 2012). Estonia made an interpretative declaration upon ratification about Article 12.

A detailed analysis of the articles of the UNCRPD was done and the compliance of Estonian legislation with them was assessed beforehand to determine whether full implementation of every particular obligation is already ensured. The Ministry of Social Affairs consulted with people with disabilities on the impact of the UNCRPD on individuals, businesses and others. The articles of the UNCRPD were also discussed with other ministries, associations of local governments, the Estonian Chamber of People with Disabilities and Estonian Institute of Human Rights. Many issues requiring further clarification also emerged during the preparation of ratification and that prolonged the ratification process. However, it was concluded that no amendments of legislation were needed in order to proceed.

In Finland, the main part of the legislation already complies with the requirements of the Convention. The Ministry of Social Affairs and Health is preparing the legislative amendments needed for the ratification of the Convention. A new Act on the use of coercion on persons with intellectual disabilities and dementia will be required by Article 14 of the Convention (Liberty and security of person). A working group to prepare the legislation was set up in July 2010. In relation to the right of persons with disabilities in need of institutional or residential care to move from one municipality to another, Article 18 (Liberty of movement and nationality) and Article 19 (living independently and being included in the community) required changes in the Municipality of Residence Act and the Social Welfare Act. The legislative amendments necessitated by Articles 18 and 19 were completed during 2010 and the relevant Acts entered into force on 1 January 2011.

Additional issues requiring further clarification or specification of legislation may also emerge during the preparation for ratification. Finland has currently no mechanism that has been, or could as such be, designated to attend to the tasks referred to Article 33.2 of the UN Convention. Thus, the ratification of the Convention will necessitate either the establishment of a new mechanism or the transformation or some existing mechanism into such a mechanism. All in all, preparation of the legislative amendments will still take time and Finland would be prepared to ratify the Convention during the current Government's term of office.

The Ministry for Foreign Affairs has, in May 2011, set up a working group to prepare the measures necessitated by the ratification of the Convention and its Optional Protocol in Finland. The working group is comprised of representatives of the public administration and the local and regional authorities, as well as the National Council on Disability (VANE), the Finnish Disability Forum and the Center for Human Rights of Persons with Disabilities (VIKE). The work of the working group and the preparation of the legislative amendments is still ongoing. The intention is to ratify the Convention during the current Government's term of office (2011-2015).

France: The ratification of the UNCRPD and the Optional Protocol were enabled by Law 2009-1791 of 31 December 2009. The instruments of ratification were deposited at the UN on 18 February 2010. Consequently, the Convention and the Optional Protocol entered into force in France on 20 March 2010.

Germany: The German Bundestag passed the law with the consent of the Bundesrat which was necessary for ratifying the Convention and the Optional Protocol. The law entered into force on 1 January 2009. Germany ratified both the Convention and the Optional Protocol. The instruments of ratification were deposited 24 February 2009 at the UN Headquarters. Germany has translated both the Convention and the Protocol into sign and easy-to-read versions.

Greece signed the UNCRPD on 30th March 2007 and the Optional Protocol on 27th September 2010. On 11 April 2012 the Greek Parliament enacted Law 4074 / 2012 ratifying the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto. The instrument of ratification of both the Convention and the Optional Protocol is expected to be deposited with the Depositary of the Convention within the current month.

Hungary has ratified the Convention and the Optional Protocol on the 20th July 2007 by the Act No 92 of 2007.

Ireland signed, subject to ratification, the UNCRPD on its opening for signature on 30 March 2007. It is the Government of Ireland's intention to ratify the UNCRPD as quickly as possible, taking into account the need to ensure that all necessary requirements under the Convention are being met. There will be no undue delay in the State's ratification of it; however, Ireland does not become party to treaties until it is first in a position to comply with the obligations imposed by the treaty in question, including by amending domestic law as necessary. The National Disability Strategy (NDS) of Ireland in many respects comprehends many of the provisions of the UNCRPD. A high-level Interdepartmental Committee advises on and monitors legislative, policy and administrative actions required to enable the State to ratify the UNCRPD. This Committee has developed a Work Programme to (i) address any elements of the National Disability Strategy that require alignment with the Convention and (ii) address any matters that fall outside the NDS which are required to enable Ireland to ratify. This programme is being progressed across the relevant Government Departments. At the Committee's request, the National Disability Authority, the lead statutory agency for the sector, has independently assessed the remaining requirements for ratification so as to ensure conclusively that all such issues will be addressed. The Committee will also closely examine the Optional Protocol to the Convention in consultation with the Department of Foreign Affairs and the Office of the Attorney General (the Government's legal advisers). The Optional Protocol will be addressed by the Government at the time of ratification of the Convention.

Italy: On November 28th, 2008, the Italian Government approved the ratification proposal for the UN Convention and Optional Protocol, which was passed by the Parliament on February 24th, 2009. By law no. 18 of 3 March 2009, the Italian Parliament has ratified the UN Convention and the Protocol. On 15 May 2009 Italy deposited its instruments of ratification with the depositary of the Convention.

The ratification decision also established the new National Observatory on the condition of persons with disabilities, which met for its first official meeting on 16 December 2010. The Observatory is responsible for the implementation of the UNCRPD in close co-operation with the inter-ministerial Committee on Human Rights (CIDU) of the Italian Ministry of Foreign Affairs. It will also assure the monitoring activities provided by Article 33.2 of the UN Convention.

Latvia: On 28 January 2010 the Parliament of Latvia finalised the ratification of the Convention at the national level. In accordance with the Depositary Notification communicated by the Secretary-General of the United Nations, the ratification was completed on 1 March 2010. The Convention entered into force for Latvia on 31 March 2010 in accordance with its Article 45(2). Furthermore, on 3 June 2010 the Parliament of Latvia has ratified at the national level also the Optional Protocol to the Convention. The ratification of the Optional Protocol was completed on 31 August 2010 and it entered into force for Latvia on 30 September 2010.

Lithuania: On 30 March 2007, the Minister of Social Security and Labour of Lithuania signed the UNRCPD and its Optional Protocol in New York. On 27 June 2007, by Order No. A1-176, the Minister of Social Security and Labour initiated an inter-institutional taskforce to deliver the analysis of relevance and feasibility for ratification of these international instruments. The taskforce involved representatives from the Ministry of Culture, the Ministry of Health, the Ministry of Education and Science, the Ministry of Transport and Communication, the Ministry of Social Security and Labour, the Ministry of Foreign Affairs, the Ministry of National Defence, the Ministry of Environment, the Office of Equal Opportunities Ombudsperson, the Department of Physical Education and Sports under the Government of the Republic of Lithuania and representatives of NGOs.

The analysis of the relevance and feasibility of ratifying the UNCRPD encompassed the conformity of the Lithuanian legal framework with the provisions of the Convention as well as the possibility of ratifying all articles of the Convention and the Protocol. On 27 May 2010, seeking to become a full-fledged member of the international community pursuing the equal opportunities mainstreaming policy effectively, Lithuania ratified the UN Convention and its Optional Protocol (Republic of Lithuania Law on the Ratification of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol, Official Gazette, 2010, No.67-3350).

Luxembourg: After analysing the compatibility of national legislation with the Convention - in order to identify potential conflicting laws or regulations - Luxembourg started the official ratification procedure in May 2010 and finally ratified the Convention and the Optional Protocol on 13th July 2011 (Law of 28th July 2011). The date of the deposit of the instrument of ratification at the UN Headquarters is the 26 September 2011. The Convention entered into force for Luxemburg on October 26, 2011.

In Malta, a Disability Matters Bill was approved by Parliament on 26 March 2012. It will come into effect in mid-April. In light of these legislative changes, fresh consideration is being given to the ratification by Malta of the Convention and the Optional Protocol.

The Netherlands is carrying out a study of the nature and scope of the obligations of the UN Convention as a preliminary step for an impact assessment of the financial consequences of the Convention. The results are expected in spring 2012. Based on the results, the draft

version of the Approval and Introductory Act will be finalised. These Acts contain all changes necessary in Dutch laws to implement the Convention. Civil society is actively involved in these legal analyses and in the drafting of the Approval and Introductory Act.

The Netherlands expect to start the consultation process with civil society of the drafts of the Approval and Introductory Act in spring 2012. The proposals for the Approval and Introductory Act will then be submitted to the Council of State. Upon receipt of the advisory opinion of the Council of State the proposals will be submitted to the Parliament. It is expected that this will take place in 2012. The ratification process will be concluded when both Chambers of Parliament have consented to the proposals for legislation.

Poland: For international agreements concerning human rights, the Polish Constitution requires "a major ratification process", which means that the Council of Ministers has to adopt a draft Act on the ratification and submit it to the Parliament for consideration and approval, before the President can ratify the agreement. Ratified agreements are promulgated in the Official Journal of Laws and only then constitute part of the domestic legal order.

The assessment of compatibility of national legislation with the Convention, carried out by the Ministry of Labour and Social Policy, in collaboration with relevant ministries, resulted in the proposal on ratification of the Convention in July 2011. Extensive consultations with social partners and NGOs took place. Consideration of the proposal by the Council of Ministers, foreseen for August 2011, has been suspended to make additional consultations with the Minister of Finance.
The process was slowed down because of the parliamentary election which took place on 9 October 2011 (a new Government's term of office started on 8 November 2011).
On 27 March 2012 the Council of Ministers considered the proposal on ratification of the Convention, revised following the adoption of new legislation since August 2011, and decided to submit a draft Act on the ratification to the Parliament for consideration.

Portugal: The UNCRPD was ratified in 2009 and since then it is part of the Portuguese legal system. Both the first Action Plan for Persons with Disabilities (2006-2009) and the National Strategy for Disability (2011-2013) develop and implement the Principles and obligations defined in the Convention. According to the latest Government proposal, the National Institute for Rehabilitation (INR, I.P.) will be designated the national coordination mechanism within the government and it will elaborate the national report to submit to the Committee on the Rights of Persons with Disabilities in 2012. The civil society has been consulted in the beginning of current year. According to the latest Government proposal, the independent mechanism will be designated in 2012.

In Romania, the Ratification Law of the UNCRPD was promulgated by the President of Romania in November 2010 (Law 221/2010 for the Ratification of the Convention regarding the Rights of the Persons with Disabilities) and the instruments of ratification were deposited 31 January 2011. Depositing the instrument of ratification of the Convention by Romania was announced by the Secretary General of the United Nations - as depositary of the Convention on the Rights of Persons with Disabilities - on January 31, 2011. In accordance with Article 45, paragraph 2 of the Convention, it entered into force for Romania on 2nd of March 2011.

Slovak Republic: The National Council of the Slovak Republic expressed its agreement with the Convention and the Optional Protocol in its Resolution no. 2048 of 9 March 2010 and decided that it constitutes an international agreement which, pursuant to Article 7 (5) of the

Constitution of the Slovak Republic, has precedence over national laws. The President of the Slovak Republic ratified the Convention and the Optional Protocol on 28 April 2010. On 26 May 2010 the Deed of Ratification was deposited with the Secretary General of the United Nations.

The Convention became binding for the Slovak Republic on 25 June 2010 in accordance with Article 45 (2) and also the Optional Protocol entered into force on 25 June 2010.

Slovenia: The Act on Ratification of the Convention and the Protocol was adopted in the Parliament on April 2, 2008. The Convention and the Protocol were published in the Official Journal of the Republic in Slovenia. The Ministry of Foreign Affairs sent the documents to the UN Permanent Mission of Slovenia, which handed in the documents at the UN on 24 April 2008. The UN Convention and the Protocol were officially translated, submitted to the UN and published on the UN web page by 2007. In 2008, the Convention was printed in Slovenian in both the usual and the accessible formats for persons with disabilities, namely the easy-to-read, Braille and sign language versions.

Spain signed the UNCRPD and the Optional Protocol on 30 March 2007 in New York. The instruments of ratification were deposited at the UN on 3 December 2007 and were published into the Spanish Official State Gazette (BOE) on 21 April 2008. Consequently, they entered into force in Spain on 3 May 2008.

Sweden: An investigator within the Government's office examined Swedish legislation in order to see if it is in harmony with the UN Convention's requirements and those of the Optional Protocol. This work has been published in a report and referred to stakeholders for further consideration. This report formed the basis of a bill to the Parliament. The ratification of the Convention requires a parliamentary resolution. Sweden ratified the UN Convention and its Optional Protocol on 15 December 2008. According to the above mentioned examination, the Swedish legislation is in harmony with the UN Convention's requirements. The translation into Swedish can be found at www.sweden.gov.se.

The United Kingdom ratified the Convention on 8 June 2009 and the Optional Protocol on 7 August 2009. The UK developed reporting and monitoring arrangements, including the establishment of an independent mechanism comprising the UK's four equality and human rights commissions. The UK submitted its initial report to the UN on 24 November 2011.

The European Union signed the Convention the 30 March 2007. On the 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).[3]

As required by Articles 3 and 4 of this Decision, a Code of Conduct needed to be adopted before the deposit of the instrument of formal confirmation on behalf of the European Union could take place. On 2 December 2010, the Code of Conduct between the Council, the Member States and the Commission was agreed, setting out internal arrangement for the implementation ad representation of the EU relating to the UNCRPD.[4] Following this, the

[3] Decision 2010/48/EC http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:023:0035:0061:EN:PDF

[4] **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:340:0011:0015:EN:PDF, 2010/C 340/08**

EU deposited the instruments of ratification on 23 December 2010. The UNCPRD entered into force with respect to the EU on 22 January 2011.

In August 2008, the Commission adopted a proposal for a Council Decision on the EU accession to the Optional Protocol (COM(2008) 530 final/2). However, it was decided within the Council to give priority to negotiations on the Decision on the Conclusion of the Convention, and then on the Code of Conduct. Now that the Code of Conduct has been agreed in December 2010, and the EU has concluded the Convention, it is up to the Council Presidency to act on the Commission's Draft Decision on the Optional Protocol.

Declarations and Reservations

The majority of the Member States do not foresee any reservation as regards to the matter of application of the Convention or of the Optional Protocol. Even though the need for reservations after finalising the screening of the national legislation may arise, most countries express a strong political will to ratify the entire Convention and its Optional Protocol.

As exception, at the signing ceremony the Dutch Ambassador had a statement on several articles. It is not known now whether the need for new reservations or explanations will arise.

During the ratification of the Convention on 27th of May, 2010, the Lithuanian Government has made a statement regarding the Article 25 (a). The Parliament of the Republic of Lithuania stated that the concept "sexual and reproductive health" can't be interpreted as establishing new human rights and constituting relevant international obligations for the Republic of Lithuania. In the content of this concept is not included support, promotion or advertising of disabled peoples abortions and sterilization and medical procedures which could lead to discrimination based on genetic characteristics.

The Maltese Government has also already made an interpretative statement regarding the phrase "sexual and reproductive health" in Article 25(a) to the effect that Malta understands that this phrase does not constitute recognition of any new international law obligation, does not create any abortion rights and cannot be interpreted to constitute support, endorsement, or promotion of abortion. Malta further understands that the use of this phrase is intended exclusively to underline the point where health services are provided, they are provided without discrimination on the basis of disability. Malta has also made a reservation pursuant to Article 29(a)(i) and (iii) of the Convention. While declaring its full commitment to ensure the effective and full participation of persons with disabilities in political and public life, including the right to vote by secret ballot in elections and referenda, and to stand for elections, with regard to Article 29(a)(i), Malta reserved the right to continue to apply its current electoral legislation in so far as voting procedures, facilities and materials are concerned and with regard to (a)(iii) Malta reserved the right to continue to apply its current electoral legislation in so far as assistance to voting procedure is concerned. It is envisaged that both the above-mentioned interpretative statement and reservation will be confirmed on ratification.

France has not made any reservations; however, it made a declaration on the term 'consent' in Article 15. France will interpret this term in conformity with international instruments such as the Council of Europe Convention on Human Rights and Biomedicine and its Additional Protocol on Biomedical Research, as well as on its national legislation which is already consistent with the latter instruments.

Poland submitted a reservation concerning article 23.1 (b) and 25 (a) (reproductive health). International law of treaties asks for the confirmation at the moment of submitting ratification documents. This point will be decided at the moment of ratifying the Convention. Currently it is planned to slightly modify the original text of this reservation and submit an additional one concerning article 23.1 (a) (on marriage of a disabled person whose disability results from a mental illness or mental disability), as well as an interpretative declaration concerning article 12 (on application of the incapacitation).

When depositing the Deed of Ratification, the Slovak Republic expressed a reservation in respect of the provision of Article 27 (1), a) of the Convention on the Rights of Persons with Disabilities in accordance with its Article 46, in the following wording: "The Slovak Republic shall apply the provisions of Article 27 (1) a) provided that implementation of prohibition of discrimination on the basis of disability when determining the conditions of recruitment, hiring and continuance of employment shall not apply to hiring of members of armed forces, armed state security services, armed corps, National Security Authority, Slovak Information Service and Fire Brigade and Rescuers."

The UK has introduced a proportionate system of review for social security benefit appointees and therefore removed its reservation in respect of Equal Recognition before the Law (Convention Article 12.4) when it submitted its initial report to the UN. The reservations in respect of Work and Employment (Convention Article 27 mainly); and Liberty of Movement (Convention Article 18); and an interpretative declaration and a reservation in respect of Education (Convention Article 24, Clause 2 (a) and 2 (b) remain in place.

Cyprus has submitted a reservation on Article 27 of the Convention regarding employment.

The EU in the Decision concerning the conclusion of the UNCRPD states that it concludes the Convention without prejudice to the right, conferred on its Member States by virtue of the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 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 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.

2. ACTIONS UNDERTAKEN BY THE MEMBER STATES, EUROPEAN UNION AND STAKEHOLDERS TO IMPLEMENT AND MONITOR THE UNCRPD

Austria

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

In Austria, the Federal Ministry of Labour, Social Affairs and Consumer Protection is the Focal point at federal level. The Ministry of Labour, Social Affairs and Consumer Protection is also responsible for coordinating the implementation of the UN Disability Rights Convention in Austria. In 2012 the government has foreseen a decision on a National Action Plan (NAP) on the implementation of the UN Disability Rights Convention 2012 to 2020 ("**NAP Behinderung**"). The National Disability Action will promote the objectives of the UN Disability Rights Convention and contain the guidelines and strategies for the Austrian policy for persons with disabilities in the upcoming years (from 2012 to 2020).

2.1.2. National strategies to implement the UNCRPD

In accordance with Article 35 para. 1 of the UNCRPD, Austria drew up its **First State Report** for the United Nations in October 2010. On the basis of numerous contributions from governmental and non-governmental organisations, this comprehensive report reflects the measures taken to fulfil the obligations from the agreement. The main purpose of the **National Action Plan 2012 to 2020** is to promote and to implement the aims of the UNCRPD. The Plan is built on the basis of the First State Report of the Austrian Government required by the UNCRPD, submitted in 2010.

The Federal Ministry of Labour, Social Affairs and Consumer Protection, in its function to coordinate disability policy in Austria, was responsible to set up the National Action Plan. The draft of the Action Plan was presented in January 2012. The Federal Disability Advisory Board was involved in the process of setting up the plan from the beginning. In order to involve all stakeholders, the plan was established in close cooperation with civil society. There will be a further broad discussion with stakeholders, civil society and NGOs at the end of February 2012. After that the Action Plan is expected to be adopted by the Federal Government in spring 2012.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The 2008 amendment to the Federal Disability Act established the Independent Monitoring Committee. The Monitoring Committee is also represented in the Federal Disability Advisory Board at the Federal Ministry of Labour, Social Affairs and Consumer Protection with representatives from the federal government, the nine "Länder" as regional authorities, the social insurance institutions, disability organisations, social partners and the Disability Ombudsman.

The Independent Monitoring Committee has started to work on implementing the UNCRPD in 2008. Since December 2008 the Committee has held 37 meetings (one per month). Every 6 months ca. a public meeting is organized. The latest public meeting took place in November 2011. One meeting was held at the Austrian Parliament in November 2009. About 40 individual complaints were raised until now. The Independent Monitoring Committee regularly gives a written and published expert opinion on a current disability policy issue (e.g. inclusive education, occupational and work therapy, violence and abuse, personal assistance, legal capacity and supported decision-making) and makes recommendations. Although the Independent Monitoring Committee is only responsible for the federal level, it also deals with requests at the regional level if no other monitoring unit is in charge.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The Independent Monitoring Committee is solely composed of members from civil society. In fact, the members of the Committee are representatives from disability organizations, human rights organizations, development organizations and representatives of academic institutions.

Representatives of disability organisations are involved in many boards of the Federal government (for example protection against dismissal of people with disabilities, most second level authorities in matters of people with disabilities).

The Federal Disability Advisory Board has to be heard by the Federal Minister of Labour, Social Affairs and Consumer Protection in all important issues concerning people with disabilities.

Furthermore, there are various tools and methods used in Austria to foster the empowerment of people with disabilities:

- Experts' opinions on laws
- Support in all questions about equal rights
- Raising public awareness: events, campaigns, reports, brochures
- Brochures in 'Easy-to-read'-versions
- Empowerment-programmes financed by the Federal Ministry of Labour, Social Affairs and Consumer Protection
- Working groups with representatives from all stakeholders, including the disability NGOs
- 'Peer-Groups'

2.2.3. Collecting statistics and/or developing indicators (Art. 31)

The National Action Plan 2012-2020 refers to the necessity to set up further disability statistics in Austria. The plan also contains some disability indicators such as the unemployment quota of people with disabilities.

Belgium

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

In Belgium, the Federal Public Service Social Security is the focal point at the federal level and also the coordinating mechanism (interfederal: for the national level and the level of the Regions and Communities). In each administration at the federal level, a contact point is or will be designated.

Focal points were also established in the various regions and communities:

- *Flemish* region: the team 'Equal Opportunities in Flanders' (*Gelijke Kansen in Vlaanderen*);
- Walloon region: the Agency for Integration of Persons with Disabilities (*Agence Wallonne pour l'Intégration des Personnes handicapées*);
- *Brussels-Capital* region: the "Equal Opportunities and Diversity" body *(cel Gelijke Kansen en Diversiteit);*
- Commission of the *French-speaking* Community (*Commission communautaire française - COCOF*): the PHARE Service (*Personne Handicapée Autonomie Recherchée*) ;
- *Joint Community Commission* (*Commission communautaire commune - COCOM*): the COCOM Administration;
- *French-speaking community:* the WBI Multilateral World Service (*Wallonie-Bruxelles International – Service multilatéral mondial*) ;
- German-speaking community: the Office for People with Disabilities (*Dienststelle für Personen mit Behinderung*).

2.1.2. National strategies to implement the UNCRPD

Belgium ratified the Convention and the Optional Protocol on 2 July 2009. They became binding on 1 August 2009.

In accordance with article 35, § 1 of the UNCRPD, Belgium drew up its **First State Report** for the United Nations in July 2011. On the basis of numerous contributions from governmental organisations at the federal level and at the level of the Regions and Communities and with implication of the civil society, this comprehensive report reflects the measures taken to fulfil the obligations of the UNCRPD.

Both on the federal and on the regional level, governments work on a mainstreaming policy for the inclusion of persons with disabilities.

Flanders published its strategic framework on disability 2012-2014 in December 2011. The strategic and operational goals will be translated into concrete action plans during 2012. The evaluation of the framework strategy will be handled via indicators, deliverable from January 2012 on.

Wallonia is busy to prepare its strategic framework on disability 2012-2017. It will be translated into concrete action plans during the last six months of 2012. The first action of this

plan is nominated 'A more inclusive society'. The evaluation of the framework strategy will be handled via indicators in link with UNCRPD.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

On 12th July 2011 Belgium designed the Centre for Equal Opportunities and Opposition to Racism (the Centre) as independent mechanism to promote, protect and monitor the implementation of the Convention.

The Centre was established in 1993. Following the extension of its mandate in 2003 and 2007, it became Belgium's national equality body. It provides advice to government on disability issues and handles complaints of discriminations against persons with disabilities. The Centre is currently a national human rights institution with B-Status.

Both the federal state and the federated entities (Communities and Regions) have agreed to designate the Centre. The operation of the independent mechanism has been defined through individual agreements between the Centre and the federal state and the seven federated entities. This includes the establishment of a CRPD Unit and of a CRPD Commission.

On the one hand, the CRPD Unit, a permanent expertise and administrative cell composed of five persons, amongst whom a head of unit has been created to promote, protect and monitor the implementation of the CRPD. The CRPD Unit works in close cooperation with the other branches of the Centre and is in permanent contact with public authorities, national institutions, DPOs, NGOs, independent mechanisms abroad and international organisations.

On the other hand, the Disability Commission is a non-permanent body composed of 23 members chosen by their knowledge, experience and interest in the disability sector, among which a President elected by his/her peers. Members emanate from: DPOs (10), universities (6) and labour unions (7). The Disability Commissions approves the annual and triennial strategic plans of the independent mechanism and follows its daily activities.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

At national level
The Belgian Disability Forum (BDF) and the national higher Council of disabled persons monitor the work on the implementation of the Convention. The BDF expressed opinions during the implementation of the ratification process and will follow the application of the Convention.

The BDF is an ASBL comprising 20 associations of disabled persons. The ASBL aims to inform its members regarding the repercussions of supranational regulation on the rights of disabled persons. The ASBL also endeavors to make the political, economic and social Belgian actors aware of the need to incorporate the disabled needs of persons into their discussion and decision process. The BDF is the official representative of Belgium within the European Disability Forum.

At federal level
The national higher Council of disabled persons is in charge of examining all the problems relating to disabled persons, falling within the federal competence. The Council is entitled, through its own initiative or at the request of the relevant Ministers, to deliver opinions or to make proposals on these subjects, inter alia for rationalisation and of the coordination of the legal and regulatory provisions. The Council is composed of 20 members, specially qualified through their participation in activities of organizations of persons with disabilities or through social or scientific activities.

At regional and community level
People with disabilities and the organizations/associations representing them are members of the management Board of the Office of the German-speaking Community for People with Disabilities. They are therefore directly involved in important decision-making processes during the formation of the policymaking for the disabled in the German-speaking Community.
There is also an annual plenary meeting attended by the disabled and all the organizations/associations representing them. The aim is to discuss common concerns and questions and work out joint responses to outstanding issues.

In Flanders, the umbrella organization "Toegankelijkheidsoverleg Vlaanderen" ('Accessibility consultation Flanders') represents people with disabilities concerning the accessibility-topic. They are consulted with regards to the accessibility policy that the Flemish Equal Opportunities unit works on.

With regards to disability, there is no regional board or council representing people with disabilities. But "Equal opportunities in Flanders" actively consults civil society when setting their policy targets via the open method of coordination. Representative organizations are not only involved when elaborating the transversal equal opportunities policy. Even at the level of the different departments and policy fields structures are created to guarantee the participation of people with disabilities in the policy preparation and execution (for e.g. the working group 'Integrale Jeugdhulp', the advisory committee at the Flemish Agency for Disabled Persons (VAPH), Flemish Platform for organizations with disabilities, commission diversity at SERV, etc.). Furthermore, ad hoc consultations will be organized when deemed necessary (for e.g. in regard to the first report on the CRPD).

In 2011, a research project was set up to examine the possibilities, conditions and approach of participation of people with disabilities in policy preparation and execution (Nothing about us without us. Policy participation of people with disabilities). Its aim is to end up with a formula for an advisory, communication and consultation structure for the Flemish Government.

For the territory of the Walloon Region, a Walloon Advisory Board for Persons with Disabilities was created. This council aims to ensure the participation of persons with disabilities and of their associations to the development of the measures which concern them. To this end, the council:
- represents all the associations representative of persons and can ensure coordination of them;
- Gives to the Walloon regional Council and to the Government, upon their request or own initiative, opinions on the guidelines of the policy for persons with disabilities, and on the practical methods of its implementation;

- delivers its opinion on the operation of the Agency and the way in which it carries out the missions which are entrusted to it

Various tools and methods are used in Belgium to foster empowerment of people with disabilities, both at federal and local level.

The associative sector regularly organizes debates, dialogue and training. For example, training intended mainly for the professionals, including the professionals of the associative sector, is organized by the SPF Social Security. In the German speaking Community each disabled person who contacts the Office for People with Disabilities is given individual assistance in the form of an Individual Service Plan (*Individueller Dienstleistungsplan* - IDP) specifying the measures necessary for their social integration and full participation. Furthermore, awareness-raising measures are also being continually organised to increase the general public's awareness of the needs of the disabled. Regular training courses are also available for disabled people. The people concerned and the organisations representing them are actively involved in a working group for monitoring the implementation of the UN Convention on the Rights of Persons with Disabilities and the Action Plan 2006 – 2015 of the Council of Europe. People with disabilities and their respective organisations were involved when drafting the first report on the implementation of the CRPD. They will certainly be involved when drafting the action plan, even if the form has not been determined yet.

In Wallonia, pursuant to Article 120 a) of the new communal law, it is possible for the communes of to establish an Advisory Board of disabled persons.
These communal Advisory Boards of disabled persons aim to:
- Incorporate the needs of disabled persons into local authorities' urban and communal policies.
- Strengthen or establish regular co-operation and dialogue mechanisms enabling disabled persons, by the channel of their representative organizations, to contribute to planning, implementation, follow-up and the evaluation of each action of the political and social field aiming at equality and inclusion.

– All reception and accommodation services approved by the AWIPH are required to create a "Council of the users" representing those and, if necessary, their legal representatives, comprising at least three members including an elected President at its centre. Its members can under no circumstances form part of the organizing service power.

Since February 2011, due to his first “Equal Chances Plan”, an “Equal Chances public agent” will be designated in all communes and cities of Wallonia.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

Since there is no single definition of 'disability' in Belgium, certain persons with disabilities may not be recorded by various data collection mechanisms, and due to the structure of the Belgian State and of legislation on the protection of privacy, it is not possible to globalize the various statistics. For example, at federal level, there are statistics on the benefits and on medical certificates allowing for granting benefits as well as various social and tax advantages.

In the Walloon Region, the indicators currently used are those relating to the management Contract of the Walloon Agency for the Integration of Persons with Disabilities. Indeed, certain main principles of this contract relate to a number of articles of the Convention.

In Flanders, indicators are being drawn up to measure the progress made within the framework of the Open Method of Coordination. These indicators will be available from January 2012 on.

Bulgaria

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The focal point is the Integration of People with Disabilities Department, in the Ministry of Labour and Social Policy.

Bulgaria is currently in the process of establishing a coordination mechanism foreseen in Article 33 (1) of the UN Convention. Representatives of the NGOs of and for people with disabilities which are members of the National Council for Integration of People with Disabilities are involved in that discussion and also in the same process of establishment of the coordination mechanism. There is a draft of amendment of legislation in relation to the establishment of the coordination mechanism foreseen in 33 (1) of the CRPD.

2.1.2. National strategies to implement the UNCRPD

- At the beginning of 2011, an expert group was set up with the task to prepare a comprehensive plan for preparing Bulgaria for implementation of the UN CRPD. Representatives of the national representative NGOs of and for people with disabilities take part of the mentioned expert group. The outcome of that expert group was presented to the Council for Integration of People with Disabilities and it was taken into account for ratification of the CRPD.

- In 2012, following ratification, the Ministry of Labour and Social Policy will prepare a biannual action plan for the implementation of the UN Convention by the expert group draft.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

During the work of the expert group preparing the comprehensive plan for Bulgaria's implementation of the UN CRPD, the issues of a framework for promoting/protecting/ monitoring CRPD will be discussed.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The National Council of Integration of People with Disabilities has been set up with the Council of Ministers. The National Council was established when the new "Integration of People with Disabilities Act" was adopted and came into force 1 January 2005. The National Council is functioning according to the "Regulation of Procedure of the National Council for the Integration of People with Disabilities" and the criteria for representation of organizations of people with disabilities and organizations for people with disabilities, adopted by the Council of Ministers, in Ordinance No 346 from 17 December 2004. The mentioned Regulation lays down the criteria for representation of the organizations of and for people with disabilities which are members of the National Council. In accordance with the Integration of People with Disabilities Act, it is responsible for the cooperation in the policy

development and conduct in the field of disability. It is an advisory body which includes representatives of the state, named by the Council of Ministers, representative organizations of and for people with disabilities, representative organizations of workers and employees, representative organizations of employers and the National Association of Municipalities.

Representatives of NGOs of and for people with disabilities are members of the National Council for Integration of People with Disabilities, which gives a preliminary stand before the statutory instruments for people with disabilities are adopted.

Currently 20 non-governmental organizations of and for people with disabilities in Bulgaria are members of that National Council. Members of the National Council which represent children and adults with disabilities are also involved in drafting the national strategy, action plans, pieces of legislation and also expert group for preparing Bulgaria for the implementation of the UN CRPD.

There is a National strategy for ensuring equal opportunities for people with disabilities and a biannual Action plan for implementation of the strategy. The Bulgarian Government is confident of the great importance of implementation of UN CRPD and it always expresses its willingness to discuss with civil society the problems related to the ratification of the UNCRPD in the framework of the National Council for integration of people with disabilities. In 2012 the Bulgarian disability strategy will be updated to be brought in line with the European Union Disability Strategy and the UN Convention for persons with disabilities.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

During the work of the expert group responsible for preparing the comprehensive plan for Bulgaria's implementation of the UN CRPD, the issue of developing indicators will be discussed.

Cyprus

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

In Cyprus, the Department for Social Inclusion of Persons with Disabilities has been nominated as the focal point for the implementation of the Convention.

As coordination mechanism for the ratification, implementation and monitoring of the Convention was nominated the Pancyprian Council for Persons with Disabilities which is the highest consultative body for the issues of persons with disabilities. The role of the Council is to consult the government as to the formulation, monitoring and implementation of social policies for persons with disabilities. The Chairman of the Council is the Minister of Labour and Social Insurance and its members are representatives of co-responsible for disability issues Ministries, Organisations of persons with disabilities, social partners (trade unions and organisations of employers) as well as independent persons.

In order to strengthen the coordination procedures regarding the implementation of the UNCRPD the establishment of thematic sub-committees under the Council with the participation of a liaison officer to be nominated by each responsible Ministry dealing with disability issues is in process. The whole coordination mechanism will be supported administratively by the Department for Social Inclusion of Persons with Disabilities.

2.1.2. National strategies to implement the UNCRPD

Strategy guidelines, aims, policies and measures promoted on disability issues are already included in the Governance Programme 2008-2013, the Strategic Development Plan 2007-2013, the National Strategy on Social Protection and Social Inclusion, the National Employment Strategy and others. Taking into account the new European Disability Strategy the Council of Ministers has decided to assign to the Department for Social Inclusion of Persons with Disabilities the coordination of the formulation of a National Disability Action Plan.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

By a Council of Ministers Decision on the 9th of May 2012, the Ombudsman and Commissioner for the Protection of Human Rights being also the Equality Authority in Cyprus has been nominated as the independent mechanism pursuant to Article 33.2 of the UN Convention.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The representatives of the disability movement are involved in the monitoring process through the Pancyprian Council for Persons with Disabilities. In addition, the representatives of the Cyprus Confederation of Organisations of Persons with Disabilities will participate in a

consultative committee to cooperate with the Ombudsman and Commissioner for the Protection of Human Rights.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

There in no central Disability Database for the time being. Each state service collects its own statistical data according to the services provided to persons with disabilities. The Statistical Service also collects and issues data related to employment and social protection of persons with disabilities according to Eurostat requirements and standards.

Recognising the need for the establishment of National Records on persons with disabilities in Cyprus in order to be able to formulate the appropriate policies, programmes and measures, the Ministry of Labour and Social Insurance has prepared a plan for the creation of a new System for the Assessment of Disability and Functioning based on the International Classification of Functionality, Disability and Health of the World Health Organisation. The new System aims to provide credible and reliable information to all public services related to the needs and capabilities of persons with disabilities. The disability database will also enable the collection of statistics and the development of indicators related to the application of Article 31 of the Convention.

Czech Republic

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

In the Czech Republic, the Convention has entered into force on 12 February 2010, so the relevant bodies have started working. The Ministry of Labour and Social Affairs was appointed as the national focal point for the issues relating to the implementation of the Convention.

2.1.2. National strategies to implement the UNCRPD

A new National Plan for Promoting Equal Opportunities for Persons with Disabilities 2010–2014 was approved by Resolution of the Government of the Czech Republic No 253 of 29 March 2010. The basic format of the new Plan, its content and structure, draw on the general principles on which the Convention is based. In the development of the document, only those articles of the Convention which are most important and relevant for the next five years in terms of promoting an equal and non-discriminatory environment for persons with disabilities were selected.

The National Plan is divided into separate chapters corresponding to the individual articles of the Convention. Each chapter contains a quotation of the relevant article of the Convention, brief explanation of the field in question, the desirable target situation to be achieved, and clearly formulated measures specifying the competent department and the proposed deadline for fulfilment.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

In the Czech Republic, the Ministry of Labour and Social Affairs is the focal point as it is responsible for its implementation pursuant to legal regulations. Based on the current practice and experience of other State Parties to the Convention, the establishment of another focal point is not considered at present.

The process of creating monitoring mechanisms to implement the Convention was initiated in 2010. In the Czech Republic, no institution has been established yet that would systematically deal with the issues of human rights (national institution to protect and promote human rights consistent with Paris Principles), although the Ombudsman conducts an informal review of state administration. However, the Ombudsman's principal task is to observe the performance of state administration in pursuance of good governance principles.

On account of this situation, it was not possible to use existing institutions to monitor the Convention, and other options had to be found to comply with the provisions of the Convention. A suitable solution may be one of the alternatives, the Monitoring Committee. This alternative is also accepted by organizations of persons with disabilities. Nevertheless, consensus regarding the composition of such Committee, the number of its members and its

legal form has not been reached yet. However, the negotiations and consultations conducted to date have brought numerous ideas and suggestions which will be processed and used in the preparation of the statute and rules of procedure of the referred Monitoring Committee.

A comprehensive draft on measures taken to give effect to the Convention and its monitoring at the national level according to Article 33 will be prepared in cooperation with the organizations of persons with disabilities and social partners. The Government of the Czech Republic should approve it no later than in the 1st half of 2012.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The involvement of civil society is guaranteed by the Government Board for People with Disabilities and other formal and informal mechanisms of cooperation, e.g. with the Czech National Disability Council. The Government Board for People with Disabilities was established by the resolution of the Czech Government (1991) as its advisory body for the issues of disability. The Board cooperates with the public administration authorities as well as with the non - governmental sphere. It consists of Government representatives and ministries, as well as representatives of associations of persons with disabilities and their employers.

Organisations representing persons with disabilities play an important role, not to say the most important, in the policy planning and decision-making process concerning disability issues. One of them is for example the Czech National Disability Council, an umbrella organisation which associates about 114 organisations of persons with disabilities. The Council has its representatives in the Government Board for People with Disabilities.

Also other representative organisations are invited to take active part in the policy planning, for example through participation in working groups established to deal with any disability-related issues (preparation of new legislation, proposals for amendments of the existing legislation, creation of disability policy plans and concepts etc.).

At local level, municipalities are supposed to take into account the views and opinions of persons with disabilities and their representative organisations when planning disability policy measures (in the field of social services, accessibility etc.). Most municipalities welcome the possibility of discussing the key issues with the organisations and individuals through public hearings, debates, surveys etc.

As far as awareness-raising activities are concerned, several conferences, debates, workshops, seminars etc. are organised in order to mainstream disability issues and to foster active participation of persons with disabilities in public life.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

There are several resources of statistical data, e.g. in 2007, the Czech Statistical Office was given a task to propose a system of statistical information collection related to persons with disabilities and their needs. The results of its work and first comprehensive report on the situation of persons with disabilities with statistical data were published in 2008.

Denmark

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Ministry of Social Affairs and Integration is appointed as the national focal point for issues related to implementing the Convention. The reason for the appointment is that the Ministry of Social Affairs and Integration is the coordinating ministry for disability matters. The appointment was made by parliamentary decision B 194, which adopted the ratification of the convention. As the coordinating ministry for disability matters, the Ministry exercises its function as the national focal point in close contact and coordination with the other parts of the government and organisations in the disability area.

The Ministry of Social Affairs and Integration heads The Inter-ministerial Committee of Civil Servants on Disability Matters which is tasked with facilitating the coordination of government disability policy.

2.1.2. National strategies to implement the UNCRPD

Since Denmark's ratification of the UN Convention on the Rights of Persons with Disabilities in 2009, the UNCRPD has set the framework for goals and specific initiatives in the disability field, including the progressive realization of economic, social and cultural rights.

No comprehensive national action plan encompassing all ministries has yet been finalised, but a wide range of initiatives has been carried out within the individual ministries in order to implement the UNCRPD progressively. The Ministry of Social Affairs yearly reviews and reports on the Government's disability policy initiatives to the Parliamentary Ombudsman, and has made the first report to the UN Committee on the Rights of Persons with Disabilities on measures taken with a view to implementing the UN Convention of 13 December 2006 on the Rights of Persons with Disabilities. These reports give a good introduction to the comprehensive work put in the follow up on the ratification.

New action plan for the disability area
The government has launched the work of a new long-term, multi-disciplinary action plan for the disability area. The action plan work will be divided into two phases, briefly described below.

The first phase consists of an analysis to map trends and challenges in the disability area, the aim being to determine the key challenges and priority action areas. The analysis will be conducted with participation of relevant key players in the area.

In the second phase, the above analysis will be used to prepare a new action plan for the disability area. The action plan will have a 5-10-year perspective.

The action plan must contribute to setting up clear political and economic priorities for disability-policy initiatives across policy areas and must function as a framework for the continued work of implementing the UN Convention on the Rights of Persons with Disabilities.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

Parliamentary decision B 15 of 2010 established "The Danish Institute for Human Rights" as the independent mechanism for the promotion, protection and monitoring of the implementation of the UNCRPD. The Danish Institute for Human Rights carries out its mandate in accordance with the principles relating to the status and functioning of national institutions for protection and promotion of human rights (Paris Principles). The Danish Government will present legislation in 2012 which turns the Danish Institute for Human Rights (which is currently part of the Danish Center for International Studies and Human Rights) into an independent institution in order to strengthen and clarify the Institute's position as Denmark's National Human Rights Institution. The legislative proposal contains changes in the composition of the board of the Institute, i.a. in order to ensure that one of the board members is appointed upon nomination of the Disabled Peoples Organisations Denmark. In this way the Government of Denmark intends to ensure the involvement and participation of representatives of disabled people in the monitoring process according to article 33.2 of the UNCRPD.

The Danish Disability Council is a Government-funded body made up of representatives of people with disabilities, nominated by the Danish Council of Organisations of Disabled People, and from the labour market parties as well as representatives from relevant fields of research. The task of the Council is to monitor the situation of people with disabilities in society and to act as an advisory body to the Government and Parliament on issues relating to disability policy.

The Danish Parliamentary Ombudsman "Folketingets Ombudsmand" is tasked with monitoring the equal treatment of persons with disability within his area of competence.

Together the Danish Institute for Human Rights, the Danish Disability Council and the Danish Parliamentary Ombudsman constitute the framework for the promotion, protection and monitoring of the UNCRPD in accordance with article 33.2 of the UNCRPD.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Civil society, specifically organisations of people with disability, will be involved in the monitoring process in accordance with the relevant provisions of the UNCRPD.

The organisations of persons with disability will be closely consulted in the work of the Danish Institute for Human Rights.

The umbrella organisation Danish Council of Organisations of People with Disabilities (Danske Handicaporganisationer) is consulted on a regular basis on relevant matters and during all stages of the policy-making process. The Danish Council of Organisations of People with Disabilities is also strongly represented in the Danish Disability Council

Furthermore, dialogue through consultation with civil society/disability organisations at all stages of new initiatives, financial support to disability organisations, public funds

(satspuljen) support of training schemes, awareness raising activities etc. are used to foster empowerment of people with disability.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

Denmark uses the UN Standard Rules on equal opportunities and treatment of people with disabilities, in which the concept of "disability" covers loss or impairment of a person's ability to participate fully and effectively in society on an equal basis with others. The definition is intended to focus on the obstacles in surroundings that prevent persons with disabilities from participating on an equal basis with others. As the concept of disability is environment-related, it cannot be defined more unambiguously and there is no single definition of disability.

Furthermore as a result of the principle of sector accountability, the individual sector ministry is responsible for collecting data in the individual area. No common norm exists for data processing of specific statistics in the disability area, and no permanent norms exist in terms of highlighting the disability aspect in relation to statistics on the individual sectors.

General disability-related statistics are available via Statistics Denmark and the National Social Appeals Board as statements and reports on the extent of social benefits and services. These are categorised in compliance with relevant statutory provisions. Hence, Denmark does not centrally register data on private individuals. Instead, Denmark conducts national surveys that can be merged with registered data with a view to stressing the trend in, e.g., employment of persons with disabilities in relation to the population in general. The Danish National Institute of Social Research conducts such surveys, and the institute performs various surveys and analyses in the area of social welfare, including the disability area. The results of the surveys are accessible to the public and constitute a significant part of the public debate on the development of social welfare in general.

At present, there is no complete list of relevant disability data and statistics, but work is being undertaken under the auspices of the Interministerial Committee of Civil Servants on Disability Matters to prepare one.

A documentation project to improve social statistics has been launched in the area of disability. The objective of the project is to make specific recommendations for improving, renewing and simplifying the ongoing documentation of local activities and their effects. Project participants are Local Government Denmark, Statistics Denmark, Danish Regions, the Ministry of Finance and the Ministry of Social Affairs (chairman). The project group aims at preparing an agreement comprising a proposal for introducing a reporting system that is based on the civil registration number and builds on the electronic transfer of data generated in local casework. Short term, the purpose is to establish better basic documentation in the area so that developments in the disability area can be monitored. The long-term objective is to measure the effects of central and local government disability policy. In addition, other national players contribute to collecting and communicating information in the area.

The Social Services Gateway is a freely accessible Internet-based portal where authorities, providers and citizens can seek information about local, regional and private services for persons with disabilities (and other disadvantaged groups). The gateway was established in 2007 to reinforce the foundation for individual citizens' choice of specific services and with a view to generating general openness and transparency in the services existing in the area. Today, local and regional councils report information to the Social Services Gateway about a

vast number of different aspects of individual services, including target groups, number of places, services and methods of treatment, rates, staff, physical conditions, evaluations of conditions, food and eating conditions, resident activities, etc. The Social Services Gateway is run by the National Board of Social Services under the Ministry of Social Affairs.

Moreover, various national research and evaluation institutions contribute new knowledge and data collection in the disability area. From 2009 through 2010, the Danish National Centre for Social Research – an independent national research centre under the Ministry of Social Affairs and Integration– released 24 publications on disability. The Danish Evaluation Institute for Local Governments (KREVI) and the Institute of Local Government Studies (AKF) each released two publications in the area during the same period.

Estonia

2.1. National implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Ministry of Social Affairs (especially Social Welfare Department) is responsible for the implementation of the UNCRPD. In the future, the Ministry of Social Affairs shall become the focal point and also coordination mechanism. It cooperates with other ministries and the Estonian Chamber of Disabled People[5] for implementation.

2.1.2. National strategies to implement the UNCRPD

After ratification of the UNCRPD, a strategy will be elaborated for effective and comprehensive implementation of the Convention.

Right now the disability policy of Estonia is based on three main documents: the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (the abridged and adjusted version of the UN General Assembly Resolution 48/96); the Recommendation of the Committee of Ministers to Member States on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society (improving the quality of life of people with disabilities in Europe 2006-2015); and the European Disability Strategy 2010-2020.

All the mentioned documents follow the principles of the UNCRPD. Estonia will continue to work within an anti-discriminatory and human rights framework to enhance independence, freedom of choice and the quality of life of people with disabilities and to raise awareness of disabilities as a part of human diversity. Estonian disability policy acknowledges the basic principle that society has a duty towards all its citizens, to ensure that the difficulties related to disability are minimised through active supporting of healthy lifestyle, adequate health care, rehabilitation, supportive services and supportive communities.

The following tools and methods are used in Estonia to foster the implementation of the UNCRPD:

- Dialogue with other ministries (working groups, councils, written statements) to promote awareness about the UNCRPD, protect the rights of persons with disabilities and enhance collaboration between ministries;
- Dialogue and collaboration with the Estonian Chamber of Disabled People (projects and seminars about the implementation of the UNCRPD, awareness-raising campaigns, workshops etc. for general public, ministries and local governments as well as for organisations of people with disabilities);
- Financing and supporting activities of non-governmental organisations, e.g. projects that promote and protect the rights of persons with disabilities, enhance awareness etc.

[5] The Estonian Chamber of Disabled People is the national umbrella organisation of persons with disabilities in Estonia. This umbrella body was established in 1993 and has continuously gained new members since then. Right now the Chamber has 47 member organisations. It is also a member of European Disability Forum.

Civil society has been involved in the ratification process and it will be involved in the implementation process after the ratification as well. The Memorandum of principles of cooperation has been signed recently between the Government and the Estonian Chamber of Disabled People. A multidisciplinary high-level workgroup that includes relevant ministries, local governments and non-governmental organizations to implement the UNCRPD will be established after ratification. The workgroup will also remain in constant contact with people with disabilities through their representative organisations by the implementation of the UNCRPD.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/protecting/monitoring (Article 33.2)

A mechanism pursuant to Article 33.2 of the UNCRPD is not established yet, but it will be formed by the Estonian Chamber of Disabled People[6] in the coming months, following the ratification of the UNCRPD.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Estonia is using different means and methods to foster empowerment of people with disabilities, such as meetings, conferences, dialogue, collaboration, awareness raising and training. The Government also consults civil society when working on legislation, strategies or other important documents related to disability.

In the context of establishing an independent monitoring mechanism according to Article 33.2 of the UNCRPD, special attention should be paid to the need to ensure that civil society, in particular persons with disabilities and their respective organisations are included in the monitoring work of the mechanism. A multidisciplinary working group that includes several representative organisations of persons with disabilities, human rights organisations etc. for monitoring the implementation of the UNCRPD in different fields and levels will be established after the ratification of the UNCRPD. The working group will discuss its observations and statements with people with disabilities.

Civil society was involved in the ratification process and will be involved in the implementation and monitoring process after the ratification as well. The main partner is the Estonian Chamber of Disabled People. It is the national co-operation and co-ordination body for people with disabilities in Estonia. The Chamber was established in 1993 and now has 47 member organisations. The goal of the Chamber is to facilitate the improvement in the quality of life of persons with disabilities. For this purpose, the Chamber co-operates with governmental bodies and social partners in order to secure that Estonian legislation and enforcement of it also considers the disability perspective.

One of the tasks of the Chamber is also to monitor the implementation of the UN Standard Regulations in Estonia. Other tasks of the Chamber are:

– To participate in elaboration of national social policy, special initiation of the elaboration and implementation of laws and other drafts of legal acts, development plans, programmes and projects related to persons with disabilities;

[6] http://www.epikoda.ee/index.php?op=2&path=IN+ENGLISH

– To support social and working activity of persons with disabilities;
– To support the development and professional growth of member organizations;
– To promote awareness of society about the issues related to persons with disabilities and to form positive public opinion on issues related to them;
– To improve the collection and generalization of information and statistical data related to persons with disabilities, supporting the activity and research of the respective branches of science.

For an efficient execution of these tasks, the Chamber has established four commissions: the education commission, the health care and rehabilitation commission, the employment commission, and the organizational development commission.

2.2.3. Collecting statistics and/or developing indicators (Art. 31)

The Estonian government is collecting appropriate statistics which can be used for monitoring the implementation of the UNCRPD. The existing indicators will be reviewed and new ones will be applied under the strategy of persons with disabilities which will be elaborated after the ratification of the UNCRPD.

Throughout the past years, many surveys have been carried out. The aim of these surveys was to identify the changes that have taken place in the situation of independent living, employment, provision of services and thereby to evaluate the implementation and effectiveness of relevant policies and measures taken.

Finland

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Finland has signed both the UN Convention and its Optional Protocol on 30 March 2007. The Ministry for Foreign Affairs has, in May 2011, set up a working group to prepare the measures necessitated by the ratification of the Convention and its Optional Protocol in Finland. However, the work of the working group and other related work are still ongoing. Therefore neither focal points nor a coordination mechanism have yet been specifically designated. Information on the UN CRPD is spread by the Ministry for Foreign Affairs, the Ministry of Social Affairs and Health, the National Council on Disability and by disabled people's organisations. The Threshold Association, a disabled people's organisation, created an internet-based contact point.

2.1.2. National strategies to implement the UNCRPD

In 2010, the Ministry of Social Affairs and Health prepared a specific Disability Policy Programme in order to guarantee equal treatment of persons with disabilities. The programme outlines the concrete disability policy actions for the next few years (2010–2015). The social development to achieve sustainable and accountable disability policy is outlined in the same context. The objective of the programme is to create a strong foundation for human rights, non-discrimination, equality and inclusion. The programme was prepared in cooperation with the different administrative sectors, expert bodies, NGOs, DPOs and other stakeholders.

The Disability Policy Programme contains concrete proposals on how to promote and implement the UN Convention in different sectors. Areas that are covered include: independent living, social inclusion, building, transport, education, employment, social protection, health and rehabilitation, safety, culture, international cooperation and statistics. The main content of the Disability Policy Programme are measures to ensure the following objectives:

1. Preparation and implementation of the legislative amendments necessitated by the ratification of the UN Convention on the Rights of Persons with Disabilities;
2. Improving the socioeconomic status of persons with disabilities and combating poverty;
3. The availability and high quality of special services and support measures will be ensured across the country;
4. Accessibility in society will be strengthened and increased;
5. Disability research will be reinforced, the information base improved, and diversified high-quality methods developed in support of disability policy and monitoring.

The National Council on Disability (VANE) is responsible for monitoring the implementation of the Disability Policy Programme. More information in English is available at http://www.vane.to/vampo_eng.html

Furthermore, there have been major developments related to the priorities for action described in the previous reports in relation to independent living (point 4 of the 2nd HLG report),

namely, the legislative reform on personal assistance services and moving into community-based settings.

Background
There are 336 municipalities in Finland that are in charge of providing *e.g.* social and health services, including services for persons with disabilities, to their inhabitants. Services are funded by a block grant subsidy from the state, municipal taxes and by service users. The services for persons with disabilities are mostly free of charge.

In Finland the starting point is that services are provided to all citizens on an equal basis. In addition, special services tailored to the needs of persons with disabilities are provided in accordance with the Act on Services and Support for the Disabled and the Special Care Act for Persons with Intellectual Disabilities. According to these Acts, severely disabled persons have a subjective right to the following services: transportation services, service housing, daily activities, personal assistance and alterations and assistive devices in housing. In this connection a subjective right means that the municipality is obliged to provide the service as soon as the criteria set out in the legislation are fulfilled irrespectively of the financial situation of the municipality.

Legislative reform concerning interpretation services for persons with disabilities
A revised Act on interpretation services for deaf-blind, hard of hearing people and persons with a speech disorder entered into force on 1 September 2010. In effect, the responsibility for organising and financing these services was transferred from the municipalities to the Social Insurance Institution of Finland. It means that the state now takes full responsibility for financing the interpretation services.

The new Act did not change the existing rights to interpretation services, but only changed the administration and financing responsibility of those services. Deaf-blind persons have by law the right to obtain a minimum of 360 hours and persons with hearing and speech impairments a minimum of 180 hours of interpretation services a year. The amount of interpretation services may vary according to the person's individual needs.

In 2010, the total number of people with disabilities receiving interpretation services was 4500.

A new housing programme for intellectually disabled persons
In January 2010, the Finnish Government issued a Resolution on a programme to organise housing and related services for people with intellectual disabilities in 2010–2015.

The goal is to provide persons with intellectual disabilities individual housing solutions in regular housing environments and to reinforce their inclusion and equal treatment in the community and society.

The development objectives for disability legislation laid down in the Government Programme, the guidelines of the Finnish Disability Policy Programme, and the UN Convention on the Rights of Persons with Disabilities define good housing as one of the prerequisites for independent living and inclusion.

The programme aims at giving people with intellectual disabilities who are moving out of institutions or their childhood homes the opportunity of individual housing in an accessible

and functioning home in a regular housing environment. At the same time, the number of institutional care places for persons with intellectual disabilities is reduced systematically and in a controlled way.

The programme also aims at producing about 1,500 homes for persons with intellectual disabilities moving from institutions and about 2,000 homes for grown-up persons moving out of their childhood homes. Once implemented, the programme will reduce the number of places in institutions, from 2,000 long-term places of the year 2010 to about 500 places by the end of 2015. Implementation of the programme is ongoing. In 2010-2011, the construction of over 1000 dwellings has been started, financed by investment grants from the Housing Finance and Development Centre of Finland (ARA).

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The work of the working group set up to prepare the measures necessitated by the ratification and other related work is still ongoing. Thus, a framework including one or more independent mechanisms pursuant to Article 33.2 of the UN Convention has not yet been established. However, in the context of nominating/establishing a mechanism referred to in Article 33.2 of the UN Convention, particular attention will be paid to the need to ensure that civil society, in particular persons with disabilities and their respective organisations are involved in the monitoring process.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

In Finland, there is already a well-established practice to cooperate and involve civil society and other organisations in all stages of reforming legislation. Also, in its existing human rights reporting practice, the Finnish Government encourages civil society to actively participate in the reporting to the international organisations. Usually, when a periodic report is prepared, civil society is asked to provide views on the information to be included in the report, and the interested civil society representatives are invited to attend a discussion on the draft report before its finalisation. Civil society is also encouraged to participate in the so called "shadow reporting", i.e., to send parallel reports to the human rights treaty monitoring bodies.

The organisations of persons with disabilities have actively participated in international processes related to the human rights of persons with disabilities, in particular in relation to the drafting of the UN Convention. Organisations of persons with disabilities and the National Council on Disability have also been consulted on the legislative amendments needed for the ratification of the UN Convention. In addition to the representatives of the public administration and the local and regional authorities, the National Council on Disability (VANE), the Finnish Disability Forum and the Centre for Human Rights of Persons with Disabilities (VIKE) are members of the working group set up to prepare the measures necessitated by the ratification of the Convention and its Optional Protocol.

The organisations of persons with disabilities and the National Council on Disability are also consulted in relation to the overall human rights policy of Finland, which includes a focus on the rights of persons with disabilities.

In connection with awareness-raising, organisations of persons with disabilities have been notified in various contexts of the legislative amendments necessitated by the ratification of UNCRPD.

The preparation of the Government Disability Policy Programme was based on a process of active participation of persons with disabilities and their organisations. This included - among other activities - a series of ten open seminars in different parts of the country, where both representatives of the key ministries and persons with disabilities met and debated on the challenges of promoting "a society for all".

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The collection of statistics has not yet been linked to the Convention. Statistics on disability are collected mainly by the National Institute for Health and Welfare, Statistics Finland and the Social Insurance Institution of Finland.

In general, statistics are based on national legislation. However, since disability is not used as a variable in population surveys, it is impossible to gather comprehensive data on persons with disabilities in Finland. Statistics Finland collects disability statistics only according to EU legislation through different EU surveys (for example Labour Force Survey's ad hoc module 2011 on employment of people with disabilities) for which the definitions and specifications are given by Eurostat.

Statistics on disability describe mostly services provided to persons with disabilities. SOTKAnet Indicator Bank (www.sotkanet.fi) operated by the National Institute for Health and Welfare (THL) is an information service that offers key population welfare and health data from Finnish municipalities since 1990. Disability data is collected by several different indicators that fall under the following five categories: services for persons with disabilities, housing services for people with intellectual disabilities, sheltered work for disabled people, statutory services and assistance for disabled people and other disability services and benefits. Social Insurance Institution of Finland provides annual statistics about the benefits it grants to persons with disabilities.

A monitoring group on barrier-free communications services chaired by the Ministry of Transport and Communications will this year start to develop concrete indicators for a barrier-free information society. The Ministry of Transport and Communications have published a study that presents a number of justifications and suggestions for actions that could be applied in promoting information society accessibility and are based on well planned usage of indicators and measured data.

France

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Since disability policy is of cross-cutting nature, it is expected that rather than nominating a single focal point, the government will designate all ministerial bodies directly involved in disability policy. Depending on the organization mechanisms of the different ministries, the focal point will either be an administration, a bureau or even a mission.

Since the dissemination of knowledge on the Convention onto the entire country is necessary for its effective implementation, focal points could perhaps be put in place at the level of decentralized services and regional authorities. The practical details of such a designation still require further analysis, so as to respect the constitutional principle of free administration of regional authorities.

Sans être officiellement désignées comme « points focaux locaux » au sens de la convention de l'ONU – car, placées sous l'autorité des présidents de Conseil général dont les collectivités départementales qu'ils dirigent sont régies par le principe constitutionnel de libre administration des collectivités territoriales- , les maisons départementales des personnes handicapées (MDPH) constituent de facto autant de relais locaux pour l'application des dispositions de la convention, telles qu'elles s'expriment dans notre législation nationale. Pour mémoire, les MDPH sont administrées par une commission qui réunit le département, l'Etat, les organismes locaux de sécurité sociale et, pour un quart de ses membres, les représentants d'associations de personnes handicapées. Elles sont présentes dans chacune des 100 collectivités départementales et exercent une mission d'accueil, d'information et de conseil des personnes handicapées et de leurs familles. Elles reçoivent et procèdent à l'évaluation de toutes les demandes de reconnaissance de droit (prestations, orientations) qui relèvent d'une décision de la commission des droits et de l'autonomie des personnes handicapées (CDAPH) ; elles assurent également l'accompagnement et le suivi de la mise en œuvre desdites décisions. Elles ont enfin une mission de sensibilisation de tous les citoyens au handicap. Elles sont donc « un carrefour incontournable » et un interlocuteur privilégié de la personne handicapée : elles doivent l'aider et lui simplifier toutes les démarches nécessaires à la réalisation de son projet de vie. Réciproquement, elles sont pour tous, un lieu de référence local pour l'ensemble des questions touchant au handicap.

La coordination de l'activité des MDPH est assurée au niveau national par la Caisse Nationale de Solidarité pour l'Autonomie (CNSA). Cette caisse a été créée en 2004-2005 pour collecter et distribuer les financements nécessaires aux prestations, services et établissements qui contribuent à l'autonomie des personnes handicapées et des personnes âgées. Elle rassemble elle aussi des représentants de l'Etat, des départements, des partenaires sociaux (employeurs et syndicats), des personnes handicapées et des personnes âgées, ainsi que des institutions spécialisées (établissements et services).

Parmi ses missions, cette caisse anime le réseau des MDPH, sans pour autant exercer une autorité hiérarchique sur ses maisons, chacune d'elles étant autonome et relevant de son département d'implantation. Par la contribution au financement de leur fonctionnement, par l'échange de bonnes pratiques, par la diffusion d'informations et de recommandations, par la signature de conventions de qualité de services, par l'organisation de formations, la caisse

contribue à faire converger les pratiques des maisons afin d'assurer une égalité de traitement des personnes handicapées sur tout le territoire national.

Even though the coordination mechanism is deemed voluntary according to the Convention, France has decided to yet put in place such a mechanism. The Interministerial Commitee of Disability (Comité interministériel du handicap (CIH)), established by the decree nr. 2009-1367 of 6 November 2009, will be responsible for setting up this mechanism. By appointing the interministerial CIH as the coordination mechanism, the French Government wishes to highlight that it regards disability policy as a political priority.

Moreover, the CIH's secretary general will be able to appoint and call together the focal points as deemed necessary. The secretary general has already set up meetings with responsible persons and administration on several occasions ever since its creation, even though they have not yet been officially appointed as focal points for the implementation of the UNCRPD.

The French Government also expresses its wish to establish close relations between the coordination mechanism and the representatives of persons with disabilities. Therefore, the government asked the CIH secretary general to also exercise the duties of the secretary of the National Advisory Council for Persons with Disabilities (Conseil National Consultatif des Personnes Handicapées), in order to establish an institutional link between both bodies.

2.1.2. National strategies to implement the UNCRPD

The implementation of the obligations arising from the UN CRPD and its Optional Protocol has been foreseen through the law nr. 2005-102 of 11 February 2005. Through its adoption, the adaptation of the French national legislation to the UN Convention will be very limited. The law of 11 February 2005 moreover goes further than the UN Convention on certain points, and thereby it gives a functional nature to most general obligations in the UN CRPD.

As the Convention sets out the establishment of a national action plan, the law of 11 February 2005 requires the holding of a national conference on disability every three years. These conferences will gather representatives of organizations of persons with disabilities, social/medical institutions or services working with persons with disabilities, social insurance institutions, trade unions and employer organizations and other bodies relevant in disability policy.

In order to prepare the conference, the law maintains that the Government has to deposit a report on the implementation and future developments of the national disability policy at the parliamentary assemblies' bureau, after a consultation with the National Advisory Council for Persons with Disabilities.

The first conference was held on 10 June 2008. It gave the opportunity to the French President to present his action plan in relation to persons with disabilities. The Plan consisted of seven objectives:

- To allow residential homes for persons with disabilities to fully fulfil their mission;
- To further develop benefits for persons with disabilities in the light of the establishment of a fifth risk of social welfare (un cinquième risque de protection sociale);
- To turn benefits for adults with disabilities (l'allocation aux adultes handicapés (AAH)) into a tool to increase resources and facilitate persons with disabilities' access to the labour market;

- To conclude a National Employment Pact for persons with disabilities;
- To decide upon an annual plan to support employment of persons with severe disabilities
- To increase and improve the accessibility to all aspects of city life;
- To allow all children with disabilities to have access to education adapted to their needs.

Une seconde Conférence nationale sur le handicap s'est tenue le 8 juin 2011, avec comme thème central une « société inclusive à tous les âges de la vie ».

Six ans après le vote de la loi du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées, la deuxième Conférence nationale du handicap du 8 juin 2011 a procédé au bilan d'application de cette loi fondamentale pour la pleine insertion des personnes handicapées dans la société.

Elle s'inscrit dans la continuité de la Conférence de juin 2008 qui a dressé un constat encourageant de l'action des pouvoirs publics en matière d'égalité des droits et des chances, de participation et d'accès à la citoyenneté des personnes handicapées. L'effort de solidarité nationale, quels que soient les contributeurs publics et privés, envers ces citoyens a fortement progressé au fil des années, notamment en termes de compensation du handicap, d'accessibilité à la Cité, d'emploi et de ressources, avec notamment une forte revalorisation de l'allocation pour adultes handicapés, mais aussi dans les champs de la recherche, la prévention et la formation.

Depuis la première Conférence nationale du handicap de 2008, le travail réalisé par l'ensemble des parties prenantes (services de l'État, collectivités locales, associations, opérateurs publics et privés), témoigne d'une mobilisation sans précédent de chaque acteur pour que soit prise en compte la thématique du handicap dans toutes les composantes de la société et s'attacher à ancrer au quotidien les droits que la Nation reconnait aux personnes handicapées.

Les mesures phares présentées lors de la conférence du 8 juin 2011 sont les suivantes :

- Un effort sans précédent des pouvoirs publics pour l'accessibilité :

- Un plan pluriannuel de mise en accessibilité des lieux de travail dans les trois fonctions publiques, les écoles de service public et les petites communes ;
- Un plan d'accessibilité numérique des sites internet de l'Etat et du Gouvernement;

- Des moyens pour garantir un accès aux savoirs de qualité, répondant aux besoins de tous les enfants et de tous les étudiants handicapés :

Dès la rentrée 2011, recrutement d'auxiliaires de scolarisation qualifiés, sous contrat de droit public, afin de faire face à la montée en charge de la scolarisation en milieu ordinaire et qu'aucun enfant ne reste sans solution d'accompagnement

- Un nouveau plan pour l'emploi des travailleurs handicapés :

- La création de 1000 postes supplémentaires chaque année dans les entreprises adaptées pendant 3 ans, soit 3000 postes supplémentaires ;
- Les jeunes en situation de handicap inscrits comme publics prioritaires des contrats Etat/régions pour l'apprentissage ;

- Une mission spécifique confiée au service public de l'orientation pour les jeunes handicapés, notamment issus des établissements médico-sociaux ;
- Des mesures pour améliorer l'information des salariés sur les formations accessibles dans chaque région

- Faire du handicap un des axes stratégiques de la recherche en France :

- En prenant en compte le handicap dans l'actualisation de la stratégie nationale de recherche et en impliquant les associations de personnes handicapées dans ces travaux.

- Des réponses spécifiques pour les plus fragiles

- Un abondement pluriannuel des fonds départementaux de compensation ;
- L'établissement de conventions d'objectifs et de moyens avec les MDPH, afin de stabiliser leur financement et leur personnel et d'améliorer le service rendu aux usagers ;
- Renforcer l'aide à la garde d'enfants pour les parents lourdement handicapés : il s'agit de majorer de 30 % le complément de libre choix de mode de garde, pour apporter un soutien à domicile aux parents lourdement handicapés dans la garde de leur enfant.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The establishment of a mechanism to protect, promote and monitor the implementation of the Convention, is currently being considered in the light of the recent reform that brings together several bodies of fundamental rights protection under the authority of a *Défenseur des Droits,* without prejudice to the powers of the National Advisory Council for Human Rights (*Commission Nationale Consultative des Droits de l'Homme* (CNCDH).

Le Défenseur des droits est une autorité constitutionnelle indépendante présidée depuis le 22 juin 2011 par M. Dominique Baudis. Il est nommé par le Président de la République pour un mandat de 6 ans non renouvelable et non révocable. Cette autorité, qui regroupe notamment les missions antérieures du Médiateur de la République, du Défenseur des enfants, de la Haute Autorité de Lutte contre les Discriminations et pour l'Egalité (HALDE) est chargée de veiller à la protection des droits, des libertés et de promouvoir l'égalité en particulier pour l'ensemble des personnes handicapées, quel que soit leur âge.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Co-operation with disabled persons is ensured by the Advisory national Board of disabled persons (CNCPH).

The law of 17 January 2002 had created the CNCPH to ensure the participation of disabled persons in the development and in the implementation of the policies related to disability (article L. 146-1 of the CASF). The CNCPH links the public authorities and civil society. Indeed, it assembles the following institutions: organizations for persons with disabilities and their relatives, administrative bodies, bodies financing social protection of disabled persons or

relevant research projects, trade-unions, professional organizations, the representatives of territorial authorities.

The law of 11 February 2005 widened the scope of responsibility of the CNCPH beyond its right of initiative or the optional rights granted by the Government, by giving it the responsibility to assess the situation of persons with disabilities. It is given the role to analyse whether the situation corresponds to the national principle of solidarity. According to Government's proposals it shall be granted this responsibility "by continuous multi-annual programming". Especially, the last article of the 2005 law envisages an obligatory consultation of the CNCPH for all regulatory texts of application of the law of 11 February 2005.

The CNCPH plays therefore an essential role for both, in the implementation of the law and in the evaluation and development of policies dealing with disability.

The CNCPH organized the work of its Committees as to examine the most complex decrees and foster the co-operation with the administrations, which allowed for a smooth development of certain draft texts. Thus, the CNCPH was not an advisory body solely responsible for approving or disapproving. Rather, it could play an active role in the development of regulation. In 90 % of the cases, the application texts of the 11 February 2005 law were given favorable comments by the CNCPH.

The CNCPH discussed several topics which developed into a report on disabled persons in situation of dependence and on the granting of minimal incomes. The Minister of Labour, Solidarity and the Civil Service, and the secretary of State responsible for Solidarity also contributed to the report on the development of "trade plans".

The CNCPH is responsible for "coordinating" the Departmental Advisory Boards of Disabled Persons (CDCPH) provided for in article L. 146-2, evaluating the departmental implementation of disability policy and the situation of disabled persons. To facilitate their analyses, the CDCPH gather information on the activities of the Departmental Houses of Disabled Persons (MDPH) and of the contents and the application of the Departmental Programmes for the Inclusion of Disabled Workers (PDITH). They moreover have access to the data of the Committee of the Rights of Autonomy of Persons with Disabilities (CDAPH) and of the institutions working with persons with disabilities.

2.2.3. Collecting statistics and/or developing indicators (Art. 31)

In accordance with Article 31 of the UN Convention, France has to set up a statistical mechanism specifically for monitoring the implementation of the UNCRPD. Currently, France does not yet have this type of mechanism. However numerous tools used on a national level for collecting information on persons with disabilities could be used to this end. For instance, once may refer to the survey on disability and dependence (HID), which relates to all persons residing or being looked after in special facilities or living in ordinary homes. The HID survey is being updated since April 2008, carried out with 40,000 participants. Numerous statistics are also available in the field of employment.

Moreover, an interministerial Observatory for accessibility and universal conception has been established on 11 February 2010, with the mission to monitor the developments, identify the challenges to the implementation of accessibility, disseminate good practice and create

monitoring indicators. The first progress report will be presented in 2011 during the national disability conference. The Observatory is composed of construction and transportation experts and representatives of organizations for persons with disabilities. The secretary general of the interministerial committee for disability issues is in charge of its secretariat.

L'Observatoire insiste tout particulièrement sur l'objectif final d'une Cité conçue pour tous. Afin d'accompagner la mise en mouvement de la société française et en particulier de la filière industrielle dans cette voie, il est important de rendre concrète et opérationnelle la notion de « conception universelle ». À cet effet, il a organisé, le 9 décembre 2011, une journée technique visant à promouvoir cette nouvelle approche en France à partir d'actions qui la déclinent actuellement sur le territoire et d'exemples relevés dans d'autres pays

Monsieur Philippe BAS, ancien ministre délégué à la Sécurité sociale, aux Personnes âgées, aux Personnes handicapées et à la Famille, sénateur de la Manche, préside l'Observatoire depuis le 10 novembre 2011. Cette instance s'est réunie le 9 février 2012 pour évoquer ses principales missions et faire un point d'étape au regard de l'objectif d'accessibilité fixé par la loi de 2005.

At the same time, numerous studies carried out for Community coordination use indicators which are also relevant to disability-related issues (employment, fight against exclusion, social welfare…) and could therefore be used for collecting statistics of developing indicators.

Germany

2.1. National implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Art. 33.1)

Germany highlights the importance of national implementation and monitoring structures as a precondition for an effective implementation. Due to the federal structure of Germany, an important part of the implementation of the Convention lies with the German Länder.

The Federal Ministry for Labour and Social Affairs (www.bmas.bund.de) is appointed focal point according to Article 33. Some of the Länder have appointed focal points on their level as well. Others work with a comparable structure.

The Federal Government Commissioner for Matters relating to Persons with Disabilities (www.behindertenbeauftragter.de) is appointed Coordination Mechanism according to Article 33. In September 2010, the Commissioner has appointed in close cooperation with the German Disability Council (www.deutscher-behindertenrat.de) an advisory board called "Inclusion Committee", in order to ensure a long-term and strategic consultation process with civil society, particularly with organisations of and for persons with disabilities in the implementation process of the Convention. For this reason, the Committee consists mainly of people with different disabilities. In addition, the Committee installs four thematic working groups to integrate the broader civil society in the process and enable the development of technical input to specific themes and topics.

2.1.2. National strategies to implement the UNCRPD

The UN Convention is the international equivalent to the change of paradigms, which was initiated in Germany especially by the Ninth Book of the Social Code and the Equality Act for Persons with Disabilities. The Federal Government will use the UN Convention to strengthen and promote new developments in disability policy in order to further advance a self-determined and discrimination-free participation in Germany.

In the Coalition Agreement of the Federal Government for the 17th legislative period it was agreed to draw up a National Action Plan (NAP) to implement the UN Convention. This Plan, adopted by the Federal Government on 15 June 2011, draws up a long-term overall strategy for the implementation of the Convention. It is a package of measures rather than a legislative package and is, in particular, aimed at closing existing gaps between the legal situation and the practice. More than 200 plans, projects and activities show that inclusion is a process that covers all areas of life.

The federal government's action plan is supplemented by other action plans of the federal states, municipalities, rehabilitation providers, disability and social organisations as well as providers of services for persons with disabilities and private sector companies. Most of the Länder have developed or still are developing own action plans. Also cities and enterprises and institutions like the German Social Accident Insurance have brought on action plans.

The voice of the civil society, especially of organisations of and for persons with disabilities, has been and is streamlined in a special advisory board. The closest cooperation with persons

with disabilities and their organisations is not only postulated by the UN Convention. It is also of tremendous importance for the Federal Ministry and the Federal Commissioner.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The Federal Government's Cabinet decision of 1 October 2008 initiating the legislative procedure for ratifying the Convention and the Optional Protocol entrusted the Deutsche Institut für Menschenrechte e.V. (German Institute for Human Rights) with the monitoring task under Article 33(2) UNCRPD.

The Institute is an independent body operating on the basis of the United Nations Paris Principles, to which Article 33(2) refers. It is currently financed by the Federal Ministry of Justice, the Foreign Ministry and the Federal Ministry of Economic Cooperation and Development and its independence is guaranteed via its legal form and the articles of association. It started work in 2001 and was recognised internationally as the national human rights institution with an A-status in 2003. To comply with the monitoring task under UNCRPD, a separate department within the Institute for the tasks under Article 33(2) has been set up. The Federal Ministry for Labour and Social Affairs provides some 430 000 EUR a year to support the independent body.

The Monitoring Body has six staff members – besides the head, the body is comprised of two research and policy professionals (one law, one social science), one assistant, one public relations and communications and one for administrative matters. The existing budget of the National Monitoring Body provides additional resources to organise conferences, to cover travel costs and conferences fees, and to commission research to some minor extend.

The German Institute started to set up the National Monitoring Body in May 2009, which is under full operation since November the same year. Since then, it has developed a great number of activities, e.g. it holds regular consultations with civil society organisations, has started a publication series with elements in easy to read, organised public conferences.

For up-to-date information on the work of and events organised by the Mechanism see its website www.institut-fuer-menschenrechte.de/de/monitoring-stelle.html (German only).

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

All three pillars involve civil society in the implementation and/or monitoring process:

1) Federal Ministry of Labour and Social Affairs as focal point

Civil society was consulted during the ratification process, for the implementation of the Convention by means of a national action plan these consultations were continued with several workshops, bi- and multilateral meetings and via the online-portal www.einfach-teilhaben.de. and a special advisory board with civil society representatives. Members of the special advisory board are representatives from disability organizations, social partners, charity organizations, the Federal Government Commissioner for Matters relating to Persons with Disabilities and a representative of an academic institution.

As mentioned above, the closest cooperation with persons with disabilities and their organisations is not only postulated by the UN CRPD. It is also of tremendous importance for the Federal Ministry and the Federal Commissioner.

Furthermore and with a view to implementing the UN CRPD, the Federal Ministry of Labour and Social Affairs takes – among others - the following measures to inform the public about the Convention:

- broad public awareness campaign to implement the UN CRPD;
- regular lectures for civil society and other institutions;
- translation of the convention into accessible formats (easy-to-read language and sign language) and distribution of all versions via brochures, dvd and/or the internet;
- Handbook for persons with disabilities: the handbook is the Ministry's most important publication in the area of disability policy. The new version will include the text of the Convention and provide information on it;
- Online portal www.einfach-teilhaben.de, which gathers information for persons with disabilities, their families, enterprises and administration.

2) Federal Government Commissioner for Matters relating to Persons with Disabilities as coordinating mechanism

In order to ensure a long-term and strategic consultation process with civil society, particularly with organisations of and for persons with disabilities, the Commissioner established a council. One of the main tasks of the council is to advise the federal government in questions related to the national action plan to implement the UN CRPD. In addition, the Commissioner established a consultative committee with members only from organisations of and for persons with disabilities. The Commissioner also launched a website that includes participatory elements of web 2.0 in order to ensure the participation of individuals. In addition, the coordinating mechanism informs the public in expert meetings and campaigns on all relevant aspects of the implementation of the Convention.

3) Monitoring Body at the German Institute for Human Rights:

The National Monitoring Body has underlined in public statements that monitoring the implementation is a task involving a number of non-state actors besides the National Monitoring Body, such as the UN Committee on the Rights of Persons with Disabilities at the international level and civil society, in particular persons with disabilities and their representative organisations within Germany. Consequently, the collaboration of these actors is of great importance. Thus, the German civil society organisations have the standing invitation to participate in the regular consultations with the National Monitoring Body. These meetings take place twice or three times a year. Although the National Monitoring Body does neither have the mandate nor the resources to handle complaints, it is open to receive individual communications and to learn from them, since individual cases might indicate deficits in structural terms.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

Statistics on the population, labour market and housing situation in Germany are collected by the Federal Statistics Office and the Regional Statistical Offices under the *Mikrozensusgesetz*

(Micro-Census Act). The micro-census is a multiple random sample survey which provides detailed information on the economic and social situation of the population and answers questions about employment, the labour market and training.

On the basis of *§131 SGB IX* a statistical survey of persons with severe disabilities, which started as early as 1979, is carried out every two years.

In addition to the evaluation of existing data, part of the action plan will be the establishment of a better data basis on the situation of persons with disabilities in Germany. A pre-study with suggestions for a respective roadmap was presented in February 2011. The work on the report is on progress. It will be published end of 2012.

Greece

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Until the governance structure is established, all ministries are called to take the provisions of the UNCRPD into consideration when working on questions related to disability.

2.1.2. National strategies to implement the UNCRPD

Until now, no concrete measures were taken for the implementation of the Convention. Greece is in the stage of examining relevant methods, processes and policies. One of the main priorities for all government-owned mechanisms involved in the issue of disability is also adapting the existing legal framework to the requirements of the Convention. The review of the existing legal framework in relation to the UN CRPD provisions as well as the establishment of new or additional regulations are considered necessary for the implementation of the Convention. The establishment of a central mechanism that will examine the subject of disability in all the dimensions will strengthen the effort for a united and completed approach to disability.

In terms of major developments, deinstitutionalisation is a basic pillar in the area of health and social care. Within this aim, 35 structures (small houses with a limited number of patients and staff) have been established, where people with disabilities are under constant care from specialized personnel (nurses, psychologists etc.). The aim is to increase the number of these establishments in the next few years. (See HLG-Report 2008, chapter 4 on Independent living).

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Art. 33.2)

As required by Article 33.2 of the UN CRPD, a monitoring body should be defined to facilitate and supervise the application of the Convention in different sectors and on different levels. In Greece, such a body has not yet been defined. All ministries are thus reminded to recall the provisions of the Convention until a new body is established.

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

The national organizations of people with disabilities are much consulted by the governmental bodies. They offer essential advice and support the rights of people with disability. After the development of an independent mechanism, the participation of organizations of people with disabilities is considered as essential. They will fully participate in the process of monitoring the implementation of the Convention.

The role of the National Confederation of Disabled People (ESAMEA) and the National Confederation of Parents and Tutors of Disabled People (POSGAMEA), the most representative NGOs of people with disabilities, may participate in the dialogue with the

Ministries' services for the determination and implementation of the UN Convention and also for the nomination of the monitoring body.

People with disabilities and their representative organisations participate as full members in several committees and working groups at national, regional and local level contributing in the formulation of policies relating to people with disabilities. In addition, they are members of political parties on an equal basis with ordinary members and to several non-profit organisations.

According to Law 2430/1997, every year on the 3rd December – which is the International Day of People with Disabilities - several events take place under the aegis of the Greek Parliament, the Ministry of Health and Social Solidarity and the National Confederation of Disabled People (ESAMEA) with the aim to raise awareness of the human and social rights of people with disabilities in Greece. On the same day, each year, ESAMEA submits a report on the situation of people with disabilities in Greece to the president of the Greek Parliament.

It is a priority for all authorities, ministries and unions of people with disabilities to raise awareness of issues related to disability and to participate in dialogue to implement related programmes and actions more effectively.

Seminars, lectures and conferences are organized on a regular basis, covering subjects that are related to disability. They are not only relevant for people with disabilities but for the society as a whole. These meetings, seminars and conferences are organised each year throughout the country by the Secretariat General of Communication/ Secretariat General of Information with the aim to promote positive attitudes towards people with disabilities. Advertising campaigns are also promoted by the government authorities or by non-governmental organisations, aiming at the sensitization of society in the subject of disability, showing ways of improving the lives of people with disabilities.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The central administration - mainly governmental bodies and the ministries – meet on a regular basis to exchange information and statistical data on people with disabilities so that they have a complete overview of the issue in the whole of Greece.

As an institution assembling individual statistical indicators, the national statistical service produces regularly centralized statistical bulletins with regard to disability. Thereby, it is possible to locate weaknesses and omissions concerning the obligations mentioned in the UNCRPD. Consequently, adequate policies can be developed in order to effectively implement the Convention.

Hungary

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The National Council on Disability Affairs (NCD) was established by the act on the rights of people with disabilities in 1998. The NCD is an advisory body to the Government with the following rights:

- To take initiatives, make proposals, and provide consultation and co-ordination in all decisions related to persons with disabilities;
- To carry out analysis and evaluation in the process of implementing such decisions;
- To comment on draft legislation concerning persons with disabilities;
- To make proposals for decisions, programs and legislation affecting persons with disabilities;
- To be involved in co-ordinating activities related to the affairs of persons with disabilities;
- To brief the Government regularly about the situation of persons with disabilities;
- To elaborate the National Disability Program and monitor the implementation thereof.

According to the Statutes of the Ministry of National Resources, the tasks related to the implementation of human rights conventions belong to the Ministry's responsibility, and the Constitution on Operation of the Ministry assigns the international issues connected to disability to the Department of Disability. This way the appointment of the central governmental actor is indirectly deducible, although no concrete, specified appointment has been done.

2.1.2. National strategies to implement the UNCRPD

The Hungarian Parliament adopted the National Disability Action Plan in 2006 for 2007-2013. In order to implement the DAP the Government adopted the midterm Action Plan for 2007-2010. Although these legal and policy instruments were adopted before the ratification of the UNCRPD, in great part they comply with the principles and main targets of the Convention. The new Action Plan for 2011-2013 was elaborated in February 2011. In the work process the UNCRPD is identified also formally as a main point of reference.

Furthermore, the following developments have taken place in relation to the implementation:

- The Hungarian Parliament adopted the Act No 125 in 2009 on the Hungarian Sign Language and the use of Hungarian Sign Language. This Act implements Article 9 subsection 1.b), Article 21, Article 24 subsections 3.b), 3.c), 4.
- The Ministry of National Resources coordinates the interministerial discussions on the legislation concerning the strategy and the tasks of the Government regarding the implementation of the transition from institutional care of disabled people (deinstitutionalisation). That will implement Article 19 UNCRPD. With the governmental decree 1257/2011, the Hungarian Government has adopted the Strategy of the replacement of the large social institutions providing nursing and caring for persons with disabilities with community based settings (Deinstitutionalisation) 2011 – 2041 (hereinafter referred to as Strategy). Based on the decree, the Minister of National Resources has established the National Body for Deinstitutionalisation (hereinafter referred to as Body). The Body is in

charge of coordinating the tasks defined in the Strategy. Every three years, the Minister of National Resources proposes an Action Plan encompassing the realization of the Strategy scheduled for the three-year-period to the Government, which is also outlined by the Body. The first Action Plan has to be submitted on March 31 2012. The realization of the task is supported by the EU development resource Code TIOP 3.4.1, which amounts to 7 billion HUF and aims at the deinstitutionalisation of 1500 capacities.

- On the assignment of the legal predecessor of the Ministry of National Resources, a National Autism Strategy was adopted in July 2008, under the technical guidance of the Hungarian Autistic Society. This five-year comprehensive plan for the development of services for people living with autism sets out medium-term targets and tasks in the field of diagnostics, professional staff training, education, development, employment, adult training and family support.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

Taking into account that the NCD already had the right and duty to follow up and comment governmental activities related to persons with disabilities as well as to monitor the implementation of the National Disability Program, the Government Decree No 1065 of 2008 (X.14.) assigned to the NCD the task to promote, protect and monitor the UNCRPD.

Nevertheless this solution is not fully in line with the UNCRPD since the NCD is not considered as an independent body because it is constituted by representatives of the relevant ministries and governmental organisations as well as representatives of the civil society.

It is also important to mention that in 2009 the Hungarian Ombudsman for civil rights carried out an ex officio thematic review about the effectiveness of the rights of people with disabilities.

The first deadline for the compilation of the report required by Article 35 UNCRPD was 3 May 2010 for Hungary. Due to the governmental restructuring the contributions from the different ministries arrived with a great delay, so Hungary asked for the extension of deadline until 15 October 2010. The National Report has been prepared by that deadline and Hungary submitted it through the UN High Commissioner for Human Rights to the UN Commission on Human Rights. The Committee on the Rights of Persons with Disabilities reviewed the Hungarian report on the implementation of the Convention and adopted a 31-item list of issues requesting supplementary information on April 20 2012. The written replies of Hungary to the list of issues have to be submitted within a month. The consideration of the report will take place on September 20-21 2012 in Geneva.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Civil society takes part in the monitoring process mainly through the National Council on Disability Issues, since it was officially appointed by the Government Decree mentioned above for the task of monitoring. In the NCD, the elected civil members and the national civil society organisations representing various branches of disability as permanent representatives take part, therefore civil society is fully involved in the process. The NCD consists of two

main parts, namely, the governmental and non-governmental side. Within this constellation, the non-governmental side itself has a dual composition. On the one hand, the representatives of the main branches of organisations advocating the rights of persons with disabilities are permanent members of the Council. On the other hand, there are also elected members from the non-governmental sector. They win their seats during a delegating meeting arranged on the basis of legislative regulation where the participants are exclusively those non-governmental organisations working for the benefit of persons with disabilities that do not have permanent seats in the Council. Thus, the NGOs elect these members from amongst themselves.

Every policy document, proposal, draft, etc. which deals with disability issues or may have an impact on people with disabilities, has to be submitted to the Council for further comments. Besides, during the elaboration of such documents, the relevant civil organisations are consulted about the draft proposals and provisions.

The National Council on Disability Issues has the right to discuss, comment all policy documents and draft legislation dealing with disability and/or having any impact on people with disabilities.

Apart from the above mentioned involvement, drafts of new legislation related to disability is discussed separately also with the professional and interest representation organisations mainly concerned.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

In the course of a national census there are always questions concerning the status of being disabled and the type of it. Regarding the fact that disability and information related to it are so called sensitive data, the declaration on it is voluntary, this means that the validity of statistics compiled on this base is doubtful. For measuring the implementation of international conventions, including mainly the UNCRPD, the legal predecessor of the Ministry of National Resources developed a specific system of indicators. By using this set of tools it is considered possible to get a more realistic view on the social process affecting people living with disabilities.

Ireland

2.1. National implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Focal point and coordination arrangements pursuant to Article 33.1 will be settled in due course following Ireland's ratification of the UNCRPD.

The Disability Policy Division (DPD) of the Department of Justice and Equality co-ordinates both the implementation of the National Disability Strategy and the work of the Interdepartmental Committee on the UNCRPD, which are the primary elements at present in meeting the requirements of the UNCRPD.

2.1.2. National strategies to implement the UNCRPD

The Irish Government launched its National Disability Strategy (NDS) in September 2004 to underpin the participation of people with disabilities in Irish society. The NDS builds on existing policy and legislation, including the policy of mainstreaming public services for people with disabilities, and comprehends many of the provisions of the UNCRPD.

The NDS continues to be the focus of Government policy and the Programme for Government 2011-2016 commits to publishing "following wide consultation, a realistic implementation plan for the National Disability Strategy (NDS), including sectoral plans with achievable time scales and targets within available resources and ensuring whole of government involvement and monitoring of the Strategy, in partnership with the disability sector". The Minister for Disability, Equality, Mental Health and Older people has established a new National Disability Strategy Implementation Group to guide the development of this plan and monitor its subsequent implementation. This Group replaces the former National Disability Strategy Stakeholder Monitoring Group.

Implementation of the NDS, which is ongoing in spite of current economic circumstances, also provides the basis for implementation of the UNCRPD.

The key elements of the National Disability Strategy are:

- the Disability Act 2005
- Sectoral Plans for services prepared by six Government Departments
- the Citizens Information Act 2007 which provides for a personal advocacy service for people with disabilities
- the Education for Persons with Special Educational Needs Act 2004
- a multi-annual investment programme 2006-2009 targeted at high-priority disability support services.

The Disability Act 2005 is designed to support the provision of disability-specific services and improve access to mainstream public services for people with disabilities. In accordance with the Act, a review of its operation was carried out in 2010. Under the Act, six Government Departments published Sectoral Plans in December 2006 that set out the programme of measures to be taken in relation to the provision and mainstreaming of services for people with specified disabilities. The relevant Departments are those with the functions

of Employment [7] ; Health [8] ; Transport [9] ; Social Protection [10] ; Environment [11] ; and Communications. The Disability Act also requires the preparation of reports relating to the progress made in the implementation of the Sectoral Plans not more than three years after their publication. These Reports were approved for publication by Government in February 2010. The general finding was one of significant and substantial progress by all six Departments.

In terms of the UNCRPD, the NDS is complemented by a high-level Interdepartmental Committee on the UNCRPD which advises on and monitors legislative, policy and administrative actions required to enable the State to ratify the UNCRPD. The committee is chaired by Disability Policy Division of the Department of Justice and Equality and contains officials from the six Sectoral Plan Departments as well as other relevant Government Departments and the Office of Public Works. It has developed a Work Programme to address (i) any elements of the NDS that require alignment with the Convention; and (ii) any matters outside the NDS required for ratification. This programme is being progressed across the relevant Government Departments. At the Committee's request, the National Disability Authority, the lead statutory agency for the sector, has independently assessed the remaining requirements for ratification so as to ensure conclusively that all such issues will be addressed.

An example of what is required for ratification of the UNCRPD is the enactment of mental capacity legislation. The Government's Legislation Programme as announced on 11 January 2012, indicates that the Mental Capacity Bill is expected to be published in the current Parliamentary session. The Bill will replace the Wards of Court system with a modern statutory framework governing decision-making on behalf of adults who lack capacity. The passage of this Bill will add substantially to the overall progress on implementation of the requirements towards ratification of the Convention.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The role of the Interdepartmental Committee on the UNCRPD was outlined at 2.1.2. It is likely that this committee will continue to monitor the process towards implementation following Ireland's ratification.

The National Disability Strategy (NDS), as also outlined at 2.1.2, comprehends many of the provisions of the UNCRPD. Progress on its implementation is driven by the Senior Officials Group on Disability (SOGD), which reports to the Cabinet Committee on Social Policy.

Progress on the overall implementation of the NDS is monitored by the National Disability Strategy Implementation Group, which provides a means of facilitating dialogue between all parties involved. Membership of the Group is made up of representatives of the Senior Officials

[7] Sectoral Plan is at *www.entemp.ie/labour/strategy/sectoralplan.pdf*
[8] www.dohc.ie/publications/fulltext/disability_sectoral_plan/
[9] www.transport.ie/upload/general/7760-0.htm
[10] w.ww.welfare.ie/EN/Policy/CorporatePublications/HowWeWork/Disability%20Sectoral%20Plan/Pages/index.aspx
[11] www.environ.ie/en/LocalGovernment/LocalGovernmentAdministration/SectoralPlan/PublicationsDocuments/FileDownLoad,2011,en.pdf

Group on Disability (SOGD) [12] ; County and City Managers Association; the Disability Stakeholder Group (DSG)[13]; and the National Disability Authority.

The National Disability Authority (NDA) is the lead state agency on disability issues and is under the aegis of the Department of Justice and Equality. It develops and monitors standards in services for people with disabilities and advises Government on disability policy and practice. The NDA is actively involved with the implementation of important aspects of the National Disability Strategy and supports Government Departments and agencies in meeting relevant objectives.

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

The purpose of the National Disability Strategy Implementation Group is to maintain a constructive relationship with stakeholders, provide them with a forum to raise issues and a means of facilitating dialogue between all parties involved in the NDS. Membership of the NDSIG (see also 2.2.1. above) includes the Disability Stakeholder Group, which represents the sector, its organisations and service users.

The Interdepartmental Committee on the UNCRPD consults with people with disabilities through their representative organisations and has prepared Irish language and Braille versions of the UNCRPD.

People with disabilities, their families, carers, advocates and service providers were consulted on the Sectoral Plans before they were completed. Each plan includes arrangements for complaints, monitoring and review procedures. The DSG, apart from being part of the NDSIG, is in ongoing consultation with relevant Government Departments in relation to Sectoral Plans and all aspects of disability.

Disability organisations were also consulted in respect of the review of the operation of the Disability Act (see also 2.1.2.). A consultation event was held with the assistance of and in the headquarters of the National Disability Authority (NDA). Presentations were made and discussions held at the event on the context of the review; clarification of its purpose in examining the operation of the Act; and an overview of each Part of the Act under review and how it operates at present. Following the event, an official invitation was extended to all stakeholders to make submissions on the review.

2.3. Collecting statistics and/or developing indicators (Art. 31)

The Central Statistics Office (CSO) is the national statutory body with responsibility for the collection, compilation, extraction and dissemination for statistical purposes of information

[12] The SOGD comprises officials from the Departments of Health; Social Protection; Transport, Tourism and Sport; Environment, Community and Local Government; Jobs, Enterprise and Innovation; Communications, Energy and Natural Resources; Arts, Heritage and the Gaeltacht; Agriculture, Fisheries and Food; Education and Skills; Children and Youth Affairs and Public Expenditure and Reform.

[13] The DSG comprises representatives from Disability Federation of Ireland; Inclusion Ireland; Mental Health Reform; National Federation of Voluntary Bodies; National Service Users Executive and Not for Profit Business Association. It also includes a number of service users who are serving as individuals in a personal capacity.

relating to economic, social and general activities and conditions in the State14. CSO surveys with particular relevance in providing statistics on people with disabilities include:

- the Census of Population
- the National Disability Survey
- the Quarterly National Household Survey
- the annual Survey on Income and Living Conditions (SILC)

The National Disability Authority has a statutory remit to undertake, commission or collaborate in disability research and to contribute to the development of statistical information relating to programmes and services for people with disabilities. The NDA fulfils this remit in a number of ways, including:

- the production and dissemination of disability research on a wide range of policy and service related issues;
- contributing expertise to national research and development initiatives - such as the Central Statistics Office's National Disability Survey, the Health Research Board's National Disability Databases (see below), and projects in partnership with agencies such as the National Women's Council, the Council for Ageing and Older People, the Equality Authority and many others;
- hosting the NDA Annual Disability Research Conference;
- the NDA Database of Disability Research in Ireland;
- funding research at grassroots level through the Research Promotion Scheme (RPS); and
- funding postgraduate research through the NDA Disability Research Scholarships

There are two national service-planning databases in Ireland for persons with disabilities managed by the Health Research Board: the National Intellectual Disability Database and the National Physical and Sensory Disability Database. These databases inform decision-making in relation to the planning of specialised health and personal social services for people with intellectual, physical or sensory disabilities.

[14] www.cso.ie

Italy

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Art. 33.1)

The Ministry of Labour and Social Policies, Directorate-General for inclusion and social policies serves as the focal point for Italy, in co-ordination with other relevant ministries and departments, as well as regional and local authorities.

2.1.2. National strategies to implement the UNCRPD

The tasks assigned to the National Observatory aim at giving new and constant inputs regarding public policies in the field of disability and can be summarized as follows:

a. implementation of the UN Convention on the Rights of Persons with Disabilities, also through a detailed report on the measures taken, as provided by Article 35 of the Convention, in close co-operation with the Inter-ministerial Committee on Human Rights;
b. to set up of a two-year plan of action for the promotion of the rights and integration of people with disabilities, as provided by national and international provisions;
c. to collect statistical data on the situation of people with disabilities, with reference to the local peculiarities;
d. to set up a national report on the implementation of policies in the field of disabilities (as provided in national Law n. 104/1992);
e. to promote studies and researches that can contribute to the identification of priority areas of actions and programs for the promotion of the rights of people with disabilities.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The ratification act of the UN Convention was adopted by the Italian Parliament by national Law n. 18/2009, also providing the establishment of a National Observatory in order to monitor the condition of people with disabilities. The National Observatory, which met for its official session on December 16th, 2010, will also ensure the implementation of the activities provided by Article 33.2 of the UN Convention.

The Observatory is a collective body that will facilitate the constant link between government and people with disabilities and their families and supporting organizations, and the discussion on the various needs of people with disabilities in order to identify proper and joint solutions, based on an effective coordination of policies and programs.

The Scientific and Technical Committee (CTS) within the Observatory deals with scientific analysis in relation to the activities and tasks of the Observatory itself. The Committee meets regularly since the first meeting of the Observatory; in 2011 it produced the methodological guidelines on the Observatory's several activities and functions.
On July 2011 six working groups were formed in order to deal with all major areas of reference set by the UN Convention on the Rights of Persons with Disabilities. It was thus

confirmed that the research and analysis of the working groups, whose members are, by a large number, representatives of associations of people with disabilities, will contribute to the report under Article 35 of the UN Convention, in order to give maximum importance to the Convention provisions on the full participation of civil society and organizations representing people with disabilities throughout the monitoring process (art.33.3).

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

In the Observatory the following entities are represented: the administrative departments from the national level involved in the definition and implementation of policies in favour of persons with disabilities; regions and autonomous provinces of Trento and Bolzano; the local autonomies, i.e. provinces and municipalities; the national Institutes of social provisions and protection; the national institute of statistics; trade unions representing persons with disabilities, workers, retired people and employers; national associations representing persons with disabilities; organizations from the non profit sector dealing with disability issues.

The national organisations and federations representing people with disabilities have been involved in the decision-making processes on disability issues, at national, regional and local level. In 1992 the law n. 104/1992 introduced a National Conference on the policies for disability with the active participation of people with disabilities and their representative organisations. Organised every three years, the last Conference was held in Turin in October 2009. The law provides a Communication to the Parliament on the conclusions of the National Conference.

Until the ratification of the UN Convention, Italy lacked an institutional body for the permanent consultation of persons with disabilities. However, thanks to the National Observatory for monitoring the condition of people with disabilities, established by the national law for the ratification of UN Convention (Law 18/2009), mainstreaming strategy on disability issues will be thoroughly discussed there. It has to be underlined that within the Observatory 14 members out of 40 are representatives of organisations and federations of people with disabilities.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

A specific data collection related to the implementation of the Convention has not been launched yet. However, at www.disabilitaincifre.it, a website promoted by the Ministry of Labour and Social Policies in co-operation with ISTAT, the national institute for statistics, various data on Persons with Disabilities are available. The website is currently under development on the basis of a Protocol among the Ministry of Labour and Social Policies and ISTAT.

In December 2011 the General Directorate for inclusion and social policies of the Ministry of Labour and Social Policies, in accordance with the CTS guidelines, signed an agreement with the National Institute of Statistics (ISTAT) in order to fully comply with the provisions on statistics of art. 31. The agreement covers a series of activities such as, for example, the analysis of the life conditions of people with disabilities; an experimental analysis of the disability condition of children (0-17 years) through the inclusion of specific questions; a feasibility study for the preparation of a national registry of persons with disabilities, listed by gender, age, residence, type of disability to be used for statistical purposes; a system of

specific indicators to monitor the level of social inclusion of people with disabilities, in accordance with the provisions of the UN Convention, and new statistical tools for mental and intellectual disabilities.

Latvia

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Ministry of Welfare of Latvia is directly responsible for disability policy in the area of social protection and at the same time in charge of monitoring the implementation and development of equal opportunities policy for disabled people in Latvia at large; as such, this ministry is the official focal point for matters relating to the implementation of the Convention.

According to the Law on Convention on the Rights of Persons with Disabilities from 28/01/2010, passed in the follow-up to ratification, the Ministry of Welfare is appointed as coordinating body for the implementation of the Convention).

This task is carried out by gathering information from other ministries and preparing respective annual reports, by keeping track of developments of other ministries' policy related to disability, and by taking into consideration complaints and ideas for the improvement of legislation in different areas. These are proposed by NGOs. The ministry then tries to solve these problems in cooperation with other involved ministries.

The National Council of Disability Affairs (NCDA), established by the Cabinet of Ministers, is used as a forum to carry out coordination and monitoring of the Convention. Chairman of the NCDA is the Minister of Welfare, and the Ministry of Welfare carries out the secretariat's function for the National Council of Disability Affairs (it plans the content and coordinates the work). The NCDA is an advisory institution that takes part in development and implementation of integration policy of disabled people. NCDA involves line ministers, Chairperson of the Latvian Association of Local and Regional Governments, Ombudsman, Chairperson of Public Utilities Commission, Director of Society Integration Foundation, President of Free Trade Union Confederation of Latvia and also representatives of key non-governmental organizations. Starting from 2009 the progress and challenges of implementation of the Convention has been discussed in every NCDA meeting. Every year specific items of the Convention, article by article, are included in every NCDA meeting’s agenda.

Specific working groups are being established to carry out in-depth analysis, prepare reports and generate solutions and recommendations to be presented to the responsible ministries for further implementation. Working groups on legal capacity, employment matters, tackling accessibility matters have been established. The task of the latest working group will be finding bottlenecks and generating solutions of problems related to all kinds of accessibility and presenting results at the NCDA meetings on regular basis.

.

Coordination of implementation of the Convention is carried out also through several working groups formed by the Ministry of Welfare under policy guidelines and strategic plans.

Information about all NCDA meetings and relevant working groups is available at the Ministry of Welfare home page www.lm.gov.lv (in Latvian).

2.1.2. National strategies to implement the UNCRPD

Several strategic documents or advanced plans for a strategy directly devoted to the disability policy matters are already in place:

- Different ministries carry out implementation of the concept paper „Equal opportunities for all" (adopted by the Cabinet in 1998). The concept paper covers actions until 2010 within the following fields: health, education, employment, proper environment and social security. Planned actions for the implementation of this concept paper have to be included in the annual action plans of ministries. The Ministry of Welfare prepares each year the report on progress and presents it at the NCDA meeting. After 2010 an evaluation report has been prepared stating that the economic crisis that hit Latvia in 2008 particularly hard has negatively affected the implementation of several activities that were requesting additional public means. Nevertheless some progress can be observed and objectives that have not been reached are to be included in coming policy papers.
- The „Basic Principles on Policy for Elimination of Disability and its Consequences, 2005-2015" elaborated by the Ministry of Welfare has been adopted by the Cabinet in 2005. This strategic document contains guidelines for preventing disabilities and the basic principles, objectives and priorities of state social protection policy for persons with disabilities. The implementation of this strategy is supported by the „Action Plan for Implementing the Basic Principles on Policy for Elimination of Disability and its Consequences 2005-2015", adopted by the Cabinet in 2006. An aim determined in the Action Plan is to eliminate or to reduce the risk of disability for persons with threatened/prognosticated disability, to reduce the effect of a disability on persons with disability and to reduce the risk of social exclusion for all those persons. The Ministry of Welfare prepares each year the report on progress and submits it to the Cabinet.
- The UNCRPD Implementation Action Plan 2010-2012, adopted by the Cabinet in October 2009, envisages initial steps for promoting the implementation of the Convention. Due to the significant financial restrictions caused by the recession, this plan includes only short term activities where additional financing is not required, or reduced to a minimum, or supported by EU financial instruments. One of the tasks of this Action plan is to elaborate the UNCRPD implementation programme for 2013-2019 which will be a comprehensive strategy to reach the UNCRPD objectives.
- Currently the strategic document (policy guidelines) "Basic Principles of Implementation of the Convention on the Rights of Persons with Disabilities for 2013-2019" is being elaborated. This strategy will replace previous policy guidelines and plans and thus create one comprehensive policy planning document.

All above mentioned documents as well as annual reports on their implementation are available at the Ministry of Welfare home page www.lm.gov.lv (in Latvian).

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

According to the above mentioned Law on the Convention on the Rights of Persons with Disabilities, the Ombudsman office as the independent institution ensures monitoring of the implementation of the Convention. Representatives of the Ombudsman office participate in

the above mentioned NCDA and in all working groups for the implementation of the Convention.

As the ministry is responsible for disability policy at large, it is also responsible for monitoring the implementation of the Convention. All line ministries are responsible for the implementation of their specific activities, according to their respective sphere of competence

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

Civil society, in particular persons with disabilities and their representative organizations, shall be involved through the NCDA and the above mentioned working groups. Starting from 2007, on a regular basis, the Ministry of Welfare organises meetings with DPO's to discuss practical and political issues.

Information about all monthly meetings with NGOs is available at the Ministry of Welfare home page www.lm.gov.lv (in Latvian).

NGOs representing persons with disabilities have the opportunity to participate in the process of policy planning as well as monitoring of implementation. DPO's are involved in all working groups established by the ministry; they provide expertise and opinion on national legal acts and planned services. During the preparation of draft laws and regulations, and the development of amendments on existing legislation (for example, Policy Guidelines for Reduction of Disability and its Consequences, draft law On Disability and its sub laws, the conformity assessment of national legal acts to the United Nation Convention), the NGOs have played and continue to play a significant role.

The future strategic document "Basic Principles of Implementation of the Convention on the Rights of Persons with Disabilities for 2013-2019" is being elaborated in close cooperation with line ministries and DPO's.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

In Latvia the statistical data which cover also disability maters, are collected and available in several institutions, depending on the respective policy area. It should be mentioned at this stage that the Ministry of Welfare has subordinate institutions (the State Social Insurance Agency, the State Employment Agency, the State Medical Expertise Commission of Health and Capacity for Work (Expertise Commission)) whose regular statistics are used to monitor disability policy. Besides, relevant data related to disability statistics are collected also by other ministries (for instance the Ministry of Education and Science, the Ministry of Health, the Ministry of Transport etc.) and, of course, by the Central Statistical Bureau (CSB). Some statistics are provided in the annual public reports of respective ministries, or institutions, via their home pages, and in the CSB publications. Data is mostly longitudinal.

The definition of disability in Latvia is related to the level of impairment and thus all the public services and entitlements are provided to the persons with disability status that is granted by the Expertise Commission. Accordingly whenever the statistics on disabled persons are collected they include persons with disability status. An exception are provisions for technical aids, which persons with different kinds of functional disorders are entitled to, not only persons with disability status.

The improvement of data collection for the total number of persons with disability is in progress: during the 2004-2006 EU structural funds' planning period the Expertise Commission, involving ERDF co-financing, created the disability information system, i.e. a unified database of disabled people. To continue the development of this database during the 2007-2013 EU structural funds' planning period the Expertise Commission, involving ERDF co-financing, has started a new project, “Digitalization of the archive data bases and implementation of e-services”. One of the outputs of this project is an improved disability information system, which allows to obtain comprehensive and detailed statistical data distributed by gender, age, administrative region, as well as by diagnosis, covering all persons with disabilities (and also persons with anticipated disability), including also historical data, which previously was mostly available only in paper form.

In general, the above mentioned data sources are successfully used for policy formulation and monitoring of implementation. However, it is not sufficient for monitoring the implementation of the Convention because the available data cover multidimensional and multidisciplinary area of the Convention only partially.

The monitoring mechanism of the implementation of the Convention, including Article 31, is not yet adjudicated. Therefore in a view of ensuring both the monitoring of implementation of the Convention and preparation of reports on progress (in accordance with the article 35, paragraph 1 of the Convention) the development of indicators will be discussed during the forthcoming meeting of the working group for preparation of the strategic document “Basic Principles of Implementation of the Convention on the Rights of Persons with Disabilities for 2013-2019”. The working group will start its activities in March 2010 and in parallel to the elaboration of the strategic document for 2013-2019, all relevant ministries will be asked to make proposals for specific indicators which could support the analysis of the implementation of the Convention. After reaching an agreement on the indicators, the involved relevant ministries will be obliged to ensure collecting and maintenance of these specific statistical data.

Lithuania

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

As the UN Convention on the Rights of Persons with Disabilities was ratified on 27 May 2010, the coordination mechanism and focal points were designated by the Resolution of Government No. 1739 on 8th of December, 2010.

The Ministry of Social Security and Labour was designated as coordinating body and focal point for implementing the UN Convention. Other public authorities (the Ministry of Education and Science, the Ministry of Transport and Communications, the Ministry of Health, the Ministry of Environment, the Ministry of Economics, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Culture, the Department of Physical Education and Sports under the Government of the Republic of Lithuania, the Department of Statistics and the Information Society Development Committee under the Ministry of Transport and Communications) were designated as sub-focal points for the implementation of UN Convention according to their competence.

2.1.2. National strategies to implement the UNCRPD

The main aims and objectives of the UN Convention and its implementation are included in the National Social Integration Programme for Persons with Disabilities 2010-2012 (hereinafter referred to as the Programme).

The main aim of the Programme is to achieve equal opportunities and improve the quality of life for people with disabilities in line with international and national public policy objectives and commitments.

The main objectives of the Programme are:

1. To increase aid to the families of people with disabilities (children, adults);
2. To develop services for people with disabilities in the community and improve their quality of life;
3. To improve the environment for people with disabilities, the legal framework, and accessibility;
4. To improve health care and medical rehabilitation services for people with disabilities and improve the quality of these services;
5. To increase and raise the effectiveness and accessibility for the disabled of education and training services;
6. To increase access to employment and labour market;
7. To strengthen legal protection;
8. To increase participation in public and political life;
9. To increase participation in physical education and sports activities;
10. To improve the management of the social inclusion process.

The Programme is coordinated and monitored by the Department for the Affairs of Disabled at the Ministry of Social Security and Labour.

It is noteworthy that after the ratification of the UN Convention, the Plan for Implementation of the National Social Integration Programme for Persons with Disabilities 2010-2012 was complemented with other measures proposed by public authorities and non-governmental organizations of disabled persons. The document was approved by the Minister of Social Security and Labour.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The Council for the Affairs of Disabled at the Ministry of Social Security and Labour (hereinafter referred to as the Council) and the Office of Equal Opportunities Ombudsperson perform the function of independent mechanism. The Office of Equal Opportunities Ombudsperson performs the function of protection and ensures that all the rights of disabled people are guaranteed. The Ombudsperson also takes actions so that violation of the rights of persons with disabilities are stopped: the Ombudsperson accepts complaints, investigates them, solves problems, and writes comments to the Courts. The Council monitors the implementation of the UN Convention and in particular:

- Assesses the human rights situation in respect to disabled persons;
- Draws public authorities' attention to the violation of disabled rights;
- Helps to foresee measures to protect from human rights violation;
- Makes proposals for improving legislation and seeking to properly implement the Convention;
- Analyzes how provisions of the UN Convention are implemented.

2.2.2 The involvement of civil society in the monitoring process (Article 33.3)

The rights of people with disabilities are defended and represented by the associations of disabled persons. Decisions are taken after including the opinions and experiences of persons with disabilities.

The Ministry of Social Security and Labour has several subordinated bodies: the Department for the Affairs of the Disabled, the Service for Establishing Disability and Capacity for Work, the Dispute Commission, and the Centre for Technical Assistance for People with Disabilities. They organize regular meetings with relevant NGOs in order to ensure closer cooperation, distribution of information as well as resolution of existing problems. Relevant problems related to the establishment of ability-for-work and disability, determination of the need for professional rehabilitation services, ensuring equal opportunities etc. are issues discussed at these meetings.

As mentioned above, disabled persons are involved in the process of monitoring the implementation of the provisions of the UN Convention through representatives of non-governmental organizations of disabled people who take part in the activities of the Council.

The Council analyzes the most important issues in relation to the social integration of people with disabilities and submits proposals to the Minister of Social Security and Labour regarding the implementation of social integration policy relating to the needs of people with disabilities (after the ratification of the UN Convention, the Council also monitors its implementation).

The Council is composed, on a voluntary basis and according to the principle of equal partnership rights, of state institutions and representatives delegated from the Lithuanian Union of Persons with Visual Impairment, the Lithuanian Society of Persons with Hearing Impairment, the Lithuanian Association of Disabled, the Lithuanian Union of Persons with Disabilities, "Viltis" Association for Care for People with Intellectual Disorders, the Lithuanian Association for Care for People with Mental Disorders and the Paralympic Committee of Lithuania. They each have one main representative, at the level of either the president, the vice-president or the chairman.

The members of the Council representing state institutions are chosen within the Ministry of Social Security and Labour, the Ministry of Health, the Ministry of Education and Science, the Ministry of Environment, the Ministry of Communications, the Ministry of Interior and the Ministry of the Economy. They have one representative each - the vice-minister.

The purpose of the Council is to examine the key issues of social integration of persons with disabilities and to assist the Minister of Social Security and Labour and other Ministers in the implementation of the social integration policy. Decisions by the Council inform and advise the Minister of Social Security and Labour.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The Equal Opportunities Division of the Ministry of Social Security and Labour (MSSL), acting within the scope of its competence, collects, systematises and analyses information about the implementation of the equal opportunities policy in Lithuania and abroad.

The Department for the Affairs of the Disabled at the Ministry of Social Security and Labour collects, on an annual basis, information and statistics related to the social integration of people with disabilities from the state, local authorities and organizations of people with disabilities. It also systematises and summarises them before notifying the Ministry of Social Security and Labour, state and local authorities and organizations of people with disabilities.

The Service for Establishing Disability and Ability-for-Work under the Ministry of Social Security and Labour draws up statistical reports on persons with disabilities and submits them to the Ministry of Social Security and Labour and to the Department of Statistics. The Service for Establishing Disability and Ability-for-Work under the Ministry of Social Security and Labour exchanges information and collaborates with individual healthcare establishments, the National Labour Exchange under the Ministry of Social Security and Labour, the State Social Insurance Fund Board under the Ministry of Social Security and Labour, local authorities, state institutions and other organisations in accordance with the provisions of the Law on Legal Protection of Personal Data.

Luxembourg

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Ministry of Family Affairs and Integration is the designated focal point within the Luxembourg Government for matters relating to the implementation of the Convention. It also fulfils a coordination role, cooperating closely, on matters relating to the Convention, with an ad hoc Steering Group representing different players within civil society.

2.1.2. National strategies to implement the UNCRPD

The 2009-2014 state agenda plans the development of an outline law on disability proposing a global concept of integration and non-discrimination of persons with disabilities. Simultaneously, the Ministry of Family Affairs and Integration is developing a national strategy to put in place the UNCRPD and the Optional Protocol to allow persons with disabilities to participate fully in all aspects of society.

The analysis of the national legislation in relation to the ratification of the Convention was meant to identify possible laws which may be at the source of discrimination against persons with disabilities. The main findings were related to the accessibility of public services, to higher education as well as adults' legal protection.

In order to raise public awareness about the situation of persons with disabilities and to provide information about the objectives of the Convention, the Family and Integration Ministry has developed an information and awareness campaign on the topic of the UNCRPD.

The principle objectives of the campaign are as follows:
- Informing persons with disabilities about the objectives of the Convention
- Raising awareness of the wider public on the rights of persons with disabilities, showing through various means (posters, adverts) that these rights equal general human rights.
- Providing information to the family members and officials from the social, education, health and care sectors on the UNCRPD.

This campaign was developed in close cooperation with Info-Handicap - Centre National d'Information et de Rencontre du Handicap - and various NGOs and other institutions dealing with disability and persons with disabilities.

Furthermore, the Ministry of Family and Integration is also cooperating closely, on matters relating to the UNCRPD, with an ad hoc Steering Group representing different players within civil society. Together with the Steering Group it is organizing, on a regular basis, working groups where persons with disabilities and all people interested in the subject can express their views freely and be directly involved in the decision making process related to the main subjects of the UNCPRD.

From March to December 2011, during four full-day Working Meetings, the Ministry of Family Affairs and Integration elaborated a national disability Action Plan. This was achieved

together with civil society and in close cooperation with the other Ministries. The Action Plan contains short and mid-term actions and announces modifications of the relevant bills that aim to implement most of the crucial provisions of the UNCRPD. The Government has accepted the 5-Year Action Plan on March 9, 2012. It has been officially presented to the public on March 28 by the Minister of Family Affairs and Integration together with representatives of the different working groups.. Thanks to the contributions of persons with disabilities, the document is now an Action Plan from persons with disabilities for persons with disabilities.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The 2011 act on the approval of the CRPD[15] allocates the task of promoting and monitoring the Convention to the Consultative Commission of Human Rights of the Grand Duchy of Luxembourg. It will carry out that task jointly with the Centre for Equal Treatment, while the task of protecting has been allocated to the National Ombudsman.

The mission of the Consultative Commission of Human Rights is to promote human rights throughout the Grand Duchy of Luxembourg *inter alia* for persons with disabilities, while the Ombudsman is mainly dealing with citizens' individual complaints. As for the Centre for Equal Treatment, its purpose is to promote, analyse and monitor equal treatment between all persons without discrimination on the basis of race, ethnic origin, sex, sexual orientation, religion or beliefs, disability or age.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The "Conseil supérieur des personnes handicapées" is a national council which has its legal basis in the law of September 12, 2003 about the income of disabled people. It is composed of 11 members, of which five disabled persons, four representatives of organisations for persons with disabilities, one representative of the "Centre national d'information et de rencontre du handicap" and one of the Ministry of Family Affairs and Integration. It is allowed to take the initiative of giving advice on specific disability-related issues and it is bound to express its view on every single law or other disability-specific legal instruments and to advise the Minister on other issues on her request.

Furthermore, the Ministry of Family Affairs and Integration cooperates largely with Info-Handicap-Conseil National des Personnes Handicapées which represents Luxembourg in the European Disability Forum (EDF). It is a loose federation currently comprising more than 50 member organisations which are active in many different areas. Some members are major service providers, responsible for running large institutions, while others are very small self-help or support groups. One of Info-Handicap's main tasks is thus to identify shortcomings in these areas and seek solutions in cooperation with the authorities. It is also undertaking, on a regular basis, actions to raise awareness in the field of disability.

[15] Loi du 28 juillet 2011 portant 1. approbation de la Convention relative aux droits des personnes handicapées, faite à New York, le 13 décembre 2006; 2. approbation du Protocole facultatif à la Convention relative aux droits des personnes handicapées relatif au Comité des droits des personnes handicapées, fait à New York, le 13 décembre 2006; 3. désignation des mécanismes indépendants de promotion, de protection et de suivi de l'application de la Convention relative aux droits des personnes handicapées.

Consultations between the Ministry of Family and Integration and several organisations of and for disabled persons take place on a regular basis. This cooperation is of variable geometry depending on the questions and problems that need to be tackled.
The pillars of the policy for disabled persons are social inclusion and the participation at all levels as well as the maintenance and development of the personal autonomy and independence of persons with disabilities. An evaluation of the expectations and of the needs is necessarily carried out before the launch of a new project.

Another important tool used to foster empowerment of people with disabilities is the support of the Ministry of Family and Integration for umbrella organisations which coordinate the activities of a number of member organisations. For some years now, two of those organisations, namely Info-Handicap a.s.b.l. and "Solidarität mit Hörgeschädigten", have been benefiting from a convention (that guarantees them regular subsidies) with the Ministry of Family and Integration for their information, consultation and training services.

That same ministry is also cooperating closely, on matters relating to the UNCRPD, with an ad hoc Steering Group representing different players within civil society. Together with that "Steering Group" it is organizing, on a regular basis, task groups where persons with disabilities and other people interested in the subject can express their views freely and are directly involved in the decision making process related to the main subjects of the UNCPRD.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The department for persons with disabilities of the Ministry of Family Affairs and Integration is reflecting upon and developing a common coherent strategy for a coordinated collection of statistical data. In the meantime, Luxembourg uses statistical data collected by different actors working with issues related to disability such as the *Service des Travailleurs Handicapés de l'Administration de l'Emploi*, the *Service de l'Education Différenciée*, *l'Assurance Dépendance et la Caisse Nationale des Prestations Familiales.* While collecting relevant data, the main problems encountered were the double citing of certain figures and the legal protection of specific data.

Malta

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Art. 33.1)

The Disability Matters Act was approved by the Maltese Parliament on 26 March 2012. It will come into effect in mid-April. It includes amendments to the Equal Opportunities (Persons with Disability) Act. These amendments include the identification of the Ministry responsible for Social Policy as the focal point for the Convention.

2.1.2. National strategies to implement the UNCRPD

No strategy is yet in place since Malta still has to ratify the Convention.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Art. 33.2)

The Disability Matters Bill currently being debated in Parliament includes amendments to the Equal Opportunities (Persons with Disability) Act. These amendments include the identification of the National Commission Persons with Disability as the independent mechanism for the Convention.

2.2.2 The involvement of civil society in the monitoring process (Art. 33.3)

To date, several seminars and conferences have been held with representatives of disability organisations and other stakeholders in order to disseminate information about the Convention. The text of the Convention has been produced in accessible formats through EU funding. To date, it is available in audio, Maltese, easy-to-read Maltese versions, and in Maltese Sign Language.

The National Commission for Persons with Disability (KNPD) has the legal capacity to promote and raise awareness of disability issues and has now been identified as the independent mechanism for the Convention. The Commission is composed of not less than fourteen members. Seven of the members shall be appointed from amongst such persons appearing to the Prime Minister to best represent the Ministries responsible for Social Policy, Labour, Health, Education, Housing and Economic Planning. Another seven of the members shall be appointed from among such persons who, in the opinion of the Prime Minister, best represent voluntary organisations working in the field of disability issues. Furthermore, half the board members must themselves be persons with disabilities, or family members of persons with a mental disability. Either the chairperson, or the vice chairperson must be disabled himself or he must be related to a person with a mental disability. More than half of the employees of the KNPD's secretariat have disabilities.

The KNPD has a comprehensive programme of empowering persons with disability. KNPD organises regular awareness-raising campaigns with the direct participation of persons with disability and often with EU funding. These include an annual national conference and the

Parliament of Persons with Disability. KNPD organises training for persons with disability to assume these roles and tasks, as well as disability studies and lectures, mainly for university students. These sessions always include the direct involvement of persons with disability, in both the curriculum design as well as lecture-delivery. Disability Equality Training is also provided to public and private organisations and community groups. KNPD, on a regular basis, includes persons with disability when participating in activities organised at EU level (e.g. annual Conference organised to mark the European Day of Persons with Disability in December).

2.2.3. Collecting statistics and/or developing indicators (Art. 31)

KNPD collects statistics but not with direct reference to the Convention. The information published in KNPD's Annual Equal Opportunities Act (Cap. 413) Report is relevant to this but may be limited in scope for this purpose.

In 2009, KNPD published statistics about the quality of life of disabled people in Malta, based on the 2005 National Census. This will be updated after the next Census due to take place in 2011.

Further information can be obtained from the KNPD website, www.knpd.org.

The Netherlands

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

It is proposed that after the ratification of the UNCRPD the focal point will be the Ministry of Health, Welfare and Sport. The coordination mechanism consists of an interministerial Steering Group in which all relevant government departments and other government levels (local and provincial) are represented.

2.1.2. National strategies to implement the UNCRPD

Equal treatment and mainstreaming of issues relevant for persons with disabilities are the basic conditions for policies on a local and national level. The Government and the Parliament also assess policies on this aspect. Apart from this, no comprehensive implementation plan for the Convention has yet been put in place.

However, in the course of preparing for the ratification of the UNCRPD, the government focal point (the Ministry of Health, Welfare and Sport) prepares and supports conferences and publications on the UNCRPD.
Moreover, some measures have already been taken for the implementation of the UNCRPD:

- The Ministry of the Interior and Kingdom Relations has issued an obligation for municipalities to provide for at least 25 percent of the polling stations in every region to be completely accessible. A detailed regulation will enter into force in 2012 providing for accessible public transport system. Most buses are already accessible and around 50% of the bus stops will be accessible in 2015. This regulation sets out different time schemes for different aspects of transport system. After finalization of the notification procedure in Brussels (European Commission, DG MOVE), the regulation will enter into force in the Netherlands by the beginning of 2012. On the labour market and domain of social affairs, the growing influx of young people into the scheme for young disabled is a worrying development. In order to increase the labour participation for young persons with disabilities a new Act came into force on 1st January 2010. Under this Act, young persons must be given the chance to look for a regular job or 'supported job' before they apply for a benefit. The Rutte Government has taken further steps to increase chances on labour participation. On 1st February 2012, the Government has proposed to Parliament a new law, the 'Working to capacity Act' (Wet werken naar vermogen), for a new system on work according to capacity. The proposal integrates several existing systems into one new system for different groups (among them young persons with disabilities) and will be executed by municipalities. Main features of the new system are a single benefit, a single reintegration budget, and (under certain conditions) dispensation from the statutory national minimum wage. The new Act will not apply to people who are permanently incapable to work and people who can only work in sheltered employment. For these groups the existing laws remain unchanged. The Dutch Government aims to put the new Act into effect on 1st January 2013.
- In the domain of education the equal treatment act is broadened to all aspects of primary, secondary and higher education.
- The equal treatment act on the basis of handicap and chronic illness has been made applicable in the field of primary and secondary education and housing and will be applicable with regard to public transport in the near future (halfway 2012). At the moment

further extension of the applicability of this act with respect to web-accessibility is being prepared.

At local level many municipalities have started different stimulating programs, such as Agenda 22 in the municipality of Utrecht. This is a working method that has been derived from the 22 rules that the United Nations drafted. This working method means that the city of Utrecht involves disabled people actively in its policy. This includes the accessibility of buildings, access to public transport and better readability and usability of various forms for people with intellectual disabilities. This agenda seeks to ensure that all people of Utrecht, with and without disabilities, can participate in society.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The Netherlands have designated the new National Human Rights Institute (NHRI) as the independent mechanism for promoting, protecting and monitoring the UNCRPD. To set up the NHRI, a draft law has been approved by Parliament. The law will enter into force by July 2012. The NHRI will then start its work.

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

After ratification, the National Human Right Institute will involve civil society in the monitoring process.

Furthermore, civil society is monitoring the implementation of UNCRPD when asked for an opinion in the process of drafting new legislation and policies relevant to persons with disabilities. To this end, strong relations between several government departments and civil society have been formalized. Monitoring of UNCRPD also takes place within the ambit of several formal advisory bodies to the government in which civil society is represented. These bodies advise the government on major policy subjects. Civil society in the Netherlands is well organised and receives government funding for its work on empowering persons with disabilities, also with a view to monitoring governmental action.

On a local level, municipalities are legally obliged to establish a formal advisory and monitoring structure for persons with disabilities in the area of labour and social support. Furthermore, municipalities create “platforms” for persons with disabilities to advice local authorities, shopkeepers’ associations service providers etc. on any issue relevant for persons with disabilities. These platforms are supported by a national program funded by the government and aiming at the empowerment of persons with a disability.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

A “participation index” has been developed to measure the level of participation of persons with disabilities. This index includes indicators on education, labour, leisure, housing and the level of using mainstream provisions.

Poland

2.1. National Implementation of the UNCRD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Poland has not ratified the Convention yet, so no "relevant structures, namely focal point, coordination mechanism and a framework including independent mechanism to protect, promote and monitor the UNCRPD pursuant to its Article 33" have been put in place.
Decisions concerning these issues will be taken at the moment of deciding on the ratification of the Convention, giving due consideration to the legal system in force, existing human rights protection structures and the Convention provisions.

2.1.2. National strategies to implement the UNCRPD

As Poland has not ratified the Convention yet, there is no formal obligation to implement it. Preparation for the ratification is carried out within the framework of the procedure applicable to the ratification of international agreements, set out by the Act on international agreements.
The adoption of any special strategy is not envisaged.

The same will apply to the implementation of the Convention once Poland ratifies it. Relevant Ministries apply the principle of disability mainstreaming and include disability issues into legislation, programmes and action plans.

The Polish Government and the self-government authorities have been called upon by the Sejm to undertake activities aiming at implementing the rights mentioned in the Resolution - Charter of the Rights of Persons with Disabilities passed on 1 August 1997. The implementation of these rights aims to enable persons with disabilities to lead an independent, self-reliant and active life and not to be discriminated in any area of life. These goals reflect the goals of the Convention. In the Resolution, the Sejm called upon the Government to submit annual reports on these activities. The reports are prepared in cooperation with various Ministries and central offices and presented to the Sejm by the Government Plenipotentiary for Disabled People, situated within the Ministry of Labour and Social Policy.

Several developments regarding to information on "Voting rights" have taken place in Poland, in relation to the last Report.

The Act-Election Code, adopted on 5 January 2011, replaced previous legal acts on conduct of various elections. It includes some provisions concerning persons with disabilities. But enjoyment of the right to vote by persons with disabilities has been further improved thanks to additional provisions regarding adaptation of the organisation of elections to the needs of people with various disabilities, provided in the Act of 27 May 2011 on the amendments to the Act-Election Code and to the Act implementing the Act-Election Code. The amended Act-Election Code came in force on 1 August 2011. The Act-Election Code lays down rules and procedure for nominating candidates, the conduct and the conditions of validity of the elections to the Sejm and the Senate of the Republic of Poland, of the President of the Republic of Poland, to the European Parliament in the Republic of Poland, to the proclaiming bodies of the local self-government units, as well as of mayors.

The Act grants special rights to disabled voters. A disabled voter is defined in the Act as a person with reduced physical, psychological, mental or sensory performance, which hinders participation in the election. But some provisions of the Act concern only voters with a severe or moderate degree of disability, within the meaning of the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities.
People who have the right to vote shall be put down on the register of voters. A disabled voter, following a written request to the office of the municipality submitted not later than 14 days before the election, is added to the register of voters in the electoral district chosen by him from among electoral districts with polling stations adapted to the needs of disabled voters, in the municipality of his residence.
One can vote in person. A voter with a severe or moderate degree of disability, within the meaning of the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities, may delegate somebody to vote on his behalf. This solution also applies to voters who turn 75 on election day at the latest. Authorisation for voting shall be granted before the wójt or another officer authorized by the wójt for the drafting of authorisation for voting. The document of authorisation for voting shall be prepared at the domicile of the voter, who grants authorisation for voting, or elsewhere, as requested by the authorising person.
During voting, a disabled voter may request for help of other person, excluding members of the electoral commission and the persons of trust.
According to the Election Code, voting is conducted in permanent and separate electoral districts established in the municipality. Separate electoral districts are formed, *inter alia,* in health care institutions and nursing homes. In these separate districts a second ballot box can be used.
Moreover, as concerns disabled voters, the Act provides, *inter alia,* for:

- the right to obtain information about the organisation of elections by telephone, by printed material sent on request, including in electronic form,
- placing of information, by the National Electoral Commission on its website, on the rights of disabled voters, in the form which takes into account the various types of disabilities and preparation of information in Braille about these rights and passing it on request to interested persons,
- the obligation of members of the district election commission to transmit verbally the content of election notices,
- ensuring the accessibility of polling stations for people with reduced mobility,
- the possibility of postal voting, according to the statutory defined procedure, by a voter with a severe or moderate degree of disability, within the meaning of the Act on Vocational and Social Rehabilitation and Employment of Persons with disabilities,
- voting using overlays to voting cards prepared in Braille (the overlay model has been defined by the National Electoral Commission).

The Regulation of the Minister of Infrastructure of 29 July 2011 on the polling stations adapted to the needs of voters with disabilities came into force on 1 August 2011.

2.2. Monitoring the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

In Poland an independent mechanism pursuant to Article 33.2 of the UN Convention will be nominated at the moment of ratifying the Convention. Poland has already well-established

administrative procedures for reporting on the application of different UN conventions concerning human rights and it intends to maintain them. Should there be a need for any adaptations, they will be considered at a later stage.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Means ensuring involvement of civil society in the process of implementation and monitoring of the UNCRPD has not yet been defined. Common legal regulations which are already in force will continue to be applied.

According to the Act on access to public information, any person has the right to obtain information from public authorities and to request access to the official documents elaborated, inter alia, by the public authority bodies.

The representatives of people with disabilities are consulted within the framework of decision-making processes conducted with the participation of:

- the National Consultative Council for Disabled People (on the national level), which is an advisory body of the Government Plenipotentiary for Disabled People and acts as a platform of cooperation to the benefit of persons with disabilities between bodies of national administration, bodies of territorial self-government and non-governmental organisations. The scope of activities of the Council includes the submission to the Plenipotentiary of proposals for actions aimed at meeting the needs of people with disabilities. It also includes the submission, upon the Plenipotentiary's request, of opinions on the proposals for underlying principles of policy concerning employment and vocational and social rehabilitation of persons with disabilities and on legislative projects that can affect the situation of persons with disabilities, as well as informing on the need to establish or change the regulations in this respect;

- the voluntary voivodship councils for persons with disabilities (on the regional level), which are consultative and advisory bodies serving the marshals of voivodships; their task is to inspire actions aimed at vocational and social rehabilitation of persons with disabilities and exercising the rights by persons with disabilities, to issue opinions on the voivodship programmes of action for the benefit of persons with disabilities, to evaluate their implementation as well as to advise on draft resolutions and programmes prepared for adoption by the voivodship parliament from the perspective of their impact on persons with disabilities;

- the voluntary powiat (district) councils for persons with disabilities (on the local level), which are consultative and advisory bodies serving the starostas; the scope of their activity is powiat-wide and their tasks are similar to those of the voivodship councils.

Moreover, the Foundation "Regional Development Institute" and the Polish Disability Forum (an umbrella organisation in the field of disability) were involved in the assessment of compliance of the Polish legislation and the Convention provisions, which was carried out in 2008 as a part of a project co-financed by the State Fund for Rehabilitation of Persons with Disabilities. Their recommendations included in the report "Polish way to the Convention on the rights of persons with disabilities" are duly taken into consideration by governmental administration when considering the necessity of and elaborating proposals for amendments to national legislation prior to a decision on the ratification of the Convention.

Furthermore, consultative and participatory techniques are used to raise the awareness in terms of equal treatment and non-discrimination of persons with disabilities. Moreover they aim at supporting the incorporation of their needs in legislative and practical matters. The application of such techniques results in the participation of people with disabilities in the various evaluation and advisory bodies. It also results in promoting the integration of persons with disabilities in the upbringing and education (starting from pre-school age); organizing of seminars and conferences, media campaigns, events and other actions in order to integrate persons with disabilities into the local communities. It shall also raise awareness of the local self-governments on the needs of people with disabilities.
It should be mentioned that, according to the Resolution of the Sejm of the Republic of Poland - Charter of the Rights of Persons with Disabilities, the Government Plenipotentiary for People with Disabilities annually informs the Sejm on actions undertaken by the Polish Government and local authorities to implement the rights of persons with disabilities defined in the Resolution. This is followed by the Parliamentary debate on the developments in increasing the opportunities of persons with disabilities in the most important areas of daily life, and on questions of avoiding and eliminating any kinds of discrimination of people with disabilities.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

A more thorough examination of the Convention may reveal the need to collect statistical data which currently is not in place. At the moment, there is no particular need to collect additional statistical data or to develop indicators in view of monitoring the application of the Convention.

Portugal

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Portugal ratified the UNCRPCD in September 2009. According to the latest Portuguese Government proposal, the Focal Point will be situated within the Ministry of Foreign Affairs and the Ministry of Solidarity and Social Security. The National Institute for Rehabilitation is going to be designated as Coordination Mechanism. And finally, the Ombudsman will be invited to be the Independent Mechanism at national level.

2.1.2. National strategies to implement the UNCRPD

The Portuguese Government approved the National Strategy for the Disability (2011-2013) by the Resolution of Ministers nº 97/2010 of 14th December 2010. This strategy is based on the UNCRPD and succeeds the Action Plan for the Integration of People with Disabilities or Impairments (2006-2009).

The National Institute for Rehabilitation (INR, I.P.) is responsible for the planning, execution and coordination of policies aimed to promote the fundamental rights of persons with disabilities. This Institute will monitor the implementation of the National Strategy for Disability. This strategy was a result of a public consultation and is intended to promote a wide partnership between public and private entities, central, regional or local administration, social partners, NGOs and civil society as well as people with disabilities. It establishes a set of measures, targets and indicators distributed by five strategic areas of action:

Axis nº1: Disability and multiple discrimination;
Axis nº2: Justice and exercise of rights;
Axis nº3: Autonomy and quality of life;
Axis nº4: Accessibility and design for all;
Axis nº5: Modernization of Administrative and Information systems.

Regarding axis nº1 and 2, the National Strategy for the Disability intends to:

- Promote awareness and information about domestic violence against persons with disabilities
- develop a program about UNCRPD at national level;
- make an assessment of national legislation verifying if Portuguese laws are meeting the requirements of UNCRPD;
- make the first national report regarding the UNCRPD implementation;
- review national laws concerning the accessibilities in buildings;
- promote public dissemination of rights, dignity and better health conditions for persons with disability;

Regarding axis nº3 and 4: The National Strategy for the Disability intends to:

- develop a national campaign on the employment of persons with disabilities
- Implement a National System of Intervention in Precocious Childhood
- Strengthen teachers skills in special education
- Develop initiatives addressed to persons with disability in order to increase their skills

- Increase the number of accessible beaches
- Increase the number of accessible public buildings
- Create a guide on good practices in accessible tourism
- Improve accessibility of public transports
- Reinforce school manuals and books in accessible formats

Regarding axis nº5: Administrative modernization and information systems intends to:

- develop a project that will allow public services to answer questions and doubts of persons with hearing impairments;
- Consolidate the accessibility of public services internet sites.

The National Strategy for Disability is intended to strength the disability public policy and to consolidate the previous Action Plan for the Integration of People with Disabilities. It develops a mainstreaming approach of disability and defines the measures that will be adopted and implemented in the different areas of public policy.

Annually the National Institute for Rehabilitation I.P. elaborates a report concerning the complaints based on the disability discrimination act. The complaint procedure is also available on the Institute's website.

The Portuguese Government approved the Decree-Law 163/2006, 08th August that establishes the technical norms of accessibility to public and collective equipments, public buildings and housing. This new law reinforces the accessibility rules as well as the sanctions that apply to public or private entities.

Portugal has also approved the National Plan for the Promotion of Accessibility (2006-2015) to provide to persons with disabilities, autonomy, equal opportunities and full participation. This plan incorporates a set of measures of accessibility in the built of environment, transportation and information and communication technologies (ICT) and supportive technologies (TA) to all citizens without exception.

In October 2010, the Disability Rights Promotion International (DRPI) project was launched in Portugal. This project involves the National Institute for Rehabilitation I.P., the Calouste Gulbenkian Foundation and the High Institute for Social and Political Sciences/Lisbon Technical University. The DRPI project will create an independent instrument to monitor the Convention on the Rights of Persons with Disabilities and is intended to promote the human rights of persons with disability and their empowerment. The DRPI project is an innovative approach that involves three institutions with knowledge in disability, human rights and social research areas. It is also intended to be freely used by the independent mechanism that monitors the Convention.

The National Strategy for Disability sets up some measures, namely, the creation of an Independent Mechanism responsible for the promotion and screening of the UNCRPD.

The National Institute for Rehabilitation also invested in research and manuals in specific areas such as multiple discrimination of women with disabilities, deinstitutionalization of children with disability, accessible tourism, the available information on disability produced in public administration data and the implementation of ICF in health and social security inquiries.

These studies were financed by the ESF and are available on the Institute's website (www.inr.pt). From 2010 to 2012 it has approved more research studies on the mental health of persons with intellectual disability, the violence against persons with disabilities and personal assistance services. Most of the studies were made by research centres of Portuguese Universities and created manuals and/or recommendations to implement good practices in different public and private services.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

Portugal has not yet nominated an independent mechanism as mentioned in Article 33.2 of the UN Convention. However, according to the latest Portuguese Government proposal, the Ombudsman will be invited to be the Independent Mechanism.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The 38/2004 law ensures full participation of people with disabilities or their representative organisations in the drafting of legislation on disability, execution and evaluation of all policies mentioned in this law, so as to ensure their involvement in all situations of everyday life and society in general.

The technical and financing program of the National Institute for Rehabilitation, I.P. for NGOPD has been developed in the framework of the Convention on the Rights of Persons with Disabilities since 2009. This Financial Program has contributed to developing civil society activities in different areas as cultural and leisure activities, empowerment and awareness, accessible and easy to read information on human rights and technical seminars. The National Institute for Rehabilitation I.P. undertook some initiatives (i.e. conferences/seminars/presentations) in order to disseminate the UNCRPD and has a training program for specific groups (persons with disabilities, local communities' architects and social workers, journalists and public servants). It even published a children's version of the UN Convention and a manual for parliamentarians about the implementation of the Convention. All documentation is available and can be freely consulted on the institute's website institute (www.inr.pt).

The involvement of NGOs is also guaranteed through the National Council for the Rehabilitation and Integration of the People with Disabilities ("Conselho Nacional de Reabilitação e Integração das Pessoas com Deficiência" – CNRIPD), which is a consultative body of the Minister of Labour and Social Solidarity providing the Government with information used in deciding on matters related to the definition of the National Rehabilitation Policies. This body supports and includes representatives of all kinds of organizations of people with disabilities as well as social partners and public authorities. It issues opinions and presents proposals for measures related to the problems of rehabilitation and disability.

The State encourages and supports people with disabilities, their families and the disability movement throughout all measures taken for the prevention of disabilities, the rehabilitation and the social integration of people with disabilities.

In recent years, the disability movement has grown significantly and consolidated its form of acting. In some cases it has taken on an active role of claiming rights for the people with disabilities. The dialogue between the State and NGOs, and the logistical and financial support that the latter have received, has contributed to encouraging the social role played by associations.

In doing so, the Portuguese Government is adhering to both the principles contained in the Basic Law and to the international recommendations for the participation of people with disabilities in the definition and concretisation of effective related policies.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The Portuguese Census 2011 will update the last Census 2001. It will include the Washington Group questions about Disability as well as questions about accessibility in the environment and private houses. However the results of Portuguese Census 2011 are not available yet.

In 2010 the National Institute for Rehabilitation made two studies about the available information on disability produced in public administration data and the implementation of ICF in health and social security inquiries. The National Statistic Institute also adopted a Recommendation about the use of ICF in national data collection systems.

Romania

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The focal point is the General Directorate for the Protection of Persons with Disabilities, within the Ministry of Labour, Family and Social Protection. It also acts as the coordination mechanism.

2.1.2. National strategies to implement the UNCRPD

Romania has not yet developed any comprehensive strategy to implement the UNCRPD.

However, the promotion and observance of the rights of disabled persons shall be, mainly, the duty of the local public administration authorities where the disabled person has his/her domicile or residence and, in subsidiary, and complementarily, of the central public administration authorities, civil society and the family or of the legal representative of the person.
Based on the principle of equality, the competent public authorities shall ensure the necessary financial resources, and take specific measures as to ensure the direct and unlimited access to services. The Ministry of Labour, Family and Social Protection through the General Directorate for the Protection of Persons with Disabilities and the other local and central public authorities shall ensure the necessary conditions for the social integration and inclusion of disabled persons.

2.2. Monitoring the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

Within the Law 221/2010 for the Ratification of the Convention the monitoring mechanism was established. The Ministry of Labor, Family and Social Protection through the General Directorate for the Protection of Persons with Disabilities is designated the central authority for the implementation of the UNCRPD, incorporating functions of both coordination mechanism and focal point. The independent monitoring mechanism is not established yet.

2.2.2 The involvement of civil society in the monitoring process (Art. 33.3)

Civil society will be involved through the independent mechanism to protect, promote and monitor the UNCRPD.

The NGOs of persons with disabilities are consulted in regard to all legislative measures for persons with disabilities in the following areas:

- For activities related to the protection and promotion of the rights of disabled persons, the Ministry of Labour, Family and Social Protection and the local and central public administration authorities maintain dialogue, collaboration and partnership relationships with the non-governmental organizations of persons with disabilities or

which represent their interests, and with the cult institutions recognized by law with activity in this field.

- The Council for the analysis of the problems of disabled persons is an advisory body attached to the General Directorate for the Protection of Persons with Disabilities, formed by representatives of central public administration authorities as well as representatives of civil society.

- The task of the Council is to analyze problems related to the protection of disabled persons, to propose measures regarding the improvement of their living conditions and to notify the competent bodies of the breach of the rights of disabled persons.

The Ministry of Labour, Family and Social Protection through the General Directorate for the Protection of Persons with Disabilities may conclude partnerships with non-governmental organizations of disabled persons, which represent their interests or perform activities in the field of promotion and defense of human rights.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

The Ministry of Labour, Family and Social Protection through the General Directorate for the Protection of Persons with Disabilities is collecting statistics on the number of persons with disabilities, the kinds of disabilities, the number of residential institutions and the living conditions they offer, the number and type of alternative services, data regarding the implementation of specific quality standards in residential institutions and data regarding the costs.

Slovakia

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

Currently, no contact point has been established in the Slovak Republic to deal with implementation of the Convention.

However, the discussion on the modalities of implementation of the Convention is very intense. Several meetings discussing the modalities concerning institutional infrastructure have already taken place: for instance a Round Table organized by the Slovak Disability Council, the umbrella organization for NGOs working for people with various types of disability (March 2011), whose recommendations were also introduced publicly at the constituting meeting of the Government Council for Human Rights, Minorities and Gender Equality (April 2011); the meeting of the representatives of the Ministry of Labour, Social Affairs and Family of the Slovak Republic and the Ministry of Foreign Affairs of the Slovak Republic (March 2011); the meeting of the representatives of the Ministry of Labour, Social Affairs and Family of the Slovak Republic and the Government's Office of the Slovak Republic (July 2011) to mention a few.

The core document in this respect is the "Proposal for the implementation of Article 33 of the Convention on the Rights of Persons with Disabilities", introduced by the Disability Rights Center on the second meeting of the Government Council for Human Rights, Minorities and Gender Equality on June 27th 2011. The document offered analysis of the resource and competence implications with respect to several governmental bodies (the Office of the Prime Minister, the Office of the Deputy Prime Minister for Human Rights and National Minorities, Ministry of Labour, Social Affairs and Family of the Slovak Republic) which are considered for the position of the Central Focal Point, as well as that of specialized (secondary) focal points at the respective ministries.

2.1.2. National strategies to implement the UNCRPD

No strategy on the Convention implementation has been developed so far. However, a new National Programme of developing the living conditions of persons with disabilities has been under preparation, based on the Convention on the Rights of Persons with Disabilities and could serve as a national strategy. By Resolution no. 158 of 2 March 2011, the Government approved the Statute of the Government Council for Human Rights, Minorities and Gender Equality and also abrogated the Council of the Government for people with disabilities. The role and functions of the Council of the Government for people with disabilities have been taken over by the Committee for People with Disabilities, a standing expert body of the newly established Government Council for Human Rights, Minorities and Gender Equality. The Statute of the Committee for People with Disabilities has been approved by the Council on June 27th 2011.

The newly constituted Committee for Persons with Disabilities made the finalization of the National Programme for the Development of living conditions of persons with disabilities its priority, in line of which the Committee established a specialised expert working group to deal with this issue in more detail. The deadline for completion of the National Programme

for the Development of living conditions of persons with disabilities is envisaged for the end of 2012.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The Slovak Republic has currently not established an unambiguous, independent mechanism for promoting, protecting and monitoring the Convention. Some conclusions in this respect can be however drawn from the recently approved Proposal for a Creation of the Nationwide Strategy on the Protection and Promotion of Human Rights in the Slovak Republic, which suggests mandating the current parliamentary ombudsman institution (The Public Defender of Rights) with the task of independent promotion, protection and monitoring of the rights of people with disabilities by creating a post of vice-ombudsman for disability issues. The finalization of the Strategy is set for the end of September 2012.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Civil society, in particular persons with disabilities and their representative organisation (in accordance with Article 33 (3) of the Convention) have been preparing for the monitoring process through the National Council of Persons with Disabilities.

Apart from this, also the Statute of the Committee for People with Disabilities follows the principles of parity and direct participation, thus creating wide and relevant possibilities for people with disabilities to participate and influence the work of the Committee.

The Statute recognizes six different groups of organizations representing different types of disability - intellectual disability, chronic illness, mental and behavioral disorder, hearing impairment, physical disability, and visual impairment. According to the Statute, two representatives, elected by organisations representing different types of disability, became members of the Committee following a call for interest opened on July 4th 2011. In order to make the call widely accessible, it was marketed both on the internet and in one of the nationwide daily newspapers.

An initiative to create a nationwide coalition of organisations of people with disabilities and the independent monitoring mechanism shall be discussed during a thematic meeting of the Committee for People with Disabilities scheduled for February 21st 2012 (focusing on UNCRPD implementation process and related issues).

2.2.3. Collecting statistics and/or developing indicators (Article 31)

At present, there is no national coordination of disability research in Slovakia either in terms of research institutions or explored topics. The final available research products on issues related to disability and the lives of the disabled and their families are rather matter of individual research initiatives of various, mainly publicly-funded institutions. For working purposes, these can be divided into several groups:

- *Sectoral Disability Research* (these are mostly different research projects thematically linked to the selected topical issues addressed in the scope of individual sectoral Ministries, such as sector of Labour, Social Affairs and Family, sector/ of Education, Science, Research and Sport, Ministry of Culture, etc.)

- *Disability Research conducted by universities and the Slovak Academy of Sciences* (this refers to different research projects implemented with the support of national grant schemes, such as VEGA, and international grant schemes)

- *Research implemented by independent and civil society organizations* (such as IVO/Institute for Public Affairs, SOCIA Foundation, Slovak Disability Council etc.)

The Statistical Office of the Slovak Republic does not collect data regarding people with disabilities disaggregated by gender, age, education or various types of disability (physical, visual, auditory, intellectual/learning, mental, internal), the cause of the disability, level of independence, economic activity or whether they live in home/community-based environment/independent living or in institutional settings. In the framework of the ESSPROS methodology – European System of Integrated Social Protection Statistics, there are data on the number of recipients of disability pensions, including recipients of disability pension for youth, and data on expenditure on disability social benefits.

In 2009, the Statistical Office conducted a pilot project that aimed to prepare and test the Slovak version of the European Disability and Social Integration Module (EDSIM). Given the fact that testing of the Slovak version of questions of the module was carried out on a small sample, the results of the survey were not representative and were not published. Outputs from the project were provided to Eurostat.

Slovenia

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Art. 33.1)

The Ministry of Labour, Family and Social Affairs was designated as the focal point within government for matters relating to the implementation of the Convention in accordance with the Act on ratification of UNCRPD and the Protocol, in accordance with the Slovenian system of disability policy.

Within the National Assembly there is a special Committee on Labour, the Family, Social Policy and Disability and within the National Council of the Republic of Slovenia there is a special independent Commission for Social Care, Labour, Health and the Disabled (the current president of this commission is a person with a disability).

The framework of organisations which are also dealing with disability issues in Slovenia is composed of the National Council of Disabled People's Organisation of Slovenia (NSIOS) with its representative and other disabled people's organisation working on a national level and of several expert and governmental institutions.

2.1.2. National strategies to implement the UNCRPD

In 2006, the Slovenian Government accepted the Action Programme for Persons with Disabilities 2007-2013. The program is based on the Convention on the Rights of Persons with Disabilities, as well as on other UN documents, Action Programme of the EU for persons with disabilities and on the Action Programme of the Council of Europe. Slovenian Government approves a yearly report on implementation and control of the objectives and measures of APPD (report for 2010 – in Slovenian only).

The purpose of Slovenia's Action Programme for Persons with Disabilities is to promote, protect and ensure the full and equal enjoyment of all human rights by persons with disabilities, and to promote respect for their inherent dignity. The program comprises twelve fundamental objectives together with 124 measures, comprehensively governing all spheres of persons with disabilities life, and referring to the period 2007 – 2013.

The last section of Action Programme for Persons with Disabilities 2007-2013 (APPD) includes a list with several actions for the implementation and control of the objectives and measures laid down in the APPD. Participation of civil society is provided for in 2nd article: "ensuring that disabled people's organizations are fully involved in control procedures". Further to that a Disabled Organisations Act (article 4) prescribes that all the state institutions should consult with Disabled People's Organisations in all matters concerning the planning of national policy and actions to ensure equal opportunities and equal treatment of disabled people.

A special Governmental committee was established to control the implementation of actions laid down in the APPD and has the task to prepare an annual report to be send to the Ministry of Labour, Family and Social Affairs. Members of this committee are representatives of all

relevant ministries, institutions and of the NSIOS, as representatives of persons with disabilities.

The goals of the Action Programme for persons with disabilities 2007-2013 are to:

1. Expand awareness throughout society regarding persons with disabilities, their contribution to the development of society, rights, dignity and needs;
2. Ensure that all persons with disabilities have the right to decide, on an equal basis with others and without discrimination, where they wish to live and have the right to fully participate in community life;
3. Ensure that persons with disabilities have access to the physical environment, transport, information and communications;
4. Ensure, on an equal basis with others and without discrimination, an inclusive educational system at all levels and lifelong learning;
5. Ensure that persons with disabilities have access to work and employment without discrimination in a work environment that is open, inclusive and accessible;
6. Ensure that persons with disabilities have an adequate standard of living, financial assistance and social security;
7. Ensure to persons with disabilities effective health care;
8. Enable persons with disabilities' full inclusion in cultural activities and collaboration in the area of accessibility of cultural materials on an equal basis with others;
9. Ensure persons with disabilities' participation in sports and cultural activities;
10. Ensure that persons with disabilities can participate in the religious and spiritual activities of their communities on an equal basis with others;
11. Strengthen the position of organizations of persons with disabilities;
12. Detecting and preventing violence and discrimination against persons with disabilities.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

According to Article 28 of the Equalization of Opportunities for persons with Disabilities Act (Official Gazette, 94/2010), the Council for Persons with Disabilities of the Republic of Slovenia (hereinafter: Council) shall be an independent tripartite body; it shall be composed of representatives of DPOs, representatives of professional institutions in the field of protection of persons with disabilities and representatives of the Government of the Republic of Slovenia. The tasks of the Council shall include promotion and monitoring the implementation of the Act Ratifying the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention on the Rights of Persons with Disabilities, too.

The Act provides that “the ministry responsible for the protection of persons with disabilities shall perform professional, administrative and technical tasks for the Council” and that “funds for the work of the Council shall be provided from the budget of the Republic of Slovenia”.

Until the establishment of the Council in 2013, the Government Council for the Disabled will perform its functions.

Big efforts to protect, promote and monitor the UNCRPD are provided by NSIOS whose mission is the systemic implementation of human rights of disabled people and their legal representatives as well as full inclusion and equality of disabled people in all social areas. In this sense NSIOS is also constantly pursuing to examine Slovenian legislation and provide initiatives for its amendments in accordance with the interests of the disabled; to participate in the preparation of new legislation and to verify whether the interests of disabled people and their organisations are adequately taken into account in the proposed laws. NSIOS also encourages the provision of equal opportunities for disabled persons in the society and is always asserting the principle "nothing about disability without disabled".

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

Civil society and in particularly persons with disabilities and their representative organizations are involved and fully participate in the monitoring process through the Government Council for persons with disabilities of the Republic of Slovenia. They may also submit proposals directly to the drafts of Acts, to the Programmes and are participating at working groups.

The Government Council for Persons with Disabilities ensures that persons with disabilities are given due consideration in all national programme documents and gives expert opinions on proposed acts and implementing regulations.

Besides, the Council discusses all legal acts concerning the status of persons with disabilities in different stages of drawing up and adoption, it monitors the implementation of adopted legal acts and draws attention to problems and deficiencies that arise in the process. Within international cooperation the Council keeps itself informed of new developments in the EU concerning persons with disabilities (reports of ministries, NSIOS and representative organisations of persons with disabilities). The Council considers expert reports of institutions operating in the field of protection of persons with disabilities. It draws up opinions and positions on documents the relevant ministries prepare for the Government and on initiatives and proposals submitted to it by disability organisations, social economy organisations, professional institutions and individuals.

The Council is tripartite – it consists of representatives of representative disability organisations, Government representatives and experts. Of fifteen members, five are representatives of organisations of persons with disabilities.

Under the Slovenian Act on disability organizations adopted in 2002, Article 4 on Engagement to consult disability organisations provides that "Disability organizations participate in shaping the national policies and measures for providing equal opportunities and equal treatment of persons with disabilities. National authorities consult disability organizations on all matters from previous paragraph" Furthermore Article 10 states that, disability organizations among other define interests and defend the needs of persons with disabilities on all levels concerning the life of disabled persons and contribute to the awareness of general public and have an impact on changes in favour of disabled persons, plan, organize and perform program

Representative and other disability organizations functioning on national level can join into a national council of disability organizations - National Council of Organisations of Persons

with Disabilities. The goal of the Council is to coordinate the interests of all persons with disabilities in the country, respecting the autonomy of each disability organization and to represent them in the dialogue between professional associations, national authorities, public institutions and other stakeholders. The National Council proposes candidates for the representatives of persons with disabilities in the authorities of national institutions and authorities of international organizations and cooperation, and performs other commonly agreed activities.

The government and line ministries consistently respect this provision and consult the representatives of representative disability organizations on all important issues. Also public discussions on preparatory acts are being held at the same time.

2.3. Collecting statistics and/or developing indicators (Article 31)

Statistics and data are collected by different institutions, for example by Ministry of Labour, Family and Social Affairs; the Employment Service of Slovenia; the Pension and Disability Insurance Institute of the Republic of Slovenia; the Statistical Office of Republic of Slovenia; the Fund for the Promotion of the Employment of the Disabled; the Health Insurance Institute of Slovenia; the Social Protection Institute of the Republic of Slovenia; the University Rehabilitation Institute – Soča, etc.

Spain

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The focal point for the UNCRPD is the Ministry of Foreign Affairs and Cooperation as well as the Ministry of Health, Social Services and Equality, through the Directorate-General for Disability Support Policies, which is responsible for the coordination of both.

The government coordination mechanism to protect, promote and monitor compliance with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is the National Disabilities Council. The National Disabilities Council was designated in 2009 as the body of reference for the promotion and monitoring of international legal instruments in matters of the human rights of persons with disabilities, and in particular the implementation of the UNCRPD but it existed before that date and it was used by the government as an instrument for the coordination between all the Ministries.

This is a consulting body made up equally of representatives of all of the ministries and representatives of persons with disabilities. It was created in 2004 by Royal Decree 1865/2004[16], which regulates the National Disabilities Council. It is assigned to the Ministry of Education, Social Policy and Sport and formalises the participation of the associative movement of people with disabilities, their families and the General State Administration in the definition and coordination of a coherent disability policy.

In particular, promoting equal opportunities and non-discrimination of people with disabilities is the task of this Council. To do so, and on account of the adoption of tzhe UN Convention, the original responsibilities of the National Council on Disability have been modified and extended through Royal Decree 1468/2007[17], of 2 November by adding the functions of constituting reference body for promoting and monitoring legal international instruments regarding the human rights for people with disabilities. The last modifications of the National Council on Disability were introduced by the Royal Decree 1855/2009[18], of 4 December. Furthermore, the Commission on Integral Policies on Disabilities was created in the Congress of Deputies.

Spain is made up of Autonomous Communities. Considering the distribution of competences between the central government and the autonomous regions, the Ministry of Health, Social Services and Equality holds periodic meetings with the general directors responsible for disability policies in each autonomous region, through the Directorate-General for Disability Support Policies. The Ministry thereby ensures coordination between both levels of administration. The approval and operation of a mechanism such as that of the joint work methodology between the national government and the general directorates of the autonomous

[16] www.mtas.es/sgas/Discapacidad/ConsejoDisca/RD1865-04.htm
[17] http://www.mtas.es/sgas/Discapacidad/ConsejoDisca/RD1865_04modif.pdf
[18] http://www.boe.es/boe/dias/2009/12/26/pdfs/BOE-A-2009-20890.pdf

regions in matters of disability encourage the putting into practice of the focal points and the obligations set forth in the UN Convention at the Spanish regional government level.

2.1.2. National strategies to implement the UNCRPD

Spain ratified the UNCRPD and the Optional Protocol, and has been incorporated into national law.[19]

In Spanish Law, the evolution of disability towards a social model had already occurred before the coming into effect on 3 May 2008 of the Convention. This evolution started with the adoption of the Law 13/1982 of 7 April, on Social Integration of Disabled Persons (LISMI) and culminates with the adoption of the Law 51/2003, 2 December, on equal opportunities, non discrimination and universal accessibility of people with disabilities (LIONDAU) and its implementing rules.

The Law 26/2011 for the normative adaptation to the UN Convention made progress in many areas, amending regulations and modifying several Spanish laws in response to the Convention, and including important positive action measures in health, housing, employment and other areas.

The first step taken within the global strategy for implementing the UNCRPD, was the creation of an inter-ministerial working group to draw up an integral study of Spanish law, with the objective of adapting it to the Convention's provisions. This group was approved by the Council of Ministers on July 10, 2009. It was presided over by the Ministry of Health and Social Policies (currently the Ministry of Health, Social Services and Equality) and included all the ministries. It was advised by the CERMI (Spanish Committee of Representatives of Persons with Disabilities). The work group conclusions contained basic information for the first Spanish Report sent to the UN Committee of the CRPD on 3 May 2010.

A permanent inter-ministry work group continues working in different areas such as education, justice, culture, etc. Specific forums were created in these areas like the Inclusive Education Forum which is working in the modification of the university law and the Justice and Disabilities Forum which is analysing matters of the article 12 of the UNCRPD.

The UN Committee on the Rights of Persons with Disabilities considered the initial report of Spain (CRPD/C/ESP/1) at its 56th and 57th meetings, held on 20 September 2011, and adopted concluding observations at its 62nd meeting, held on 23 September 2011, that constitute a framework to continue with the work of implementing CRPD in Spain.

The Spanish Disability Strategy 2012-2020, approved in November 2011, has been elaborated taking into account the principal areas of concern and recommendations made by the Committee, as well as the general targets established in Europe 2020 and the specifics of the EU Disability Strategy 2010-2020.

The III Action Plan for Persons with Disabilities is still in force, and sets the government's strategy for 2009-2012 in matters of disabilities; this falls within the framework laid down by the UNCRPD.

[19] boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2008-6996

The Spanish Strategy of Action for the Employment of People with Disabilities 2008-2012 is another governmental initiative in order to promote quality employment for persons with disabilities and prevent any kind of discrimination in the labour conditions.

The periodic meetings with the general directors of the autonomous regions' governments allow to promote the measures for compliance with the Convention within their areas of authority, as part of their action plans for persons with disabilities.

All of the mechanisms began early in their work of promoting, protecting and monitoring the UNCRPD. One reflection of this was the joint Declaration[20] supporting the UNCRPD, signed by the Ministry of Foreign Affairs and Cooperation, the Ministry of Labour and Social Affairs (currently the Ministry of Health, Social Policies and Equality), CERMI and the ONCE Foundation.

At the same time, the dissemination of the UNCRPD has been a priority in the actions undertaken. Thus, the Convention has been published and distributed in different accessible formats: Easy to read (Real Patronato de Discapacidad and the CNSE Foundation), audio format (ONCE Bibliographic Service), Spanish and Catalonian sign language (Real Patronato de Discapacidad and the CNSE Foundation) and in Braille. Likewise, it has been translated into all of the official languages: Spanish, Basque, Galician and Catalonian. All these formats are available at: http://www.convenciondiscapacidad.es/convencionESPANA.html

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

The Royal Decree 1855/2009[21], which modified the regulation of the National Disabilities Council mentioned above, designates it as the body of reference for the promotion and monitoring of international legal instruments in matters of the human rights of persons with disabilities, and in particular the implementation of the UNCRPD. The National Disabilities Council created the CERMI (Spanish Committee of Representatives of Persons with Disabilities), applying the provisions of article 33.2, as the first independent civil society organization. This also fulfills the provisions of article 33.3, concerning the monitoring and follow-up of the Convention's application in Spain.

2.2.2 The involvement of civil society in the monitoring process (Article 33.3)

The Ministry of Health, Social Services and Equality works very closely with civil society and promotes its involvement. Different mechanisms have been created, both on the Ministry's initiative and by the principal organizations of representatives of persons with disabilities. Among them are:

- The participation of the academic sector, through Madrid's Carlos III University, in the elaboration of reports relative to Spanish legislation that needs to be adapted to the provisions of the UNCRPD.
- The permanent link with the European Disability Forum (EDF) through the Social and International Relations Area of the ONCE Foundation, headquartered in Brussels.

[20] http://sid.usal.es/idocs/F3/LYN10297/3-10297.pdf
[21] http://www.boe.es/boe/dias/2009/12/26/pdfs/BOE-A-2009-20890.pdf

- The web page[22] created by the CERMI to offer specialized information on the UNCRPD, which represents a fundamental instrument for promoting, disseminating and raising awareness of the principles of this agreement.

All projects on regulations and general plans concerning people with disabilities are consulted through the National Disability Council, in which organizations of people with disabilities and their families are represented.

People with disabilities have access to all public means of training that are of interest and likewise, they have programmes financed by Public Administrations and other collaborators that are undertaken by their organizations in order to favour their competence and skills.

Dialogue is open permanently by these Organizations and those who represent them.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

In Spain, the National Statistics Institute (INE in its Spanish initials) has been carrying out a macro survey on disabilities since 1986. The updated edition of this survey was published in 2008, under the title: Encuesta sobre Discapacidades, Autonomía personal y Situaciones de Dependencia[23] (Survey on Disabilities, Personal Autonomy and Dependent Situations).

As a consequence of Spain's ratification of the UNCRPD, and as relates to Article 31, the government initiated a project to include the disabilities indicator in all of the active population statistics produced by the INE.

A new yearly statistical operation called Employment of Persons with Disabilities (EPD 2008: Empleo de las Personas con Discapacidad[24]) was first published on 20 December 2010 as a pilot project. This data collection, elaborated by the Statistics National Institute of Spain (INE), focuses on the employment of people with disabilities, but also includes information about educational levels of people with disabilities aged 14-64. EPD is prepared through the exploitation of data from the Economically active population survey (EPA) and the National Database of people with disabilities (BEPD) with the collaboration of Spanish Committee of People with Disabilities and ONCE Foundation (Spanish National Organization of Blind).

The results became from the crossing statistics data of the two sources mentioned above (EPA and BEPD) so that it was possible to combine the socio-demographic and labour force information with the people who has recognized a legal disability situation equal or up to 33% in the Spanish legislation. The use of survey and administrative data have the advantage of less budget cost and also make less burden in the answers of the informers.

In December 2011, INE published the detail results for year 2009-2010 of the EPD statistical operation. INE also receives information about persons with disabilities and their situation

[22] http://www.convenciondiscapacidad.es

[23] http://www.ine.es/jaxi/menu.do?type=pcaxis&path=/t15/p418&file=inebase&L=0

[24] **http://www.ine.es/jaxi/menu.do?type=pcaxis&path=%2Ft22%2Fp320%2Fa2008%2F&file=pcaxis&N=&L=0**

through bodies like Observatorio Estatal de la Discapacidad [25], Real Patronato de la Discapacidad[26] and the information system named SID[27].

[25] http://www.observatoriodeladiscapacidad.es/
[26] http://www.rpd.es/
[27] http://sid.usal.es/

Sweden

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Division for Family and Social Services of the Ministry of Health and Social Affairs is responsible for the co-ordination of disability policy within the Government and has been appointed as the national focal point for matters related to the United Nations Convention on the Rights of Persons with Disabilities.

The Family and Social Services Division of the Ministry of Health and Social Affairs is also leading a working group within the Government consisting of civil servants representing the following ministries: Ministry of Employment, Ministry of Culture, Ministry of Justice, Ministry of Education and Research, Ministry of Health and Social Affairs, Ministry of Finance and the Ministry of Enterprise Energy and Communication. The purpose of this group is to mainstream disability policy within the Government.

Furthermore, The Swedish Agency for Disability Policy Coordination (Handisam) plays an important role in co-ordinating, monitor and accelerating disability policy by supporting the sectoral authorities tasked with implementing the national plan for disability policy.

2.1.2. National strategies to implement the UNCRPD

The current disability policy was established already in the year of 2000 when the Swedish Parliament passed the Government Bill “From patient to citizen: a national action plan for disability policy”. This decision by the Parliament represented a step of fundamental importance for Swedish disability policy. Since then the objective of disability policy has been a society that makes it possible for disabled people to fully participate in the life of the community. The aim is to mainstream a disability perspective in all sectors of society by identifying and removing obstacles to full participation for people with disabilities. Another goal is to prevent and fight discrimination against people with disabilities and to make it possible for boys and girls, men and women to lead independent lives and to make their own decisions about their own lives.

The ten-year action plan ended in 2010. The Government has decided a strategy for the future disability policy during 2011. The implementation of the UNCRPD forms the basis of the future disability policy. In the strategy the Government presents a number of strategic objectives for disability policy in nine priority areas for the coming five-year period: physical accessibility, IT policy, social policy, education policy, labour market policy, the judicial system, transport policy, public health policy, and culture, media and sport policy.

Within these areas the strategy defines the direction and give concrete form to how society’s measures will be implemented, coordinated and consolidated, and continuously monitored in order to develop disability policy.

2.2. Monitoring of the UNCRPD

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

In October 2010, the Delegation for Human Rights in Sweden presented its final report with proposals on, inter alia, how the system for national implementation of human rights can be strengthened. One of the proposals of the Delegation was the establishment of a national institution for human rights. According to the proposal, such an institution should be provided with a broad mandate to protect and promote human rights according to all human rights conventions ratified by Sweden, including the CRPD. The Delegation's report features contributions from a wide range of actors in society and has also been the topic of a consultation process during the autumn of 2011. At present, the Delegation's proposals are being considered within the Government Offices as part of the elaboration of Sweden's third human rights action plan, which is planned to be finalised during 2012. The proposal of establishing a national human rights institution with the mandate to protect and promote the rights under the CRPD and other human rights conventions is being considered within that context.

In the meantime the responsibility of protecting and promoting the rights proclaimed in the CRPD lies within existing state agencies in accordance with their respective mandates. In that context, the Family and Social Services Division of the Ministry of Health and Social Affairs and the Agency for Disability Policy Coordination (Handisam) play an important role.

2.2.2. The involvement of civil society in the monitoring process (Art. 33.3)

The Government has established a committee as a forum for mutual information and discussions (according to standard rules 17 and 18). The Minister for Elderly Care and Public Health at the Ministry of Health and Social Affairs, who is responsible for disability policies, is chairing the committee which is composed of members of the Swedish disability organisations together with State Secretaries from seven Ministries. Members of the committee meet four times a year and the agenda for the meetings are prepared jointly between the government and the disability movement.

The co-operation with people with disabilities and their representative organisations is of great importance. In an agreement between the Government, non-profit organisations in the social area and the Swedish Association of Local Authorities and regions, it is stated that the relationship between the Government and the non-profit organisations is to be characterised by responsibility and mutuality, be based on the circumstances of both and utilise the perspectives and expertise of both. The agreement also contains a description of the principles which should apply to cooperation between the disability movement and the Equality Ombudsman. At the moment the interacting between the Government and people with disabilities and their representative organisations are being under discussion in order to develop the dialogue in accordance with the Convention.

In almost all local municipalities there are local councils dealing with disability policies.
The Swedish Agency for Disability Policy Coordination (Handisam) has the task to raise awareness about the UN Convention amongst people with disabilities, authorities, politicians and stakeholders throughout the municipalities and county councils. In 2010 Handisam was granted slightly more than 190 000 EUR for this purpose.

The leading principle is dialogue and before any major step is taken in the policymaking process the dialogue intensifies with different kinds of public debates. In the governments public inquires civil society and disability organisations are among the respondents.
The Swedish Disability Federation has been granted 5,3 millions SEK from The Swedish Inheritance Fund to run a project with the purpose of raising awareness about the UN Convention amongst people with disabilities, authorities, politicians and stakeholders. Disability organisations are also frequently used as bodies to which a proposed measure is referred to for consideration. Civil society usually produces shadow reports in connection to the Governments reports, which are given high priority. In almost all local municipalities there are local councils dealing with disability policies.

2.2.3. Collecting statistics and/or developing indicators (Article 31)

Statistics Sweden (SCB) is a governmental administrative agency under the Ministry of Finance. The agency supplies statistics for decision making, debate and research to ministries and other customers. Besides producing and communicating statistical data, it is tasked with supporting and coordinating the Swedish system for official statistics. The agency also produces national population studies. Another state agency that produces reports related to people with disabilities is the Swedish National Institute of Public Health. The Institute works to promote health and prevent ill health and injury, especially for population groups most vulnerable to health risks. The institute produces reports on public health on a regular basis.

The definition of disability in Sweden is related to the environment and not to the diagnoses or level of impairment of the individual. The statistics that are provided in the field of disability can therefore be seen as somewhat scattered or fragmentised. You would find rather precise statistics in connection to different support system or special support measures directed to a well defined group of persons. However, people with disabilities that are not entitled to, or chose not to receive support within the social service system or in the labour market, would be difficult to find within the existing statistics. Some groups within the disability sector, such as persons with minor cognitive disabilities or group of persons with psychiatric disabilities would therefore be very hard to define.

There are continuously a lot of individual studies made in the field of disability. This is of course an opportunity to extract trends or indication of problems also for a broader group of people. Still, there is a need to strengthen the provision of longitudinal statistics in the field of disability. One way of doing this is to use general population studies combined with a well defined screening process to distinguish if a person might be classified as a person with disability or not. Screening questions would probably also be able to roughly distinguish what kind of impairment is causing the disability.

To promote this work the government is planning to deal with related issues of methodology. The government is also considering ways to find indicators that will enable monitoring of this group and their performance/situation in those fields where statistics are underdeveloped.
The general strategy for Swedish disability policy is to include disability into all relevant political areas. Therefore there is also a need to measure the development of the society from the perspective of accessibility and inclusion of persons with disabilities. To promote this the governmental authority Handisam is developing a system of indicators that will measure the progress of accessibility for persons with disability in a broad range of areas.

There will always be a need for special studies as a complement to statistics based on the population. There have been initiatives to create a more holistic system for provision of statistics and data in the field of disability. A number of legal restrictions is however preventing interconnection of such a coherent statistical system. This is a difficult balance between protection of personal integrity and needs of data and a question that the government is continuously considering and investigating.

Furthermore, the Delegation for Human Rights and the Swedish Agency for Disability Policy Coordination have recently finished a project on indicators for the implementation of certain selected human rights. The project also includes indicators relating to the rights of persons with disabilities.

United Kingdom

2.1. National Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

The Office for Disability Issues (ODI)[28] is the designated focal point within the United Kingdom Government for matters relating to implementation of the Convention. It also fulfils a coordination role, liaising closely with other Government Departments and the UK's Devolved Administrations, (in Northern Ireland, Scotland, and Wales), on matters relating to the Convention. For example, ODI coordinated the UK's report on implementation of the Convention and continues working with other Government Departments and the Devolved Administrations on coordination issues with a view to avoiding duplication, and using existing co-ordination structures where appropriate.

The responsibility for actively implementing the Convention in respect of areas that fall within their policy remits rests with individual Devolved Administrations and Government Departments.

Ministers, ODI and officials in other Government Departments, regularly meet disabled people and their organisations to discuss a wide variety of issues including the Convention. Similar arrangements operate in the Devolved Administrations.

2.1.2. National strategies to implement the UNCRPD

The UK Government is developing an overarching Disability Strategy to coordinate work towards disability equality. Disabled people's rights as set out in the Convention will be an integral part of the Strategy. The Strategy will demonstrate the UK Government's commitment to overcoming the barriers which prevent disabled people from fulfilling their potential and having opportunities to play a full role in society. It is likely to focus on three main areas identified by disabled people:

- Realising aspirations: ensuring appropriate support and intervention for disabled people at key life transitions, to realise disabled people's potential and aspirations for education, work and independent living.
- Individual control: enabling disabled people to make their own choices and have the right opportunities to live independently; and
- Changing attitudes and behaviours: promoting positive attitudes and behaviours towards disabled people to enable participation in work, community life and wider society, tackling discrimination and harassment wherever they occur.

The aim is for the Strategy to be published later in 2012.

The Disability Strategy will mainly apply to England, except where issues are not devolved to Wales, Scotland and Northern Ireland. The devolved administrations will adopt there own strategic approaches to the achievement of disability equality.

2.2. Monitoring the UNCRPD

[28] http://www.odi.gov.uk/

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Art. 33.2)

The UK's four equality and human rights commissions, i.e. the Equality and Human Rights Commission (EHRC), the Scottish Human Rights Commission (SHRC), the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI)[29], have been designated as the independent element of the UK's framework to promote, protect and monitor implementation.
The four Commissions, as the independent element of the UK framework, are developing their plans in respect of promoting, protecting and monitoring implementation of the Convention in the UK. The four Commissions meet regularly and where they consider it appropriate to do so, co-ordinate their activities. For example, in January 2010 the SCHR ran an event on the Convention in conjunction with the EHRC's Scotland Office and the Scottish Government.

The EHRC has information on its website about the Convention, and how its work relates to the Convention and its role within the framework to promote, protect and monitor implementation. The EHRC had worked to promote the Convention, for example by: hosting conferences to raise awareness of the Convention; publishing their 'Hidden in plain sight – Inquiry into disability related harassment' report (August 2011); producing 'What does it mean for you?' guidance about what the Convention can mean for disabled people and their organisations (published Summer 2010); and working with legal professionals and legal advisors to increase awareness and use of the Convention.

2.2.2. The involvement of civil society in the monitoring process (Article 33.3)

The UK government recognises that the involvement and participation, of disabled people and their organisations is crucial for the success of the Convention. Departments and Devolved Administrations are actively encouraged to involve disabled people in policy development.

The UK government is developing a new Disability Strategy aimed at enabling disabled people to fulfill their potential and have opportunities to play a full role in society.

The 'Fulfilling Potential' discussion document published on 1 December 2011 asked disabled people, their organisations and those who support disabled people to explore how the new disability Strategy should be framed and what actions would be both realistic and have the greatest impact. http://odi.dwp.gov.uk/odi-projects/fulfilling-potential.php

The Strategy will build on previous involvement of disabled people including the Independent Living Strategy in England and Wales and the Roadmap as reported in previous UK contributions to HLG reports.

Scotland and Northern Ireland have involved disabled people and their organisations in the development of their own disability strategies covering areas where powers are devolved.

---

[29] www.equalityhumanrights.com/
http://www.nihrc.org/
http://scottishhumanrights.com/
http://www.equalityni.org/site/default.asp?secid=home

2.2.3. Collecting statistics and/or developing indicators (Article 31)

In December 2011 the UK has published the baseline results of fieldwork conducted between June 2009 and March 2011 on the Life Opportunities Survey (LOS). This survey aims to collect information on disabled and non-disabled people's life opportunities, covering areas such as work, education, social participation and the use of public services. It also aims to identify the reasons why people do not take part in work or leisure activities that they would like to, or why people experience difficulties with using public services. The information provided will be used to help target policies and resources where they are needed. http://odi.dwp.gov.uk/disability-statistics-and-research/life-opportunities-survey.php#how

European Union

2.1. Implementation of the UNCRPD

2.1.1. Focal points and coordination mechanisms for implementing (Article 33.1)

On 26 November 2009, the Council of the European Union adopted the Decision[30] concerning the conclusion, by the European Union, of the UNCRPD. It designates the European Commission as a focal point, both vis-à-vis Member States to the extent of Union competence as well as to the Union's institutions. On the 2 December 2010, the Council adopted the Code of Conduct, which further specifies internal arrangements for the implementation and the representation of the EU.[31] Point 11 in the Code of Conduct further elaborates the role of the EU focal point. The adoption of the Code of Conduct enabled the EU completing 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. As a party to the Convention, it is currently working on implementing the UNCRPD to the extent of the EU's competences. It also works to promote a stronger and better coordination within its services, with the other EU institutions and with the Member States. Coordination for the implementation of the UN CRPD within the EU institutions takes place within the ad-hoc committee of CPAS. The Council within its relevant working group allows for coordination with the Member States, also with the possible involvement of the Disability High Level Group.

The Code of Conduct sets out certain aspects of the coordination between the EU and the Member States, especially with regard to the coordination in establishing positions relating to the UNCRPD (point 6), coordination of speaking and voting arrangements, and with respect to monitoring and reporting.

2.1.2. Strategies to implement the UNCRPD

On the 15 November 2010 the European Disability Strategy for the years 2010-2020 was adopted. It aims at ensuring effective implementation of the UN CRPD. It also marks a renewal of the EU's commitment to improve the situation of citizens with disabilities, sets the work plan and priorities for the coming years. The overall aim of the 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. It sets clear objectives to remove the barriers persons with disabilities meet in their everyday life.
The specific measures over the next decade are clustered around eight priority areas dealing with (1) Accessibility, (2) Participation, (3) Equality, (4) Employment, (5) Education and training, (6) Social protection, (7) Health, and (8) External Action.

The Strategy is accompanied by a Commission Staff Working Document that sets out a list of actions, with respect to each of the eight priority areas, for the first five years of the Strategy's

[30] Council Decision 2010/48/EC, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:023:0035:0061:EN:PDF

[31] 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 UNCRPD

period (2010-2015).[32] Each action is also given an indicative timing. Progress in the implementation of those actions is subject to regular review, via the DHLG and the Commission's Inter-service group on Disability. The Commission will issue a progress report by the end of 2013. This, combined with the EU report to the UN Committee on the implementation of the Convention, due in 2013, will provide an opportunity to revise the Strategy and the actions. A further report is scheduled for 2016.

2.2.1. Framework, including independent mechanisms, for promoting/ protecting/ monitoring (Article 33.2)

Paragraph 13 of the Code of Conduct[33] setting out the intra-EU arrangement for the implementation of the UN Convention provides that the Commission shall propose in due course an appropriate framework (for one or several independent mechanisms), taking into account all relevant EU institutions, bodies and agencies[34].

With a view to setting up a framework at EU level, the Commission has identified four separate existing EU institutions and bodies that currently exercise the tasks of promotion, protection and monitoring under their respective mandates:
- the European Parliament's Petitions Committee,
- the European Ombudsman,
- the European Commission,
- the EU Agency for Fundamental Rights (FRA).

They would form "**the EU framework**", together with the European Disability Forum (EDF), the EU wide representative organisation of persons with disabilities, in order to ensure the direct involvement of persons with disabilities and their representative organisations as required by art. 33.3 of the Convention[35].

The Commission's proposal was presented to the member states in COHOM on 25 January 2012 and is still under discussion after a second COHOM meeting on 16 May 2012.

The EU framework's mandate covers areas of EU competence, and it is a complement to the national frameworks and independent mechanisms which bear the main responsibility for the promotion, protection and monitoring of the UNCPRD in the Member States.

The EU framework will carry out its tasks with respect to:

---

[32] SEC(2010) 1324 final

[33] 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, OJ C 340, 15.12.2010, p. 11.

[34] Hereafter, the term "institution" will be used for simplicity, except where reference is made to the specific Treaty provisions.

[35] the Council, in point 23 of its conclusions on the European Disability Strategy, "*Support of the implementation of the European Disability Strategy 2010-2020"*, 3099th Employment, Social Policy, Health and Consumer Affairs Council meeting Luxembourg, 17 June 2011 invited the Commission to involve civil society, in particular persons with disabilities and their representative organisations, in the implementation of the Convention at the EU level, as well as in the required monitoring and reporting activities.

- EU legislation and policy[36] in those areas where the Member States have transferred competences to the EU. This will be the main area of the framework's actions;
- the implementation of the Convention by EU institutions in their capacity as Public Administration (for example in relation to their employees and in their interaction with the public).

The Commission's proposal aims to ensure a simple, efficient and practical framework which, while respecting the separation of competences between the EU and the Member States, acts in complementarity with the frameworks and Independent Mechanisms established at member states' level, maximises the synergies between the work of existing bodies and institutions, and avoids an undue administrative and financial burden[37].

Point 12 in the Code of Conduct sets out certain aspects of the monitoring and reporting, especially with regard to the respective competence of the EU and the Member States. It highlights the complementarity of EU and Member State reports and the need to work in the spirit of sincere cooperation. This means for instance providing each other with the reports for information, on a confidential basis, before submitting them to the Committee on the Right of Persons with Disabilities, and, on request, assisting each other with experts to the Delegations for the examination of the Reports by the Committee.

2.2 The involvement of civil society in the monitoring process (Article 33.3)

In line with the principle of the EU Disability Strategy: "nothing about people with disabilities without people with disabilities" as well as with the Convention's obligation[38] to consult and involve representative organisations of disabled people when implementing the UN Convention, the Commission ensures participation of persons with disabilities, their families, their European representatives and relevant stakeholders in the development and implementation of disability policies.

People with disabilities are consulted through different channels and tools, such as, communications, consultation documents or participation in expert groups. Representatives of civil society and in particular of EU-level disability organisations are full members of the High Level Group on Disability where they have the possibility to raise their concerns, contribute to discussions, and co-draft policy documents.

In the development of the European Disability Strategy 2010-2020 there was extensive consultation with civil society, in particular representative organisations of persons with disabilities at European level. Besides the consultation with civil society in the DHLG, all NGOs active in the field of disability that are co-financed through the EU PROGRESS programme were invited to put forward their views as well as to dedicate part of their annual work programmes to activities related to the preparation of the new strategy, there was a consultative workshop with the main stakeholders, with participants representing civil society, sectoral business representatives and the social partners and public online consultation, where 101 replies on behalf of a wide variety of civil society organisations were received.

[36] As illustrated in the EU declaration of competences annexed to Council Decision 2010/48 for conclusion of the Convention.
[37] As stated in the European Disability Strategy 2010-2020, Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, "A renewed commitment to a barrier-free Europe", COM(2010) 636 final.
[38] Article 4.3

The yearly conference, the European Day of Persons with Disabilities, presents interested individuals and organisations advocating the rights of people with disabilities the opportunity to address their views to the European decision makers. In addition to the thematic discussion the conference expresses political commitment and offers networking possibilities. As the conference is organised by the Commission in partnership with EDF the positions of people with disabilities are considered at all stages. In 2011 the conference explored the way out of the financial and economic crisis from the perspective of persons with disabilities. Following up to the presentation of the Commission's proposals for the post-2013 Multiannual Financial Framework and the future of the EU's Cohesion Policy, it discussed how the European Union can support recovery for all in the context of Europe 2020. The European Day conference looked into how EU legislation, policies and funding can contribute both to promoting enjoinment of the rights enshrined in the UNCRPD and to finding a way out of the crisis.

The second edition of the Access City Award saw the participation of 114 cities from 23 EU countries – almost twice as many as for the inaugural edition in 2010. The project was endorsed by the EDF from the early phase of its preparation. Participation of civil society is an essential part of the Access City Award. First, the element of participation and involvement is reflected in the award criteria. One of the criteria looks at evidence of active involvement of people with disabilities, their representative organisations in the planning, implementation and maintenance of a city's accessibility policies and initiatives. In the selection procedure both at national level and also at the EU level, EDF representatives were actively involved.

The second Work Forum on the Implementation of the Convention of Persons with Disabilities, organised by the European Commission, took place in late October 2011. Civil society, DPO's in particular, was involved in the conception of the conference. The Forum focussed on the governance structures foreseen by Article 33, and in particular looked at how to coordinate the implementation of the Convention at both national and EU levels, analysing different aspects of coordination in three main sessions. The first session addressed implementation within the Member States; the second session was devoted to the coordination of the implementation at EU level; the third session, discussed issues of coordination in the process of reporting to the United Nations. The experience of the coordination with civil society in the preparation of parallel reports and the technical support provided by the International Disability Alliance were shared with participants.

The Work Forum benefited from active participation from a wide representation of Member States, from various Government Departments, NHRIs and a significant participation of people with disabilities largely through the European Disability Forum's (EDF) representative structures; it provided a platform for mutual learning, exchange of experience and provided an opportunity for constructive reflection and a dialogue on how to best involve persons with disabilities and their organisation.

The European Union also recognises that the empowerment of persons with disabilities needs sufficient financial support. The European Social Fund supports, among other things, projects to promote independent living, through staff training and modernising care systems. Furthermore, the Commission supports to running costs of various European organisations which have as their primary objectives to represent the interests of disabled people at Community level as well as organisations active in promoting equal opportunities for people with disabilities.

The European Union recognises the strength of European networks that lies in their capacity to gather and mobilise relevant members from different Member States into an open forum of discussion or exchange of expertise and experience able to inform and influence policy-making, as well as relaying EU action vis-à-vis network members.

Civil society has an important contribution to make towards effective implementation of the UN Convention. Making a difference requires a sustained, cohesive coalition capable of mobilising and analysing information, making that information available to key actors and mobilising many sources of influence. Representative organisations are in a central position to influence policy in the European Union and in the Member states through their national members. Influence is gained through the increased expertise and information which are important to policy formulation and implementation.

2.3. Collecting statistics and/or developing indicators (Article 31)

Based on data provided by Eurostat, the Commission estimates that there are up to 80 million EU citizens with disabilities. They constitute one of the largest categories of vulnerable citizens in the EU.

Presently the proportion of persons with disabilities tends to be in the order of 10%[39] of the working age population across the Member States, with current demographic trends likely to lead to a further increase.
Available evidence suggests that persons with disabilities suffer explicit or concealed discrimination or are at risk of discrimination.

1) They are socially and economically disadvantaged:
- Employment rates for persons with very severe and severe degrees of disability are respectively 19,5% and 44,1%
- Incidence of poverty for persons with disabilities is 70% higher than average[40]

2) The limitations to the ability of persons with disabilities to work carry a significant risk of isolation and exclusion
- The "benefit trap" appears to be a significant obstacle for labour market participation of the persons with disabilities.

3) The limitations of opportunities of persons with disabilities to participate fully in education carry a significant disadvantage for personal development
- Measures to facilitate full inclusion of persons with disabilities at all levels of education would considerably improve their standing in the labour market and their social inclusion

As the likelihood of having an impairment or a long-standing health problem increases with age, the current demographic trend is likely to lead to a further increase of the prevalence of

[39] According to the 2002 Labour Force Survey special module, Europe-wide average share of persons who see themselves as restricted in their functioning is 10.4% of the labour force. Further 5.2% have a long-standing health problem but do not see themselves as restricted. As incidence of disability increases with age, these proportions are higher among elderly persons.
[40] According to the 2004 EU-SILC data, over 17%of those aged 16-64 who were strongly limited in what they could do had income below the risk of poverty line compared to just over 10% of those not limited at all.

disability. Many areas mentioned above, such as content and structure of education, the norms for built environment and public spaces, leisure issues as well as social assistance are almost exclusively in the competence of the Member States. Often local authorities have a decisive role in monitoring these norms and delivering these services. The Member States are tackling these issues, but in different manners and to different degrees with very little coordination.

In order to ensure proper monitoring the collection of data is crucial. In this context and within Eurostat's annual work programme, activities in the European Statistical System (ESS)[41] will continue on further developing – through Partnership Health and in cooperation with international organisations – **Community statistics on disability and social integration** in order to provide the relevant and comparable statistical data needed to monitor the situation of people with disabilities.

More detailed statistical data on disability are also needed as part of health information in order to respond to the specific requirements inter alia those that result from the **Programme of Community Action in the field of Public Health (2003-2008)**[42]. Health information at Community level covers data ranging from health status - including disability – to health determinants, including demography, geography and socio-economic situations, personal and biological factors, and living, working and environmental conditions, paying special attention to inequalities in health. The development of the statistical element of health information is also integral part of Eurostat's annual work programme, with activities carried out in the context of Partnership Health and in cooperation with international organisations.
In general, the aim of producing comparable data on disability and on integration of people with disabilities into society can be achieved only by means of surveys that make use of common instruments. Health Interview Surveys (HIS) and Disability Interview Surveys (DIS) are widely accepted instruments that could provide comparable data for topics related to health, disability and social integration.

However, the main work related to disability statistics in 2007-2008 has been focused on development of the following initiatives:

European health and social integration survey (EHSIS)
The Council in its Resolution of 17 March 2008 on the situation of persons with disabilities in the European Union underlines that disability statistics are needed to establish a picture of the overall situation of persons with disabilities in Europe. Such statistical and research data allow informed disability policies to be formulated and implemented at the different levels of governance.

The Commission in its communication on a European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe, {SEC(2010) 1323} {SEC(2010) 1324} emphasised that EU action will support and supplement Member States' efforts to collect statistics with a view to monitoring the situation of persons with disabilities. This action will be implemented through a call for tender (with 29/30 lots, one lot for each Member State, Norway and Iceland, plus a lot for coordination) to be launched in the second quarter of 2011.

[41] European Statistical System, see: http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1153,47169267,1153_47183518&_dad=portal&_schema=PORTAL

[42] Decision No 1786/2002/EC of the European Parliament and of the Council of 23 September 2002 adopting a programme of Community action in the field of public health (2003-2008), OJEC L 271/10

2011 LFS ad-hoc module on employment of disabled people
The proposal was prepared by a Task Force. The aim of the module thus is to measure the extent of disabled people's participation in the labour market (and not to measure the prevalence of disabilities in general) following the current understanding of disability, in particular: 1) Limitation in work participation (in amount, type of work and transport to and from work) (3 variables), 2) Limitation in work participation related to health conditions or diseases (1 variables), 3) Limitation in work participation related to carrying out basic activities, 4) Use of or need for special assistance at work.

The common feature of these two actions is that the effort was made to incorporate/transfer the new concept of disability into questions and variables proposed. During the last three decades the conceptual approaches to the measurement of disability has changed. Three milestones in that evolution have to be mentioned 1) the medical model[43] ; 2) the social model[44] and 3) the biosocial model[45]. The biosocial model incorporated into the International Classification of Functioning, Disability and Health (ICF, WHO 2001) attempts to bridge the gap between the medical and social models. The biosocial concept was followed also by the UN Convention on the Rights of Persons with Disabilities.

ANED, Academic Network of Disability expert
The Commission supported in 2007 the establishment of an European Academic network of disability experts. The Network provides data collection, provides comments on policy papers and develops national and EU reports on the situation of persons with disabilities in Europe in a number of areas like employment, social inclusion and social protection, education, independent living, statistics and data collection. The network is also active on the development of indicators.

Particularly noteworthy are two key documents compiled by ANED, which have been thoroughly reviewed and updated in 2011:

- IDEE – Indicators of disability equality in Europe: the report includes presentation and discussion of 12 selected indicators; the main themes addressed are those of employment, post-compulsory education and household poverty. The study's key priorities were to populate and update a number of items of direct relevance to EU2020 indicators, and to present items of direct relevance to actions in the EU Disability Strategy (e.g. accessibility).

- Annotated review of European Union law and policy with reference to disability: the publication consists in a detailed review of EU legislation with reference to disability, from provisions in primary law to soft law instruments (Council recommendations, Parliament resolutions, or even studies or guidelines). The guiding principle for inclusion in the review was whether an instrument contributes to shaping European disability policy.

[43] Disability regarded as 'a restriction or lack of ability to perform normal activities, which has resulted from the impairment of a structure or function of the body or mind (concepts and definitions based on the medical model resulted in the International Classification of Impairments, Disabilities and Handicaps (ICIDH) in 1980
[44] Disability results from interaction between individuals and non-inclusive society
[45] The ICF (WHO 2001) states that disability is a complex phenomenon that is both a problem at the level of a person's body and a complex and primarily social phenomenon i.e. it is a disadvantage experienced by an individual resulting from barriers to independent living or educational, employment or other opportunities that impact on people with impairments, ill health or activity limitations (difficulty seeing, hearing, walking ..)

Furthermore, ANED is developing an online tool with an overview of European and national instruments relative to disability and the rights of persons with disability. The tool will allow to identify availability and contents of the main instruments needed for the implementation of the UNCRPD.

Civil society actions and strategies

2.1. Actions and strategies by civil society to implement the UNCRPD

The Confederation of Family Organisations in the European Union (COFACE) in 2011 dedicated several meetings of its working group *Inclusive policies for disabled and other dependent persons and their families* (COFACE-Disability) to the analysis of the UNCRPD. In particular, three policy positions were adopted:

- in April 2011, a policy position on the Family Dimension of the UN Convention on the Rights of Persons with Disabilities. The position undertakes a systematic analysis of the family dimension of the Convention, illustrating the main implications of the CRPD for the improvement of the rights and wellbeing of persons with disabilities and their families. The position intends to raise awareness on the scope and relevance of the Convention among family organisations, policy makers and other representatives of civil society. A factsheet and a book containing the position and the full text of the Convention were produced.
- COFACE identified guidelines for an effective implementation of the right to inclusive education and published a policy position on Inclusive education for persons with disabilities in line with Article 24 of the UN Convention.
- In December, COFACE released a policy position on Active ageing of Family Carers, in line with the European Year of Active Ageing and Intergenerational Solidarity. The position aims to stress the importance of the family carers and their specific needs, in line with the requirements of the Convention (among others in the Preamble and Art. 8 and Art. 28), to put families in the conditions of contributing to the full and equal realisation of the rights of persons with disabilities.

Some of COFACE member organisations (Unapei, UNAFTC, APF) also develop activities concerning the UNCRPD. Among them, APF and UNAFTC organised study days and held sessions (in other events such the Journées Nationales des Parents de l'APF) with a focus on the family dimension of the UN CRPD. Moreover, UNAPEI adopted an action plan to implement the UN CRPD and started to develop some awareness raising and information activities to implement the action plan.

The European Disability Forum (EDF) was active throughout the year at the European and international level and, in cooperation with its members, at the national level. In order to reinforce its capacity to promote the UNCRPD, it established an Advisory Group to the Board to provide technical expertise to the governing bodies on matters relating to implementation.

Governance of the Convention at the EU level
In May, EDF Annual General Assembly adopted the EDF strategy for implementation of the Convention. Implementation of *Article 33 CRPD "National implementation and monitoring"* has been identified as the main focus of EDF actions for 2011-2012.
Throughout 2011, EDF has held exchanges with the EU Fundamental Rights Agency, EQUINET, the European group of the National Human Rights Institutions, European Parliament, Commission, European Economic and Social Committee and NGOs, moving forward the agenda of good governance of the UNCPRD. EDF proposed the establishment of a European Disability Committee to replace and reinforce the current High Level Group as

coordination mechanism pursuant to article 33(1) of the UNCRPD. The EDF proposal was presented to the HLG members at one of the Group's meetings.
EDF also provided input to the EP resolution on the Disability Strategy 2010-2020, and contributed its expertise to the 2nd annual Work Forum on the implementation of the UNCRPD held in Brussels in October.

In December 2011, EDF was consulted by the Commission on its proposal for the establishment of the European independent monitoring framework pursuant to Article 33(2) CRPD. EDF found the proposal for a light-structured framework inadequate and voiced concerns that it would not comply with the CPRD standards and Paris Principles. At the same time, EDF drew the attention of the Council Human Rights Working Group (COHOM) to the shortcomings of the proposal and suggested a number of minimum conditions to be met.

In December, a High-Level Meeting on Disability was convened by the President of the Commission José Manuel Barroso. The meeting, co-chaired by the Commission and EDF Presidents, brought together the Presidents of the European Council and of the European Parliament, as well as EDF Executive Committee members. The meeting, to be reconvened in 2013, focused on the implementation of the Convention and ratification by the EU of the Optional Protocol, as well as the impact of the crisis on persons with disabilities.

UNCRPD article-specific work at the European level
In 2011, EDF started deepening its expertise of specific UNCRPD articles by contributing to legal debates at the international level: in January, it elaborated on UNCRPD *Articles 13 "Access to justice"* and *16 "Freedom from exploitation, violence and abuse"* in its third-party intervention to the European Court of Human Rights (ECtHR) on a case of disability hate crime; in July, it joined forces with other organisations to unwrap the protection standards of *Article 12 "Equal recognition before the law"* in a third-party intervention to the ECtHR on a case of forced sterilisations of women with disabilities; and in October, it addressed *Article 9 "Accessibility"* in a third-party intervention in a British Court of Appeal case on the rights of air passengers.

In May 2011, EDF joined forces with the European Network of Independent Living, International Disability Alliance, Mental Disability Advocacy Center, Open Society Foundation and Galway University to develop implementing guidelines for the right to live independently and being included in the community pursuant to *Article 19 UNCRPD*. Throughout the year, EDF participated in the activities of the expert group on transition from institutional to community–based services raising awareness on the right to live independently. It also discussed definition of community based services in its task force on service provision and quality control.

In March 2011, EDF and the European Trade Union Confederation co-organised a conference on the challenges in implementation of *Article 27 "Work and employment"*.

Throughout 2011, EDF campaigned in favour of legislation with regard to accessibility of websites for persons with disabilities, in order to implement *UNCRPD Articles 9 "Accessibility"* and *21 "Freedom of expression and opinion, and access to information"*.
Mainstreaming of Article 9 has been an important priority in 2011: EDF actively monitored the commitment of the European Commission to ensure that any legislation produced under the Digital Agenda for Europe flagship of Europe 2020 is CRPD-compliant.

Implementation of the existing European legislation in light of Article 9 was also monitored: EDF issued a Toolkit on the Telecoms package, which contains many provisions in relation to accessibility of electronic communication products and services, to support its members in the transposition and implementation process at national level. EDF also followed the creation and developments of European standards by providing inputs to the standardisation mandates 376 and 420 European Accessibility Requirements for Public Procurement of Products and Services in the ICT domain and built environment, respectively.
To implement *Article 30(1)(b) "Participation in cultural life, recreation, leisure and sport"*, EDF monitored the developments in the cross-border provision of accessible television programmes in relation to implementation of the Audiovisual media Services Directive.

Throughout the autumn, EDF participated in an NGO campaign based on *Article 29 "Participation in political and public life"* and organised in its framework a roundtable at the European Parliament.

EDF members' work at the national level

Governance of the Convention at the national level
In April, EDF launched a consultation with its members to better understand how the implementation of Article 33 UNCRPD was progressing in the Member States. The responses were received from organisations in 14 countries (Austria, Belgium, Czech Republic, Denmark, Germany, Hungary, Latvia, Lithuania, Romania, Slovakia, Slovenia, Spain and Sweden). The overall evaluation of the EDF members of the national efforts to set up an implementing and monitoring framework at the national level was rather negative. The focal points in most countries have been placed under the Ministry of Social Affairs and not allocated any additional resources to adequately do their work. The involvement of DPOs in the process has been described as inadequate; very few countries have taken steps to establish an independent mechanism that would be in full compliance with Paris Principles.

EDF participated and co-organised seminars on the implementation of the UNCRPD in Slovakia and Lithuania.

Disability mainstreaming in the UN system
EDF continued encouraging its members to make submissions to the international human right fora to mainstream disability issues throughout the UN system. This work is conducted in close cooperation with the International Disability Alliance. In 2011, EDF members from Austria, Denmark, Finland and Italy made written submissions to various UN Treaty Bodies and the Human Rights Council. These exercises have greatly improved the awareness of the EDF members about international human rights standards that can be used for the promotion of disability rights.

The European Association of Service providers for Persons with Disabilities (EASPD) and its member organizations across Europe have carried out several activities during 2011 with the purpose of promoting the implementation of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).

The importance of the UNCRPD has been stressed during the Executive Committee meeting in March 2011 and in the general Assembly of July 2011, where the UNCRPD has been

indicated as a reference document in all the work of the EASPD, very high on the EASPD agenda. This reference is also a milestone of the EASPD strategic choices for 2011 -2014.

EASPD events and activities
EASPD has organized a number of events and activities during 2011with the objective of disseminating information on key articles of the UN Convention and facilitating the implementation at grassroots level. Among these are the following:

- 30th June-1st July 2011: EASPD organised a conference under the title *"Old? So what? Independent Living for Seniors with Disabilities"* bringing together stakeholders and experts from all over Europe to discuss independent living and individualized support in the mainstream services for elderly persons with disabilities.

- 3rd-4th October 2011 EASPD organized a closed seminar on the theme of deinstitutionalization in Western European countries. The seminar has been organized in cooperation with KVPS (the Service Foundation for Persons with Intellectual Disabilities) and was sponsored by Ray, Finland.

- 9th-10th November 2011: EASPD held in Brussels the final conference of the project *ImPaCT in Europe "Connect, Personalise, Care: Person Centred Technology for Greater Quality of Life",* bringing together key stakeholders from across Europe to demonstrate how assistive technology can significantly support independence for people with disabilities in a person-centred way.

- 9th November 2011: EASPD celebrated its 15th anniversary by inviting members and friends to the European Parliament and renewing its commitment to the UNCRPD.

- During 2011 EASPD organised Provider Fora in Bulgaria, Estonia, Poland, Romania, Slovakia and Slovenia. In all these, the UNCRPD was presented to stakeholders and service providers. Specific Articles of the Convention, particularly within the fields of employment, education and independent living, were explored further.

EASPD has been involved in a number of *projects* during 2011. Amongst them are ImPaCT in Europe which finished the 31st of December 2011, and Pathway to Inclusion:

- ImPaCT in Europe was a two-year project which aimed to "accelerate the effective participation of target groups at risk of exclusion and improving their quality of life" by facilitating the development and implementation of PCT, stimulating the effective use of ICT-enabled services and competence building of the end users of PCT.
- EASPD is the promoter of the "Pathway to Inclusion" project to develop a sustainable network of all those committed to inclusive education.
- EASPD is partner of the project *INCLUSION – GALILEO* consortium, focusing on accessible solutions for people with limited mobility. The project will develop a satellite navigation system that will empower wheelchair users.

Member organizations' events and activities for the implementation of the UNCRPD
EASPD is a European network of service providers for persons with disabilities and has a great number of members across Europe. In 2011 these members have supported the implementation of the UNCRPD through numerous activities. Common for the service

provider organizations is that the UNCRPD is used as a guideline in their daily work providing services for persons with disabilities.

In cooperation with its members BAG:WfbM (Bundesarbeitsgemeinschaft Werkstätten für Behinderte Menschen) and Unapei (Union Nationale Des Associations De Parents et Amis de Personnes Handicapées Mentales), in 2011 EASPD has worked on the report ”Analysis of the legal meaning of Article 27 of the UNCRPD”. The Report deals with the role of sheltered workshops in light of the UNCRPD.

The main work for organizations in countries where the UNCRPD has not yet been ratified has focused on lobbying activities towards governments for ratification. To better reach this objective, in 2011 EASPD enlarged its membership to the Turkish organisation Dolunay Association of Adult Disability.

In countries where the Convention has been ratified the organizations have worked on promoting a correct implementation as well as internal and external awareness raising activities. Unfortunately, only a few organizations have been asked for involvement in the NRP’s and few know the procedure of these.

Moreover EASPD developed a successful cooperation with AATE, the Association for the Advancement of Assistive Technology in Europe.

The European Platform for Rehabilitation (EPR) has undertaken a number of actions throughout 2011 that contribute to the implementation of the UN Convention on the rights of persons with disabilities (UNCRPD). EPR and its members have proactively engaged into the process of internalising the requirements and implications of the UN Convention in the delivery of services to persons with disabilities. At several occasions, the most relevant stakeholders at European and/or national level were involved in the discussions. EPR members are leading service providers to people with disabilities throughout Europe, and have undertaken actions to promote and implement the UNCRPD in practice.

- 2 March 2011: EPR organised in collaboration with Mrs. Frieda Brepoels, Member of the European Parliament, a Dinner Debate on ‘the cross-border dimension of health and social services’. The rights of people with disabilities as well as a guarantee to quality of services were the starting points for the various speeches and discussions.

- EPR drafted an analytical paper on the EU Disability Strategy 2010 – 2020. Most emphasis was put on the implementation of the UNCRPD, and its implications for service providers in the domains of health, education, long term care, independent living, employment and rehabilitation.

- 16-17 June 2011: EPR organised a strategic workshop for directors on ‘leadership in the rehabilitation sector’. The session highlighted different articles in the UN Convention, and looked into how directors and managers in the sector should use the Convention as overall guideline of their strategy and leadership.

- In the field of *Living independently and being included in the community* (Article 19), EPR promoted the International Classification of Functioning, Disability and Health (ICF) as a way to enhance a person’s functioning and maximize participation in society in

general and in community in particular. EPR organized a benchmarking group (5-6 May in Hasselt) on the implementation of ICF within organizations from Germany, Portugal, Slovenia, the Netherlands and Belgium.

- During a two day training seminar (hosted by INTRAS in Valladolid on 21-22 September), professionals reflected on the growing need for specialised services throughout Europe to assist people with mental health problems.

- In 2011 the EPR Annual Conference was dedicated to 'reintegration of young people with disabilities'. With a very high attendance of nearly 150 participants, this event – hosted by EPR Greek members in Athens - had a big impact on sharing experiences between rehabilitation professionals on the implementation of the UN Convention in this domain.

- Under the strand 'accessibility', the EPR organised as partner of the AEGIS project a final conference entitled "Accessibility Reaching Everywhere" (28 to 30 November in Brussels). The aim was to bring together people with disabilities as well as platform and application accessibility developers, representative organisations, the Assistive Technology industry, and policy makers.

3. ACCESSIBILITY LEGISLATION, REGULATIONS AND STANDARDS IMPLEMENTING ARTICLE 9 UNCRPD

Austria

The Austrian law contains no uniform competency regulation concerning disability. This is what is known as an overlap area. There are also several federal and regional laws containing legal rulings regarding accessibility which are of significance to persons with disabilities.

a. Accessibility legislation: its place in the legal and regulatory framework

On 6 July 2005 the Austrian Parliament adopted a disability equality package, including the Federal Disability Equality Act as well as Amendments to the Disability Employment Act and to the Federal Disability Act (in force since 1 January 2006). This anti-discrimination package offered for the first time enforceable protection against discrimination of people with disabilities and enshrines legal consequences if the prohibition of discrimination is violated (financial compensation).

One of the key elements of the Federal Disability Equality Act is the legal prohibition of discrimination on grounds of disability. If services, products, infrastructures, buildings or transport facilities/systems are not accessible, this may cause discrimination prohibited by law and can lead to financial compensation (for details see Chapter 1.9, 7 and 8 of "the Government Report on the Situation of People with Disabilities in Austria 2008, www.bmask.gv.at).

The Austrian construction law falls into the legal competence of the nine Länder, which are the regional authorities. Until now it was not possible to harmonize this regional law in the field of technical regulations which could bring a higher standard of accessibility all over Austria. In Austria there is quite a numerous range of standard regulations concerning barrier-free buildings and accessibility. These so called ÖNORMEN (Austrian Standards) are very important for people with disabilities because they give an answer to technical aspects (what has to be done in a concrete situation). Often they are part of a legal act and – in that case – are legally binding.

The Advisory council for architectural culture („Baukulturbeirat"), which is a task force of qualified architects and representatives of all federal ministries, published in June 2011 the recommendation „Barrier-free Construction – Design for all" (www.bka.gv.at/site/6992/default.aspx).

b. General law, technical regulations and standards

Please see points e. and c.

c. Role of national, European and international standards

The Austrian Standards Institute (www.as-institute.at/en) works out – in cooperation with disability experts – standards in the field of technical requirements on accessibility for people with disabilities. Observance of the Austrian standard „ÖNORM B 1600" (Standardisation principles on barrier-free construction and design) has become mandatory for erecting new buildings of the federal administration and, among other things, also for the adaptation of transport facilities of the Austrian Federal Railways to suit the needs of disabled people. Other „ÖNORMEN" apply to educational and training institutions, basic principles for planning special facilities for disabled or older people as well as barrier-free tourist facilities, technical aids, mobile wheelchair lifts, acoustic signals, tactile and visual platform paving and toilet facilities for people with disabilities. See the following list of outputs and publications, a rather complete list of Austrian Accessibility Standards:

- ÖNORM B 1600 „Barrierefreies Bauen – Planungsgrundlagen" („Barrier-free construction – Design principles");

- ÖNORM B 1601 „Spezielle Baulichkeiten für behinderte oder alte Menschen – Planungsgrundsätze" („Special buildings for disabled or elderly people – Design principles");

- ÖNORM B 1602 „Barrierefreie Schul- und Ausbildungsstätten und Begleiteinrichtungen" („Barrier-free schools and training centers and institutions associated");

- ÖNORM B 1603 „Barrierefreie Tourismuseinrichtungen – Planungsgrundlagen" („Barrier-free tourism institutions – Design principles");

- ÖNORM B 4970 „Anlagen für den öffentlichen Personennahverkehr – Planung" („Facilities for short distance public transport – Design");

- ÖNORM B 5410 „Sanitärräume im Wohnbereich – Planungsgrundlagen" („Sanitary facilities in residential areas – Design principles")

- ÖNORM EN 81-1 „Sicherheitsregeln für die Konstruktion und den Einbau von Aufzügen – Teil 1: Elektrisch betriebene Personen- und Lastenaufzüge" („Safety rules for the construction and installation of lifts – Part 1: Electric passenger and freight elevators");

- ÖNORM EN 81-2 „Sicherheitsregeln für die Konstruktion und den Einbau von Aufzügen – Teil 2: Hydraulisch betriebene Personen- und Lastenaufzüge" („Safety rules for the construction and installation of lifts – Part 2: Hydraulic lifts and hoists");

- ÖNORM EN 81-40 „Sicherheitsregeln für die Konstruktion und den Einbau von Aufzügen – Spezielle Aufzüge für den Personen- und Gütertransport – Teil 40: Treppenschrägaufzüge und Plattformaufzüge mit geneigter Fahrbahn für Personen mit Behinderung" („Safety rules for the construction and installation of lifts - Special lifts for the movement of people and goods – Part 40: Stairlifts and inclined platform lifts with inclined roadway for people with disabilities");

- ÖNORM EN 81-41 „Sicherheitsregeln für die Konstruktion und den Einbau von Aufzügen – Spezielle Aufzüge für den Personen- und Gütertransport – Teil 41: Vertikale Plattformaufzüge für Behinderte" („Safety rules for the construction and installation of lifts – Special lifts for the movement of people and goods - Part 41: Vertical platform lifts for disabled people");

- ÖNORM EN 81-72 „Sicherheitsregeln für die Konstruktion und den Einbau von Aufzügen – Besondere Anwendungen für Personen- und Lastenaufzüge – Teil 72: Feuerwehraufzüge" („Safety rules for the construction and installation of lifts – Particular applications for passengers and goods lifts – Part 72: Firefighters lifts");

- ÖNORM V 2104 „Technische Hilfen für blinde, sehbehinderte und mobilitätsbehinderte Menschen – Baustellen- und Gefahrenbereichsabsicherungen“ („Technical aids for blind, visually impaired and physically disabled people – construction and hazardous area hedges “);

- ISO 21542 „Building construction – Accessibility and usability of the built environment“.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

In Austria the implementation of the UN Convention has not directly led to changes in accessibility legislation/regulation. However the public awareness about accessibility has increased because of the UNCRPD.

In January 2012 the Federal Ministry of Labour, Social Affairs and Consumer Protection presented the draft of a new National Disability Action Plan 2012-2020. This plan includes reference to accessibility with an own comprehensive chapter.

e. Services regulated for accessibility

Principally all private services are regulated for accessibility in Austria: if they are offered in public, all consumer transactions and the acts of the federal public administration are regulated by the disability equality law. This is the case for website providers, restaurant owners, food discounters, transport providers, federal ministries, public institutions, social insurance institutions, hospitals, medical services, private insurance companies and so on.

For instance the Austrian E-Government Act requires that all public websites must be barrier-free and accessible. With that it is necessary to publish also easy-to-read versions and sign language.

f. Goods regulated for accessibility as part of a service

The relevant Federal Disability Equality Act does not state technical provisions on the accessibility of goods.

g. Goods regulated for accessibility

Please see points e. and f.

h. Enforcement of accessibility legislation

According to the Federal Disability Equality Act a person who feels discriminated can – after passing a mandatory conciliation procedure – enforce damages by court when the discrimination is based on a lack of accessibility.

i. Non-compliance and litigation

The core element of protection against disability discrimination is the possibility to get a compensation of the material or immaterial damage suffered. The assertion of claims in court has to be preceded, however, by obligatory conciliation proceedings at the Federal Social Office (a body of the Federal Ministry of Labour, Social Affairs and Consumer Protection). Taking legal action without an attempt at conciliation is inadmissible. The deadlines for the

assertion of claims due to discrimination are extended by the duration of the conciliation process. The purpose of conciliation is to promote an out-of-court settlement. This is intended to avoid long and possibly expensive court cases. The option of free mediation by independent mediators is available within the framework of this conciliation procedure.

An easing of the burden of proof (rules on evidence which have a similar effect to a reversal of the burden of proof) applies to court cases. In the case of important and lasting harm to the general interests of the group of persons protected by the disability equality law, the umbrella body of the Austrian disability organisations (Österreichische Arbeitsgemeinschaft für Rehabilitation – ÖAR, a member of EDF) can initiate a class action on the basis of a recommendation by the Federal Disability Advisory Board.

Since the coming into force of the Federal Disability Equality Act 2006 until the end of 2011 there have been more than 1.000 conciliation procedures in Austria.

The Federal Disability Ombudsman, which was introduced in 2006 in combination with the disability equality law, is an independent body. It has the task of advising and supporting people with disabilities in cases of discrimination as well as raising public awareness of problems in equality or accessibility issues.

Belgium

In Belgium, accessibility falls mainly within the competence of the federate entities. Any refusal to implement the reasonable accommodation for a person with disability is a form of discrimination in various legislations. The equality of treatment of persons with disabilities and the protection against discrimination are established in the Belgian Constitution (articles 10 and 11) and the laws made by the different levels of power.

a. Accessibility legislation: its place in the legal and regulatory framework

At the federal level, the anti-discrimination legislation is being implemented in the three anti-discrimination laws of the 10th of May 2007 tending to combat certain forms of discriminations:

- the general law anti-discrimination;
- the anti-racism law;
- the law on gender.

Article 9 of the law of 10 May 2007 refers to the combat against certain forms of discriminations and stipulates that any indirect distinction based on one of the protected criteria constitutes indirect discrimination unless, in the event of indirect distinction on the basis of a disability, it is shown that no reasonable accommodation can be set up. Reasonable accommodation are appropriate measures, taken according to requirements in a concrete situation, to make it possible for a disabled person to reach, to take part and progress in the fields for which this law is in force, except if these measures impose with regard to the person who has to adopt them a disproportionate charge. This charge is not disproportionate when it is compensated adequately by measures existing within the framework of the followed public policy concerning disabled persons.

For further information on the measures implemented by the federal government concerning the accessibility of transport (railway, aviation, and maritime transport) see the Belgian report on the UNCRPD.[46]

Flemish Region

- *The Flemish Urbanisation Regulation concerning the accessibility of public buildings of June 5th 2009 (in effect since March 1st 2010).*

[46] Article 9 : « Des mesures d'accessibilité relatives au droit à la mobilité personnelle des personnes handicapées sont stipulées dans les contrats de gestion entre l'Etat fédéral et les trois sociétés du Groupe **SNCB**. Celles-ci s'engagent de garantir un accès équitable et non discriminatoire au transport ferroviaire et d'assurer l'utilisation optimale de celui-ci. Ces mesures comprennent notamment celles relatives à l'accessibilité par ascenseurs, rampes ou dispositifs équivalents d'un ensemble de gares. En matière de **transport aérien**, le règlement (CE) N°1107/2006 du Parlement européen et du Conseil du 5 juillet 2006 concernant les droits des personnes handicapées et des personnes à mobilité réduite lorsqu'elles font des voyages aériens a été transposé dans la loi belge et établit des règles relatives à la protection et à l'assistance en faveur des personnes handicapées et des personnes à mobilité réduite. Quant au droit **maritime et fluvial belge**, il prévoit que les personnes handicapées ou à mobilité réduite jouissent d'un traitement non discriminatoire et de la fourniture gratuite d'une assistance spécialisée à leur intention, tant dans les terminaux portuaires qu'à bord des navires, ainsi qu'un dédommagement financier en cas de perte ou de dégradation de leur équipement de mobilité. »

This regulation replaces the federal law of 1975 and is a section of the framework decree on the built environment. It requires that the rules on accessibility are integrated in the procedures to obtain a building permit or urban authorization and non-compliance with these rules entails the refusal of the building permit. The Regulation applies to all building and/or renovating activities on publicly accessible constructions or parts thereof and when a building permit is required for the activity or a reporting duty exists.

The rules apply to new buildings, rebuilding, renovations or annexations of public buildings of public parts of buildings. Existing buildings are free of additional modifications as long as no changes are foreseen requiring a building permit. The legislation also foresees a compulsory advisory mechanism that will be implemented during 2012. To ensure a better congruity with common building practice, the regulation was slightly adapted in 2011.

- *The Decree holding the framework for the Flemish equal opportunities and equal treatment policy (July 10th 2008).*

This decree outlines the principles of the Flemish non-discrimination policy. It prohibits discrimination based on disability (among 18 other grounds), but also qualifies that the refusal of reasonable accommodations can be construed as discrimination.

In Flanders, several complementary measures were set in place to ensure a correct implementation of the accessibility legislation:

- distribution of a short brochure within the building and public sector
- organisation of trainings for architects and civil servants working in urbanisation
- the website www.toegankelijkgebouw.be contains the Flemish manual on accessibility.
- 'wenkenbladen': These shortlists provide concrete and specific tips on how to enhance the accessibility of buildings and services. Some examples of 'wenkenbladen' are: banks, libraries, hotels, cultural centres, parks, playgrounds, swimming pools, sidewalks etc.

The Flemish government also carries out general information and awareness-raising campaigns:

- The campaign 'Accessible Flanders': this campaign wants to raise awareness of accessibility of public buildings. The website www.toevla.be contains information regarding the accessibility both of buildings, premises and tourist facilities such as town and city halls, schools, hotels, museums, socio-cultural centres, sports centres, cycle paths, footpaths and other tourist facilities.
- Accessible events: 'Intro vzw' provides tailor-made advice for events (music festivals, sport manifestations, etc) and support in the practical build-up of the event. In cooperation with volunteers and specialised organizations they also provides services such as personal assistance, feeling chairs, "ringleiding" (type of hearing aid), etc.
- Information point Accessible Travels: at this agency and on the website www.accessinfo.be (in 4 languages) travellers can find reliable information on and propositions of accessible holidays.

Région Wallonne

Any form of direct or indirect discrimination on the basis of disability is prohibited by the Walloon Government's Decree of the 6th of November 2008, relating to the fight against

certain forms of discrimination (later completed by the Decree of March 19, 2009).[47] It stipulates, in its Article 13, that reasonable accommodations have to be carried out in order to guarantee the respect of the principle of equal treatment with regard to disabled persons.

Since February 1999, the Walloon code of Regional planning, of Town planning and of the Inheritance (CWATUP) also fixed, in Articles 414 and 415, a series of rules relating to the accessibility of persons with mobility reduced to spaces and buildings or parts of buildings open to the public or for collective use.

By the "*Code wallon de l'Action sociale et de la Santé*", of the 21st December 2011, the Walloon Government takes care to ensure the full and complete participation of disabled persons in social and economic life, some are the origin, nature or the degree of their disability. The Walloon Government also provides for the implementation of such programmes to « *rendre accessibles aux personnes handicapées les établissements et installations destinés au public, les lieux d'éducation, de formation et de travail ainsi que la voirie »*' (article 268). Furthermore, the "*Code wallon de l'Action sociale et de la Santé*" stipulates that disabled persons accompanied by assistance dogs are admitted everywhere except in places that have received an exemption from the authority.

By its decree of 4 February 2004, the Walloon Government laid down the conditions and the procedures of intervention of material aid to disabled persons' integration.

In concrete terms, the Walloon Agency for disabled persons' Integration (AWIPH) grants interventions for individual requests for installation of the residence and of the post and for technical aid encouraging the social and professional integration of disabled persons.

Disabled persons accompanied by assistance dogs are admitted everywhere except in the places having received an exemption from the authority[48].

Various associations published booklets and guides concerning the accessibility the majority of which received financial support from the Ministry of social Affairs and from the Health of the Walloon Region.[49] Moreover, the ASBL ANLH carries out a database on technical aid (Access AT: www.accesat.be)

Lastly, the AWIPH support of the initiatives intended to disseminate information on technical aid. Disabled persons can obtain this information while applying to the Regional office close to their residence but also to the CICAT (Coordination of Information and Councils in technical Aid).

---

[47] Ce décret se base notamment sur les principes établis dans la directive européenne 2000/78/CE portant sur la création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail.

[48] Livre IV du Code wallon de l'Action sociale et de la Santé – volet decrétal

[49] As examples of publications:

- The event accessible by the ASBL Year 2000
- Tourism in Belgium for persons with mobility reduced by the Touring Club (2002)
- The dimension accessible by the architecture school of Cambre (March 2004)
- Accessibility by the cabinet of the Minister for social Affairs and of the Health of the Walloon Region
- Gardens accessible to persons with mobility reduced by the ASBL Nature and Progress (2004)
- Booklet of information on accessibility for the attention of the elected representatives, for the attention of the architects and for the attention of the contractors by the Cabinet of the Minister for social Affairs and of the Health of the Walloon Region (March 2004)
- Reference frame on accessibility by the (CAWAB) Collective Accessibilité Wallonnie Brussels comprising 21 associations representative of disabled persons.

The CICAT and regional offices work closely with resource and evaluation centres specializing in technical aids, so that disabled persons can make an informed choice based on their needs as well as offers available on the market.

German-speaking Community

There are two legal bases in the German-speaking community (both are currently under revision):

a. *Erlass der Regierung vom 12. Juli 2007 zur Festlegung der Bestimmungen zur behindertengerechten Gestaltung von bezuschussten Infrastrukturen* (Government Order of 12 July 2007 laying down the legal provisions governing facilities for the disabled in subsidised infrastructures): Since the effective date of the Order (2 December 2007), all projects covered by the Order must meet the technical requirements relating to facilities for the disabled if they are to be eligible for subsidies from the German-speaking Community.
b. *Dekret vom 19. März 2012 zur Bekämpfung bestimmter Formen von Diskriminierung* (Decree of 19 March 2012 for combating certain Forms of Discrimination): the Decree is intended to implement various European directives in the German-speaking Community. It goes beyond the requirements of the EU directives in that it follows federal Belgium legislation by including additional aspects of discrimination in its definition of discrimination and defining both direct and indirect discrimination.

The following guidelines are also available:

1. The DPB has prepared a set of guidelines, *Zugänglichkeit zum Wahlbüro!* (Access to the polling station), which uses text, drawings and photographs to describe requirements for parking spaces, access ways and polling booths.
2. Another set of guidelines is called *Praktischer Leitfaden für Ausrichter von öffentlichen Veranstaltungen* (Practical guidelines for organisers of public events), using drawings, photographs and text to explain how to make events accessible.
3. The *Eurecard-Label* is a service card that provides proof of a disabled person's entitlement to the cross-border use of services and concessions in the tourism, culture and sports sectors
4. The *Eurewelcome-Label* confirms accessibility in the sense of making visitors feel welcome (adopting a respectful, obliging and helpful attitude to all visitors, with or without special needs) and encourages greater accessibility through the voluntary reduction of physical barriers as an official label recognising the social benefits of a service as part of brand image.
5. The DPB published on its website detailed information on the accessibility of buildings and public events. This is a guideline for architects and event organisers on how to be accessible for an as large as possible group of people and in particular for people with disabilities.

In addition, the German-speaking Community also provides training in accessible construction for architects and their clients and craftspersons. The *Dienststelle für Personen mit Behinderung* (Office for People with Disabilities) inspects infrastructure projects to determine their accessibility.Continual efforts are also being made to raise awareness among private developers.

Brussels-Capital Region:
La Région de Bruxelles-Capitale a mis en place un coordinateur régional en matière d'accessibilité globale dans la cellule égalité des chances et la diversité du ministère de la région de Bruxelles-capitale. Ce coordinateur conseil le gouvernement bruxellois et doit développer un plan d'action sur l'accessibilité globale (avec un budget de 50 000 euros). Il travaille en collaboration avec une plate-forme qui regroupe un grand nombre d'acteurs concernés (autorités publiques, associations, …) et qui a pour tâche de relayer les informations en la matière et de coordonner les actions nécessaires.

b. General law, technical regulations and standards

Flemish Region

The requirements are found in the Flemish Urbanisation Regulation. This however only provides norms for those elements that can be read on a building plan (for e.g. height and width of doors, not the visual markings). The additional handbook however contains additional options and/or improvements (in order to go beyond what is legally required).

Walloon region

The requirements are found in the Walloon Code of Regional planning and heritage (CWATUPE, articles 414 and 415).

c. Role of national, European and international standards

Flemish Region

Accessibility legislation in the Flemish Region makes use of CEN, EN and BIN (Belgian norms) standards.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Flemish Region

No changes were made to the equality and antidiscrimination legislation.

The ratification however did inspire the equality mainstreaming policy; in the framework of objectives for disability mainstreaming (created via the open method of coordination) 2 important generic objectives were included:

1. the existing legislation will be examined on its conformity with the UN Convention on the Rights of Persons with Disabilities;
2. the impact of the UN Convention on the Rights of Persons with Disabilities will be examined for every policy domain within the Flemish Government.

This framework of objectives will be evaluated at the end of 2014, and will hopefully foster legislative and/or policy changes where necessary.

Région Wallonne

La Ministre de la Santé, de l'Action sociale et de l'Egalité des chances a été chargée par le Gouvernement wallon de réaliser un screening de la législation et de la réglementation wallonnes afin de vérifier que ces normes sont compatibles avec la Convention relative aux droits des personnes handicapées, adoptés à New York le 13 décembre 2006 et, le cas échéant, de procéder aux adaptations nécessaires comme le prévoit l'article 4 de ladite convention.

German-speaking Community

At the moment, the Government Order of the German-speaking Community dating 12 July 2007 is under revision in order to better meet the provisions of the UN Convention of the Right of Persons with Disabilities. The Parliament of the German-speaking Community has approved a decree to combat certain forms of discrimination. It prohibits discrimination based on disability (among several other reasons), but also defines the refusal of reasonable accommodations as a form of discrimination.

e. Services regulated for accessibility

Etat fédéral

Banques

Ces dernières années, les banques ont pris des mesures afin de rendre leurs services plus accessibles aux personnes handicapées :

Mesures pour les malvoyants

Pour les personnes ayant des problèmes de vue, des extraits de compte en braille sont prévus par plusieurs banques. Ensuite, certaines institutions ont adapté leurs systèmes de PC banking aux personnes malvoyantes, et proposent une application qui permet de relier le système de PC banking à un logiciel sonore spécial et des lecteurs de cartes vocaux adaptés. Cette application permet aussi d'agrandir les caractères se trouvant à l'écran.

Fin 2011 l'une de ces institutions a mis à la disposition de ses clients quelque 800 guichets automatiques avec accompagnement vocal pour les retraits d'argent. Ces guichets sont adaptés pour les clients ayant des problèmes de vue et qui ne peuvent donc utiliser les écrans tactiles. Les appareils dotés d'une technologie vocale sont reconnaissables à leur autocollant en braille.

Accessibilité des bâtiments

La législation régionale existante en la matière vise à améliorer l'accès des personnes à mobilité réduite aux bâtiments accessibles au public. Elle s'applique tant aux nouvelles constructions qu'aux rénovations nécessitant un permis d'urbanisme. L'obtention de celui-ci dépend du respect des dispositions de la législation en vigueur. Ainsi, un nouveau comptoir d'accueil doit comporter au moins une partie modulaire accessible à tous. Un espace doit être dégagé de part et d'autre du comptoir. Par ailleurs, une partie de celui-ci doit être plus basse.

De leur côté, de nombreux guichets automatiques respectent les normes ADA (Americans with Disabilities Act), lesquelles permettent une meilleure accessibilité de ces guichets aux

moins valides. Ces normes ont notamment trait à la hauteur du clavier et de l'écran des appareils. Elles sont prises en compte lors de la construction des guichets automatiques.

Chemins de fer

Conformément au contrat de gestion de la Société nationale des Chemins de fer belge (SNCB), la politique d'accessibilité est élaborée en concertation avec le Conseil supérieur national des personnes handicapées (CSNPH). Le CSNPH est le seul interlocuteur agréé en la matière. Le CSNPH mène un travail de fond afin d'amener la SNCB à rendre accessible son réseau et ses services. Il s'agit d'un "travail de fourmis" dont les aspects concrets sont discutés au sein d'un groupe de travail commun à la SNCB et au CSNPH

Aéroports

Au niveau des déplacements aériens, Brussels International Airport (BIA) relève de la compétence fédérale. Le Conseil Supérieur National des Personnes Handicapées (CSNPH) a profité de l'entrée en vigueur de la directive européenne EU1107 pour commencer à participer au groupe de travail Personnes à Mobilité Réduite, mis en place par BIA.

Flemish Region

The Flemish Urbanisation Regulation does not regulate services as such, only the accessibility of public buildings. There is however a subsidization regulation in vigour in certain policy domains within the Flemish government that has a specific focus on accessibility. For example, touristic facilities can receive governmental funding only when they comply with the accessibility norms. Another example exists in elderly care. Elderly homes can get a specific accreditation when in compliance with accessibility norms. This accreditation is however not compulsory.

Région Wallonne

Le gouvernement wallon prévoit la mise en œuvre des programmes visant notamment à '*rendre accessibles aux personnes handicapées les établissements et installations destinés au public, les lieux d'éducation, de formation et de travail ainsi que la voirie*' (article 8 du décret du 06 avril 1995 relatif à l'intégration des personnes handicapées).

L'Agence wallonne pour l'intégration des personnes handicapées (AWIPH) a mis en place un programme d'initiatives spécifiques destiné au financement de projets développés par des services experts en matière d'accessibilité et de mobilité. Ce programme a notamment pour objectif l'information, la sensibilisation et la promotion de l'accessibilité et de la mobilité auprès du grand public, des architectes, de la société civile, des entreprises, des hommes de métier et des autorités publiques.

Par ailleurs, ce sont les articles 414 et 415 du CWATUPE[50] qui définissent la liste des lieux soumis à la réglementation en faveur de l'accessibilité en Wallonie.

[50] http://dgo4.spw.wallonie.be/DGATLP/DGATLP/pages/DGATLP/Dwnld/CWATUPE.pdf

f. Goods regulated for accessibility as part of a service

Flemish Region

There is no regulation on accessibility of goods at the level of the Flemish Region.

Région Wallonne

Pour l'accessibilité aux bâtiments se référer à la question e.

Pour favoriser le degré d'accessibilité des média, depuis 2002, le gouvernement wallon s'est engagé à rendre la majorité des sites Web de la Région wallonne accessibles aux personnes déficientes visuelles. La mise en œuvre de cette politique a été intégrée en 2005 dans le volet wallon du Plan national de lutte contre la fracture numérique. On compte, pour l'instant, 27 sites symbolisés par le label « *AnySurfer* » ou « *BlindSurfer* ».

En matière de transports publics, le contrat de gestion 2005-2010 conclu entre la Région wallonne, la Société Régionale Wallonne du Transport (SRWT) et la Société de Transport en commun (TEC) prévoit, en termes d'objectifs spécifiques, la généralisation progressive des bus à plancher surbaissé et les quais adaptés aux personnes à mobilité réduite.

Plus particulièrement, le groupe TEC s'est engagé à exécuter le plan de renouvellement du matériel roulant, adopté par le Conseil d'administration de la SRWT du 7 octobre 2004, en acquérant notamment systématiquement des bus répondant aux normes d'accessibilité optimale.

g. Goods regulated for accessibility

Flemish Region

There is no compulsory regulation for the accessibility of manufactured goods. However EU-norms (BIN, EN and CEN) are enforced on a voluntary basis – with the exception of elevators in publicly accessible buildings, which are required to comply with EU-norms.

The Flemish Regulation on accessibility of public buildings does however foresee norms for doors as well as for parking places.

The '*wenkenbladen*' (documents that provide concrete and specific tips on how to enhance the accessibility of buildings and services) can be a useful tool. Some examples of '*wenkenbladen*' are: banks, libraries, hotels, cultural centres, parks, playgrounds, swimming pools, sidewalks etc.

h. Enforcement of accessibility legislation

Flemish Region

The regulation enforces certain criteria to obtain a building permit. If the building plans do not comply with the legislation, the permit is not granted. If later on it is shown that these adaptations with regards to accessibility were not put in place, the general sanctions of

building violations apply. These can be a financial penalty, administrative sanctions or remedial actions (restore the original state (break down) or execute certain adaptations).

Région Wallonne

Pour porter plainte pour discrimination ou simplement pour s'informer, il est possible de s'adresser directement à l'un des 12 Espaces Wallonie[51] qui sont désormais compétents pour entendre et traiter les plaintes pour discriminations en apportant une information claire et directe.

L'AWIPH analyse les contrats de gestion des autres Organismes d'Intérêt Public (OIP) wallons en termes de prise en compte des besoins des personnes handicapées. C'est ainsi que depuis peu, l'AWIPH a relevé que le service public wallon de l'emploi et de la formation (FOREM) a édité sur son site Web une page spécifique « Travail et Handicap » ; l'entièreté du site a obtenu le label '*AnySurfer'*. L'Agence wallonne à l'exportation et aux investissements étrangers (AWEX) dispose notamment d'un immeuble totalement accessible et de mobiliers de bureau adaptés. Le Fonds du Logement des familles nombreuses de Wallonie (FLW) a également obtenu le label '*AnySurfer'* pour son site Web.

Le Port automne de Liège a été attentif à l'accessibilité de ses dernières acquisitions immobilières. Des actions sont également entreprises afin d'améliorer l'accessibilité du port de plaisance. Dans le cadre de l'organisation de réunions avec les riverains des sites dont elle a la charge, la Société publique d'aide à la qualité de l'environnement (SPAQUE) reste attentive à trouver des lieux de réunion accessible à tous. L'ensemble des locaux de la Société wallonne des aéroports (SOWAER) est accessible aux personnes à mobilité réduite.

Dans le cadre du programme «Destination 2015» proposé par le Commissariat général au Tourisme et Wallonie-Bruxelles Tourisme apparait une action spécifique intitulée "Tourisme pour tous - Accessibilité pour les PMR". Cette action comporte un double enjeu: clarifier les informations et rendre le secteur touristique davantage accessible.

Par ailleurs, L'AWIPH et la Commission Wallonne de la Personne Handicapée ont participé activement aux consultations officielles opérées en 2011 et en 2012 dans le cadre des révisions du CWATUPE (Code wallon de l'Aménagement du Territoire, de l'Urbanisme, du Patrimoine et de l'Energie) et du Code wallon du logement.

Enfin, dans le cadre du plan global d'égalité des chances approuvé par le Gouvernement wallon le 24 février 2011, il a été prévu de désigner des personnes de contact dans chacune des administrations pour veiller à la prise en compte des besoins des personnes en situation de handicap, notamment en matière d'accessibilité.

German-speaking Community

An examination regarding the fulfilment of the accessibility requirements is conducted by a jury before granting the project. The jury consists of a representative of the '*Dienststelle für Personen mit Behinderung'* (DPB) and an external expert, both designated by the

[51] http://www.wallonie.be/vlw/n-14-decembre/les-essentiels/vous-etes-discrimine-e.html

management board of the DPB. An additional member is a civil servant of the Ministry of German-speaking Community.

i. Non-compliance and litigation

Flemish Region

Non-compliance with accessibility or the lack of reasonable accommodation can be construed as a manifestation of discrimination before the court on the basis of the decree holding the framework for the Flemish equal opportunities and equal treatment policy of 10 July 2008.

Bulgaria

In December 2007 the Council of Ministers of the Republic of Bulgaria adopted a strategy on providing equal opportunities for people with disabilities 2008 – 2015, which is consistent with the European tendencies regarding equal treatment. The main goals of the strategy served as a basis for the drafting of an action plan on providing equal opportunities for people with disabilities 2008 – 2009, including planned activities in the fields of rehabilitation and social integration, persons in charge and deadlines for implementation.

One of the goals of the strategy and the action plan is the establishment of an environment, adapted to the needs of people with disabilities, which includes rendering public, residential buildings, outdoor areas and workplaces wheelchair-accessible, provision of accessible transport and accessible information and communications.

a. Accessibility legislation: its place in the legal and regulatory framework

There are legal provisions in the Integration of people with disability Act, Spatial Development Act and Protection against Discrimination Act. There are norms in the fields of: architectural environment, accessible transport, tourism, and information and communications.

The Protection Against Discrimination Act, in article 5, states that "Harassment on the grounds referred to in Article 4 (1)[52], sexual harassment, incitement to discrimination, persecution and racial segregation, as well as the building and maintenance of an architectural environment hampering the access to public places of people with disabilities shall be considered discrimination."

The rules on the provision of an accessible living and architectural environment are regulated in detail in the Integration of People with Disabilities Act. The above mentioned law contains a section with rules on the spatial development of urban territories for the population, including people with disabilities. It is an obligation of the Ministry of Regional Development and Public Works to create conditions for accessible living for disabled people. It is an obligation of the Transport Ministry to make transport services wheelchair-accessible. Auxiliary means, devices and facilities as well as medical products for people with disabilities are provided by the Social Assistance Agency. One of the obligations of the State Agency for Youth and Sports and the Ministry of Education and Science is to create, in cooperation with the municipalities, the sport federations and the sport clubs, conditions for social integration of people with disabilities. The Culture Ministry, in cooperation with the municipalities, is obliged to provide conditions for integrating disabled people in the area of culture. The municipalities, within their competence, are responsible for providing accessible living and architectural environment, while the Bulgarian National Television, the Bulgarian National Radio and the Bulgarian News Agency are obliged to provide information, accessible for people with disabilities.

In connection with the provision of labour conditions and civil service positions for people with disabilities, the Civil Servants Act stipulates that the appointment body shall provide

[52] Article 4 (1) - Any direct or indirect discrimination on grounds of gender, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, convictions, political affiliation, personal or social status, disability, age, sexual orientation, marital status, property status, or on any other grounds established by law or by an international treaty to which the Republic of Bulgaria is a party, shall be banned.

access for people with disabilities to the buildings, where the administration works, by overcoming the respective architectural and other barriers. Six test centres have been established in the country: in the cities of Sofia, Varna, Plovdiv, Bourgas, Veliko Turnovo and Montana. The tests are computer-based and are held in real time. Candidates with visual impairment sit for the exam in specially-equipped halls with screen reader and speech synthesizer while sign language interpretation is provided for people with hearing impairment and the test is held in wheelchair accessible halls.

b. General law, technical regulations and standards

There are requirements in legislation like the Integration of people with disabilities Act, the Spatial Development Act, the Ordinance for accessible architectural environment with clear standards and also the Protection against discrimination Act.

The main guidelines in the Republic of Bulgaria regarding the provision of physical access to public buildings and areas as well as to residential buildings are contained in Ordinance No. 4 on the Provision of Accessible Environment in Urban Territories.

c. Role of national, European and international standards

The Republic of Bulgaria has undertaken all necessary measures at national level for the implementation of Regulation (EC) No. 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when traveling by air as administrative and criminal liability is envisaged for the people having violated the requirements of the regulation. The Commission for the Protection of Competition monitors the fulfillments of the commitments of the tour operators and the tourist agents under Regulation (EC) No. 1107/2006 in its capacity of a national body in charge of the implementation of this regulation.

In air transport, there are effective requirements regarding airport infrastructure and multiple requirements for accessibility for people with disabilities are implemented at community and national level.

There are provisions for the implementation of Regulation (EO) N1371/2007of the European Union for rights and obligations of travelers.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The Republic of Bulgaria ratified the UN CRPD on 26 January 2012 and there is an expert group elaborating a biannual action plan for its implementation, which may include measures of legislative changes; these will be connected to accessibility to some extent. The draft action plan has to be finished in 6 months period.

e. Services regulated for accessibility

The Ordinance on Administrative Servicing contains a requirement under which the administrations shall provide convenient and easy access for people with disabilities to the administrative servicing unit by adapting service premises and the access to them. For example, the desks for administrative servicing at the head office of the Maritime Shipping Administration Executive Agency and the territorial units in the cities of Varna, Rousse, Bourgas and Lom have been made wheelchair accessible. A portal for blind people has been created within the official website of the Transport Ministry.

The Transport Ministry, within its competences, has drafted a special programme, Generally Accessible Transport, on the provision of wheelchair accessible transport. The programme is implemented through the Road Administration Executive Agency and the Railway Administration Executive Agency, in coordination with the Finance Ministry, as its main goal is providing greater access for people with disabilities to transport services. With a view to achieving the above goal, the losses upon intra and intercity carriage are covered under the national budget while carriers are compensated for free of charge travel and reduced fares for certain groups of citizens, including people with disabilities, within the executive budget.

f. Goods regulated for accessibility

There is Consumer Protection Act which regulates the protection of consumers, the powers of State bodies and the activity of consumer associations in this area. The purpose of this Act is to ensure protection of the fundamental consumer rights. There is a Commission for Consumer Protection which organizes National campaigns for safety of the products.

According to Article 168 on Medicinal Products in the Human Medicine Act the packaging of a medicinal product shall consist of immediate and/or outer packaging and of a patient brochure. When a medicinal product is allowed for use, its name on the outer packaging, the pharmaceutical form and the content of the active substance per dosing unit shall also be printed in Braille.

g. Enforcement of accessibility legislation

In the Protection against discrimination Act there is stated that a refusal to provide goods or services, as well as the provision of goods and services of a lower quality or on less favourable terms on the grounds referred to in Article 4 (1) shall not be allowed.

The Commission for Protection against Discrimination shall:
- ascertain violations of this or other Acts regulating equal treatment, the perpetrator of the violation and the aggrieved person;
- decree prevention and termination of the violation and restoration of the original situation;
- impose the sanctions envisaged and implement administrative enforcement measures;
- issue mandatory directions for compliance with this or other Acts regulating equal treatment and etc.

There are fines in many legislative pieces as it is stated for example in the Integration of people with disabilities Act etc. In the Protection against discrimination act measures are administrative.

h. Non-compliance and litigation

There is an Ombudsman Act which regulates the legal status, organization and activities of the Ombudsman. The Ombudsman shall intervene by the means provided for in this Act, when citizens' rights and freedoms have been violated by actions or omissions of the State and municipal authorities and the administrations thereof, as well as by the persons commissioned to provide public services.

Complaints and alerts to the Ombudsman may be submitted by natural persons, irrespective of

their citizenship, gender, political affiliation, or religious beliefs. Complaints and alerts may be written or oral, and may be submitted in person, by post or by other conventional means of communication.

Cyprus

a. Accessibility legislation: its place in the legal and regulatory framework

The rights of persons with disabilities for access to goods and services are protected in Cyprus by the general law "The Persons with Disabilities Law 2000-2007". In particular, under Article 6 of this law, unequal treatment of a person - based on disability and being unjustified - for the provision of goods, facilities and services is considered to be discrimination.

Apart from the above general law, the right of persons with disabilities to accessibility is also protected in specific national laws:

- Public Buildings: Regulation 61.H of the Construction of houses and roads legislation (1999) whereby all new buildings should be accessible to persons with disabilities. Responsible for the control of good implementation are the local authorities, by whom no building permit is issued unless is the plan abides by the regulation.
- Telecomunications: 2004 Law for the Regulation of Electronic Communications and Postal Services.
- Health Services: 2001 – 2006 Law for the Use of Medicines.
- Sea Transport Services: 2004 Law for Merchant Shipping.
- Elevator requirements: 2002 Law for Basic Requirements for Specific Goods.
- Television and Radio Information: 1998-2011 Law for Radio and Television Stations.
- Employment to the Wider Public Sector: 2009 Law for the Recruitment of Persons with Disabilities in the Wider Public Sector; 1988 Law for the Recruitment of Blind Trained Telephone Operators in the Public Sector.
- Public Education: The Law for Education and Training of Children with Special Needs 113(I)/1999 is the legislative framework which regulates all matters regarding the education of children with special educational needs (SEN) attending public schools. Children with disabilities are entitled to "free appropriate public education" along with students who are not disabled; the state is responsible for making education as well as schools accessible to them. There is also a 2006 Law for the Conduct of University Induction Examinations and the provision of reasonable adjustments.
- Social Protection: Various Laws for the provision of financial assistance, allowances, pensions etc.
- Public Procurement: 2006 Law for Public Contracts for Goods and Services.

b. General law, technical regulations and standards

As explained in point a., the general law "The Persons with Disabilities Law 2000-2007" provides (article 6) for general accessibility requirements regarding equal treatment of persons with disabilities in the fields of provision of goods and services. In article 7 it also states the requirement for compliance with the technical requirements for public transport as defined in specific law and regulations; Furthermore, in article 8, the Law provides for accessibility requirements in the fields of telecommunications and information.

A new legislation concerning the EU directive for safety in use and accessibility of the buildings is under process to be adopted. A Guide of about 80 pages for the "Safety in use and Accessibility" of the built environment is about to be issued, including technical regulation and technical standards. A special Annex is included, concerning schools, banks, hotels and

touristic settlements, restaurants and cafeterias, beaches. There is an annex concerning pavements and walkways.

c. Role of national, European and international standards

All national regulations developed keep up with the European standards. All projects financed through the Structural Funds are monitored and approved by the Accessibility Bureau of the Ministry of Communications and Works, so as to comply with the latest European accessibility requirements and an Accessibility Certificate is issued.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The ratification by the Republic of Cyprus of the UN Convention on the Rights of Persons with Disabilities has not yet led to any changes in accessibility legislation.

A new legislation concerning the protection of the parking places for Blue badge holders is under preparation. The legislation concerns all parking places both in public and private buildings and provides for a higher fine than the existing one.

In addition, the existing 1999 Regulation for Construction of houses and roads is under amendment process in order to be harmonised with the EU directive concerning the "safety in use and accessibility of buildings" which comprises very detailed accessibility requirements.

e. Services regulated for accessibility

- Public Health
- Public Education
- Employment
- Social Protection (financial assistance, pensions, allowances etc)
- Public buildings
- Public buses
- Airport services
- Sea transport services
- Hotels
- Telecommunications
- Television and Radio Information
- Public Procurement

f. Goods regulated for accessibility as part of a service

The Ministry of Education and Culture following the directive of the aforementioned legislation provides the following:

<u>Access to school buildings</u>

- Schools increase access for individual pupils by making 'reasonable adjustments'. For instance, lessons are held on the ground floor if one of the pupils uses a wheelchair and the school does not have a lift.
- Other changes to the physical environment that schools make to increase access include: lighting and paint schemes to help visually impaired children, lifts and

ramps to help physically impaired children, carpeting and acoustic tiling of classrooms to help hearing impaired pupils.

- The state provides transportation to all disabled children who do not attend neighbouring schools.
- In many cases the vehicles used for transportation have the relevant equipment to suit the child's needs.
- Assistants are also provided on school transport if needed.
- The Ministry of Education and Culture also provides schools with special equipment such as wheelchairs, walking aids etc. to be used by disabled children.

Access to the curriculum

1. The curriculum is made accessible with the use of assistive technology. Examples of technology that children with SEN use include: touch-screen computers, joysticks and trackerballs, easy-to-use keyboards, interactive whiteboards, text-to-speech software, Braille-translation software, software that connects words with pictures or symbols etc.
2. Information that is normally provided in writing (such as handouts, timetables and textbooks) is made more accessible by providing it in Braille, in large print, on audiotape, using a symbol system.
3. Lessons provide opportunities for all pupils to achieve and are responsive to pupil diversity.
4. Sign language interpreters are provided to deaf children who need it.
5. Teachers allow additional time to disabled pupils to finish an exam, or use equipment in practical work.
6. Teachers allow for the mental effort expended by some disabled pupils, for example using lip reading.
7. Home schooling by special educators or classroom teachers is also available if a child cannot go to school because of health problems.
8. School visits, are made accessible to all pupils irrespective of impairment.
9. Other adjustments that help children to have better access to the curriculum include: changes to teaching and learning arrangements, classroom organisation, timetabling and support from other pupils.

g. Goods regulated for accessibility

Buses, tactile pavement plaques, elevators, W.C. equipment, automatic doors, special ramps, parking areas, wheelchairs are regulated for accessibility.

h. Enforcement of accessibility legislation

The Technical Services of the Local Authorities are responsible for the control of good implementation of the Construction Regulations during application for construction licence procedure.
In the new regulation in process, of “safety in use and accessibility”, an accessibility statement in the form of detailed questionnaire concerning accessibility requirements would be necessary. This way the architects are informed and at the same time they are committed in applying accessibility in to their projects.

If there is a complaint about any misuse concerning accessibility, the local authority is responsible to restore it.

i. Non-compliance and litigation

Any citizen with disabilities can bring a case on non-compliance with accessibility provisions to court according to the general law "The Persons with Disabilities Law 2000-2007". Article 9 of the law provides that any person that without reasonable cause acts or fails to act in a manner which amounts to discrimination against a person with disabilities shall be guilty of an offence punishable with a fine up to €6.800 or with imprisonment not exceeding six months or with both sentences. In the case of a legal entity committing discrimination the fine can be up to €11.960.

Also, any persons with disabilities or an organisation representing persons with disabilities can bring a case of discrimination because of non compliance with accessibility provisions to the Office of the Ombudsman and Protection of Human Rights which can issue recommendations for corrective actions.

Czech Republic

a. Accessibility legislation: its place in the legal and regulatory framework

With the active cooperation of organisations of persons with disabilities, in the past fifteen years numerous laws have entered into force which have created a solid legislative framework to ensure accessibility and use not only for public buildings, but also transport infrastructure and vehicles intended for public transport.

In connection with the creation of a barrier-free environment, certain basic regulations are worth mentioning, in particular the Building Act[53] and its Implementing Decrees.

The Building Act features significant modifications compared to previous provisions; barrier-free solutions and usage of buildings are recognised to be in public interest. The Building and Construction Authority can, under the provisions of the Act, order the owner of the construction, building site or developed area to arrange for its barrier-free access and usage. In addition, only such products, materials and constructions may be used in the building which will enable the due usage of the building including its barrier-free usage if the building has been designed as such.

The Implementing Decree on Building Documentation [54] comprises conditions and requirements for clearly defined and controllable solutions of buildings in terms of barrier-free access and usage by persons with limited mobility and orientation, both in the text as well as drawings sections.

The Decree on General Land Use Requirements[55] determines conditions for designing public areas so as to allow their barrier-free usage.

The Decree on General Technical Requirements for Barrier-Free Usage of Constructions[56] specifies general technical requirements for buildings and their parts so as to ensure their usage by persons with mobility related, visual, hearing and mental disability, the elderly, pregnant women, and persons accompanying a child in a pram or a child under the age of three.

On 14 July 2004, the Czech Government adopted the Governmental Plan for Funding the National Development Programme Mobility for All[57]. This programme focuses on the elimination of barriers in transport and buildings intended for public usage implemented before the date of entry into force of the Building Act which imposed the duty of barrier-free access.

The programme aims to create continuous and coherent barrier-free access routes in cities and municipalities so as to improve the accessibility of transport and buildings for persons with disabilities. In the programme, an invitation to submit plans for barrier-free access routes is announced twice a year. The plans are discussed and assessed by the Steering Committee and Assessment Committee of the programme. In its meetings, the Steering Committee, consisting

[53] Act No. 183/2006 Coll., on Special Planning and Building Code, as amended.
[54] Decree No. 499/2006 Coll., on Building Documentation.
[55] Decree No.501/2006 Coll., on General Land Use Requirements.
[56] Decree No. 398/2009 Coll., on General Technical Requirements for Barrier-Free Usage of Constructions.
[57] Resolution of the Government of the Czech Republic of 14 July 2004 No. 706.

of representatives of each department, deals not only with the evaluation of plans but also with issues of the concept, promotion and funding of the whole programme.

For the section of the Ministry of Culture, an obligation results from the Resolution to provide funding of investment undertakings in 2009 - 2015 leading to the elimination of barriers in the buildings of cultural facilities, i.e. in the buildings of museums, art galleries, theatres, cinemas, etc. amounting to approximately CZK 10 million annually.

The promotion of accessibility of cultural services for persons with disabilities is regarded a priority even in the fundamental strategic document for libraries, the Library Development Concept 2004 – 2010. The measures are implemented both in form of the continuous funding of the Library and Printing Office for the Blind K. E. Macana, a contributory institution of the Ministry of Culture, and by announcing grant tenders.

The scope of activity of the Ministry of Regional Development includes the programme "Barrier-Free Municipalities" whose purpose is to provide state support to investment and non-investment plans concerning the elimination of barriers in the buildings of urban and municipal authorities and in the social care facilities incorporated in the all-embracing chains of barrier-free routes in municipalities and cities. The state support is a system of investment or non-investment subsidies covering up to 50 % of the actually incurred costs of the undertaking in the relevant year. The following activities are referred to in particular:

- elimination of barriers in entrances and exits of buildings,
- elimination of barriers inside buildings,
- barrier-free adjustments of sanitary and social facilities in public premises,
- acquisition and application of lifting and transport technologies and systems.

In conformity with the conditions leading to the elimination of barriers to accessibility for persons with disabilities, police stations and additional premises used by the Czech Police have been subjected to gradual adjustments as well. Older premises of the district departments of the Czech Police which have not been adjusted yet are equipped with button signalling for persons with limited mobility and orientation leading to the office of the supervisor or security guard.

While renovating premises such as the previously and newly established contact and coordination centres, barrier-free entrances are built and parking space provided. In the existing premises, entrance doors are being adjusted, additional entrance platforms installed where the construction allows, and entrances for persons with disabilities are signed accordingly.

Premises of service rooms must be adjusted for internal communication, including the appropriate equipment for contact with persons with disabilities. Moreover, the venues designed for imparting information to the public must be equipped, besides other things, with induction loop system and signed with the international symbol of hearing disability.

Within the administration of the Ministry of Industry and Trade, legislative regulations were issued in recent years to institutionalize testing of aids and devices, and certification of selected products for buildings and constructions.

Regarding transport structures, the principle of non-discrimination focuses mainly on accessibility of transport routes for passengers with limited mobility and orientation. Solutions of all constructions in terms of their barrier-free accessibility and usage are contained in Implementing Decrees to the Building Act[58]. Issues of the barrier-free usage have also been incorporated in technical standards: ČSN 73 6110 Design of Local Communications (2006), ČSN 73 6425 Bus, Trolleybus and Tram Stops, Part 1: Design of Stops (2007).

The Ministry of Transport has participated actively in the preparation of the European Parliament and of the Council Regulation on the Rights of Passengers in Bus and Coach Transport[59] which will come into force on 1 March 2013. This Regulation is, inter alia, targeted at persons with limited mobility in consequence of disability, and it was adopted with a view to enabling such persons to travel by bus and coach at a comparable level with other citizens.

In railroad transport, the accessibility for persons with disabilities is incorporated in all programmes. By construction, update or renovation, the railroad constructions are designed and realized so as to meet the requirements of barrier-free accessibility according to the Decree on General Technical Requirements for Barrier-Free Usage of Constructions[60].

The update and operation of nation-wide railways incorporated in the European rail system are subject to principles of the directly applicable EU regulation which is the Commission Decision on Technical Specifications for Interoperability Relating to Persons with Limited Mobility and Orientation in Trans-European Conventional and High-Speed Rail System[61].

Mobility issues as such, including recommendations how to solve issues of mass transport (low-floor means of transport, equipment of stops, or traffic islands, adjustment of pavements and other movable or immovable facilities of cities and municipalities to suit persons with disabilities) are the subject of "Mobility Issues in an Aging Population" published by the Centre for Traffic Research and designed for staff of state administration[62].

The right to equal treatment and the prohibition of discrimination are defined by the Anti-Discrimination Act[63]. Paragraph 3 of Article 2 understands direct discrimination as such action or inaction, where an individual is treated less favourably than another person is treated or would be treated in a comparable situation, on the basis of race, ethnic origin, nationality, gender, sexual orientation, age, disability, religion, belief or opinion. Moreover, paragraph 5 determines discrimination as the action of treating an individual less favourably on the basis of her or his alleged origin as set out in paragraph 3.

[58] Implementing Decree No. 398/2009 Coll., No. 499/2006 Coll., No. 501/2006 Coll., No. 503/2006 Coll. to Act No. 183/2006 Coll., on Special Planning and Building Code, as amended.

[59] Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the Rights of Passengers in Bus and Coach Transport and amending Regulation (EC) No 2006/2004.

[60] Decree No. 398/2009 Coll., on General Technical Requirements for Barrier-Free Usage of Constructions.

[61] Commission Decision 2008/164/EC of 21 December 2007 concerning Technical Specifications of Interoperability Relating to Persons with Reduced Mobility in Trans-European Conventional and High-Speed Rail System.

[62] Published by NOVPRESS, Brno, ISBN-978-80-87342-05-3.

[63] Act No. 198/2009 Coll., on Equal Treatment and on Legal Means of Protection against Discrimination and on Amendment to Some Acts, as amended.

Afterwards, paragraph 2 of Article 3 of the referred Act defines indirect discrimination on the basis of disability also as the refusal or omission to take appropriate measures to enable the person with disability to access a certain job, to carry out certain work tasks or functional or other procedures at work, to utilise vocational counselling, or to participate in other specialized learning, or to take advantage of services intended for the general public, unless such measure would impose a disproportionate burden.

While making a decision whether a particular measure does not impose a disproportionate burden, in particular the level of merit is taken into consideration which the implementation of the given measure will bring to persons with disabilities, the acceptability of the financial burden of the measures for individuals or legal entities who are in charge of such implementation, the availability of financial and other assistance to give effect to the measures, and the eligibility of alternative action to meet the needs of persons with disabilities. A measure is not considered to impose a disproportionate burden if an individual or a legal entity is obliged to give effect to such measure under special regulation.

b. General law, technical regulations and standards

Please see point a. above.

c. Role of national, European and international standards

Current Czech legislation in the field of the barrier-free use of building is entirely comparable with the standards in force in EU countries.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

An important step helping to improve accessibility was the approval of an amendment to the Act on Public Administration Information Systems taking into account the needs and requirements of persons with disabilities. This Act was implemented by a decree on the form of disclosure of information related to public administration by means of websites for people with disabilities, which defined accessibility rules in detail.

1 April 2011 was the effective date of the Government Regulation on the Determination of Minimum Values and Indicators for Quality and Safety Standards and on the Proving Method in Connection with the Provision of Public Services in Passenger Transport[64], which implements the Act on Public Services in Passenger Transport[65] and defines the share of vehicles in public transport which must allow the transport of persons with limited mobility and orientation. The purpose is to enhance access for persons with disabilities to public transport provided by the state, regions or municipalities.

The Department of Transport, in cooperation with the Road and Motorway Directorate of the Czech Republic provides barrier-free usage of motorway and speedways constructions in places accessible to pedestrians, which means in particular rest areas and the surroundings of emergency call boxes, as part of its competence of a Special Building and Construction

[64] Government Regulation No. 63/2011 Coll. on the Determination of Minimum Values and Indicators for Quality and Safety Standards and on the Proving Method in Connection with the Provision of Public Services in Passenger Transport.

[65] Act No. 194/2010 Coll., on Public Services in Passenger Transport and on Amendment to Some Acts, as amended.

Authority for the respective land communications. The review of norms, technical regulations and model sheets of land communications concerning the issues of barrier-free usage of land communications are prepared in cooperation with the appointed representatives of non-governmental organizations, in particular with the Czech National Disability Council.

Since 2009, the barrier-free usage of the premises of schools and school facilities has been regulated by a separate Decree of the Ministry of Regional Development on General Technical Requirements for Barrier-Free Usage of Constructions[66].

The scope of activity of the Health Department includes Decree on Requirements for Material and Technical Equipment of Health Care Facilities[67] which determines, in addition to the above conditions, that the basic operating areas of inpatient departments must be equipped so that they can be used by patients with limited mobility and orientation.

e. Services regulated for accessibility

Please see above.

f. Goods regulated for accessibility as part of a service

Please see above.

g. Goods regulated for accessibility

Please see above.

h. Enforcement of accessibility legislation

The administration examines accessibility requirements before granting permits or allowing marketing of products.

i. Non-compliance and litigation

Non-compliance of accessibility legislation could be brought to court or to other relevant bodies by individuals, NGO's, public authorities, state bodies etc.

[66] Decree No. 398/2009 Coll., on General Technical Requirements for Barrier-Free Usage of Constructions.
[67] Decree No. 221/2010 Coll., on Requirements for Material and Technical Equipment of Health Care Facilities.

Denmark

a. Accessibility legislation: its place in the legal and regulatory framework

In Denmark accessibility is covered by the legal and regulatory framework.

For instance, for electronic communication networks and services the designated Universal Service Provider must provide, in accordance with sections 6 – 8 of the Executive Order 701 of 26 June 2008 on Universal Service, a number of specified services for disabled end-users on further specified terms and conditions. These services include a text telephony service and a related 24-hour call center. The pricing of USO-products for disabled end-users is regulated. Provision of public pay telephones is regulated in section 6 of the Electronic Communications Networks and Services (ECNSA) and Executive Order 710 of 25 July 1996. There is a specific provision allowing the use of hearing-aids in the executive order.

For passenger ships, MSC/Circ.735 "Recommendation on the design and operation of passenger ships to respond to elderly and disabled persons' needs" is mandatory.

In Denmark, accessibility to buildings is regulated through building legislation (the Building Act and Danish Building Regulations), which covers new building, refurbishment and renovation of existing buildings. The Danish Building Regulations are regularly updated.

Stricter accessibility requirements in connection with conversions in existing buildings were introduced in 2008, making such buildings subject to the requirement of level-free access, etc. With effect from 2 February 2008, the 2008 Buildings Regulations introduced a host of new requirements for accessibility for persons with disabilities, and existing accessibility requirements were significantly tightened.

The Building Regulations list the following requirements:

- level-free access to all units on the entrance floor of a building
- level-free access to all units on the floors of a building, parking spaces for people with disabilities, accessible passage from the car park to the building
- disabled toilets (open to the public)
- lifts that can be operated by people in wheelchairs
- induction loop systems in rooms with common activities, mobile/wireless induction loops or other forms of installations (e.g. in conference rooms and at desks)
- establishment of wheelchair spaces at permanently mounted spaces
- available signs and information in buildings

Further, several projects have been started at the Danish Building Research Institute (SBi), generally to help determine the extent to which it can be ensured that already existing provisions on accessibility are observed, so that accessibility to buildings is enhanced and improved. Thus, the projects are to be part of an overall assessment of whether additional

tools for observing accessibility provisions can improve accessibility to buildings for persons with disabilities.

The Building Regulations requirements on accessibility also apply for publicly subsidised housing as regulated in the Danish Act on Social Housing, etc. The Act sets out special requirements for housing accessibility, and funding is annually earmarked for refurbishing existing housing with a general view to increasing housing accessibility in the sector. To this end, a project has been launched to map accessibility in the more than 550,000 homes in the social housing sector. The project is presented on the Internet portal, www.danmarkbolig.dk. In the portal, persons with disabilities can find information on the accessibility of individual homes, and thus obtain help to find the homes best suited to their disabilities.

The Act on Social Housing, etc. lays down specific provisions on layout and design of social housing for persons with disabilities.

For more information in English about accessibility and article 9 in a Danish context: http://www.sm.dk/Temaer/sociale-omraader/Handicap/Documents/Engelsk_FNs_rapport_22082011.doc.pdf

b. General law, technical regulations and standards

In relation to accessibility of electronic communication networks and services, the European Universal Service Directive 2002/22/EC as amended by Directive 2009/136/EC has been implemented in the Danish Act no. 169 of 3 March 2011 on Electronic Communications Networks and Services (ECNSA).

Se above regarding the Building Regulation.

c. Role of national, European and international standards

For ships IMO standards are used. If there are no IMO standards for a subject, the Danish government would propose development of an international standard.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

As mentioned in "State of play" the only change in legislation found to necessary before the ratification was an amendment to make sure that Denmark met the provisions of Article 29 of the Convention, which require state parties to guarantee persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others.

In 2010 the requirement of accessible signs and information was introduced in connection with the implementation of the UN Convention on the Rights of Persons with Disabilities. Further, the Danish Building Research Institute performs a range of communications tasks on the building legislation on behalf of the Danish Enterprise and Construction Authority. The

tasks include advisory services, knowledge dissemination and preparation of directions, instructions and checklists.

e. Services regulated for accessibility

Services regulated for accessibility include a text telephony service and a related 24-hour call center. There are provisions for public pay telephones, as well as for passenger transport in passenger ships.

For more information in English about accessibility and article 9 in a Danish context: http://www.sm.dk/Temaer/sociale-omraader/Handicap/Documents/Engelsk_FNs_rapport_22082011.doc.pdf

f. Goods regulated for accessibility as part of a service

The Universal Service Provider for electronic communication networks and services (point a.) provides hardware and software needed to use the text telephony service.
Passenger ships are regulated for accessibility.

For more information in English about accessibility and article 9 in a Danish context: http://www.sm.dk/Temaer/sociale-omraader/Handicap/Documents/Engelsk_FNs_rapport_22082011.doc.pdf

g. Goods regulated for accessibility

Provision of public pay telephones is regulated in section 6 of the ECNSA and Executive Order 710 of 25 July 1996. There is a specific provision allowing use of hearing-aids in the executive order.
Passenger ships are regulated for accessibility.

For more information in English about accessibility and article 9 in a Danish context: http://www.sm.dk/Temaer/sociale-omraader/Handicap/Documents/Engelsk_FNs_rapport_22082011.doc.pdf

h. Enforcement of accessibility legislation

The Danish Business Authority enforces compliance with legislation regarding electronic communication networks and services. Non-compliance may be fined.
Accessibility requirements are examined before granting permits; there may be fines if a service or product is found not complying with existing regulations.

i. Non-compliance and litigation

Non-compliance with accessibility legislation may be brought before the Danish Business Authority. Decisions made by the Danish Business Authority may be appealed to the Telecommunications Complaint Board.
Non-compliance will result in the permit to operate a passenger ship being withheld or withdrawn. Non-compliance may also result in the case be brought to court.

Estonia

Estonia has done the necessary preparations needed for ratification of the UNCRPD but ratification has not entered into force yet.. So far the rights of people with disabilities, accessibility included, have been regulated and ensured by several provisions of law and included in strategic development plans of Estonian ministries.

a. Accessibility legislation: its place in the legal and regulatory framework

Legislation for buildings in Estonia, e.g. Building Act (adopted in 2002, latest review in 2011), also covers accessibility: if required by the purpose, buildings' parts intended for public use have to be accessible to and usable by persons with reduced mobility and by visually impaired and hearing impaired persons.

The Ministry of Economic Affairs and Communications is also developing different guidelines in different areas (e.g. building environment guidelines, universal design).

Access of disabled persons to public buildings is regulated by Regulation No. 14 Requirements to Guarantee Mobility of Persons with Physical, Visual and Hearing Disabilities in Public Buildings issued by the Minister of Economic Affairs and Communications in 2002. Similar requirements of access to residential buildings are the objective of one of the measures stipulated in the Development Plan for Residential Issues in Estonia for 2007-2013. The Estonian Housing Economy Development Plan 2008-2013 (approved by the Government in 2008) stipulates several direct activities to improve accessibility under the strategic development trend of guaranteeing housing availability, e.g. supporting the adaptation of housing to special needs and preparation of guidelines with respect to technical solutions in order to guarantee persons with physical disabilities access to residential buildings.

There are no legislative amendments planned for adoption in near future in the built environment sector because adequate legislation has been developed and it has come into force.

Estonia also has a Public Transport Act (adopted on 2000, last redaction on 2011), according to which disabled children, people with profound disabilities aged 16 and over, and persons accompanying people with severe or profound visual disabilities or guide dogs accompanying such persons are allowed to travel by public transport free of charge. The Transport Development plan for 2006-2013 stipulates that access to transport services and infrastructure has to be guaranteed for people with reduced mobility. This is done by development and maintenance of infrastructure. A new transport development plan for the next period is being drafted.

Local governments are responsible for arranging of transportation for persons with disabilities according to the Social Welfare Act (adopted on 1995, latest review in 2011); this is done by offering social transport and the service of adapted taxis.. The new Traffic Act (enforced in 2011) enacts specific requirements for people with visual and mobility disability on moving on pavements, also some exclusive rights of disabled drivers with reduced mobility and the drivers who are servicing a person with reduced mobility or a blind person. The Traffic Act is elaborated on that topic by a regulation of the Minister of Social Affairs.

The Electronic Communications Act (adopted in 2004, latest review in 2011) takes into consideration also the interests of different social groups, including persons with special needs. The access of disabled persons to information technologies is also prescribed in the Information Society Development Plan 2006-2013. This focuses on how to exploit the opportunities created by ICT wisely and to use them to improve overall quality of life. The Plan stipulates that particular attention should be paid to the inclusion of social groups with special needs into society, supporting regional development and local initiatives. One of the groups given high priority is people with disabilities. The goals and principles that were set in the Estonian Broadband Strategy 2005-2007 are also considered in the Strategy of Information Society 2006-2013. One of them is to make all public sector websites accessible to people with special needs.

The Ministry of Social Affairs of Estonia has prepared a Development Plan for Children and Families for 2011-2020 in 2011. Many activities in it are directed to improving the quality of life of children with disabilities and their families, including accessibility of services etc. The goal is to make it possible for every member of society to live their lives to the full with the help of the opportunities offered by ICT, and participate actively in public life. People with disabilities are included also in National Health Plan 2009-2020 and the Development Plan for the Education System 2007-2013. Furthermore, the Government takes actions to attain equalization of opportunities for persons with disabilities.

Lack of accessibility can be seen as discrimination according to the Equal Treatment Act, if existing legislation is disregarded or not obeyed in the sphere of education or employment.

b. General law, technical regulations and standards

General accessibility requirements are provided by general law, most of them for physical accessibility by Regulation No. 14 Requirements to Guarantee Mobility of Persons with Physical, Visual and Hearing Disabilities in Public Buildings issued by the Minister of Economic Affairs and Communications on 2002. Technical regulations and standards can specify the requirements for special products.

c. Role of national, European and international standards

Estonia does not have general national accessibility standards in addition to the abovementioned legislation, these issues are rather dealt with in different development plans and plans of action, e.g. for transport sector, design, health, education etc. Different European standards and best practices have been used as models for developing these plans. Principles of universal design are also mainstreamed to promote accessibility to different services – employment, buildings, transportation, medical services, information and communication, education, leisure, culture etc.

EC Regulation No 181/2011 of the European Parliament and of the Council concerning the rights of passengers in bus and coach transport will come into force in Estonia on 1st of March 2013. Regulation No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations is implemented partially due to the need for large-scale and long-term investments.

UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities (adopted in 1993, approved by Estonian Government in 1995) are also obeyed as an

international document. This guide has established an important framework for the implementation of universal design principles in Estonian society. Some international standards may be adopted by some enterprises in their economy sector, not nationally.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Estonia has not completed the ratification process of the UN Convention on the Rights of Persons with Disabilities yet. During the preparation process for the ratification, that has been conducted in the last years, there has been no need for changes in accessibility legislation. Still, the UNCRPD is used as an instrument and basis for policy-making.

e. Services regulated for accessibility

Service providers have to follow legislation that is mentioned above.

Requirements on health protection (including requirements for spaces, indoor furniture, indoor climate, lighting, maintenance, territory, etc.) for the facilities where social welfare services are provided are imposed by the Minister of Social Affairs with several regulations.

Possibilities of vocational education for persons with disabilities are ensured by the Regulation No. 25 by the Minister of Education and Science since 2006: conditions and procedures of vocational education of persons with special needs.

Requirements for the environment of children with disabilities (public buildings, streets, vehicles) are also stipulated in the Child Protection Act. In other respects legislation is based on the principle of equal treatment and children with disabilities are not differentiated from children without disabilities.

Requirements for work, tools and workplace adjustments for employees with disabilities are imposed in the Occupational Health and Safety Act and also in the Labour Market Services and Benefits Act.

Public libraries are bound by the Public Libraries' Act to offer free home service for persons with limited mobility, if needed. Interpreter for deaf party of a proceeding are enabled according to the Code of Civil Procedure and Code of Criminal Procedure.

Requirements imposed on accommodation, children's and health institutions, etc. do not differentiate between persons with disabilities and persons without disabilities. Therefore there are neither special requirements nor legislation imposed on them in addition to the ones mentioned above. Generally, there are no different rules or regulations for public or private service providers.

f. Goods regulated for accessibility as part of a service

There is Regulation No. 14 Requirements to Guarantee Mobility of Persons with Physical, Visual and Hearing Disabilities in Public Buildings issued by the Minister of Economic Affairs and Communications in 2002. It regulates access of disabled persons to public buildings and has imposed some requirements for goods used by it, including ramps, stairs, handrails, signs, bathrooms, mailboxes, box-offices, ATMs, ticket machines, counters, doors,

gates, elevators, fixture, fitment, equipment, lighting, upholstery materials and colors, flooring, toilet-bowls, washbasins etc.

g. Goods regulated for accessibility

Please see answer f.

h. Enforcement of accessibility legislation

The enforcement of accessibility legislation has administrative nature and all the mentioned types of enforcement power fines, examining accessibility requirements before granting permits or allowing marketing of products can be applied, if necessary. Enforceability of accessibility legislation could be better in Estonia. A lot of relevant tasks are directed to local governments (e.g. construction supervision, social transportation etc.) and the capability of local governments to accomplish its duties varies in different regions. The compliance with accessibility legislation is monitored also by the Chancellor of Justice (Ombudsman) who can also pay inspection visits, if necessary.

i. Non-compliance and litigation

A case of non-compliance with accessibility legislation can be brought to court, to the Chancellor of Justice (Ombudsman) or to the Gender Equality and Equal Treatment Commissioner. The Gender Equality and Equal Treatment Commissioner is an independent and impartial expert who acts independently, monitors compliance with the requirements of the Gender Equality Act and Equal Treatment Act. The Commissioner provides opinions concerning possible cases of discrimination. The Commissioner can be called upon by natural persons, the Chancellor of Justice by a legal entity or a natural person. The Chancellor accepts applications that explain what sections of the legislation or situation are not in conformity with the Constitution and the law according to the opinion of the applicant. He also can perform inspection in public institutions. The Chancellor proposes to harmonise the situation with the Constitution and the law. If the position of the Chancellor is not met or if the institution does not respond to the inquiry, he may submit a report to the body that monitors the activity of the institution, or to the Government or the Parliament. The Chancellor of Justice has the right to conduct conciliation. His position is final and can not be challenged in court.

Finland

The Ministry for Foreign Affairs has, in May 2011, set up a working group to prepare the measures necessitated by the ratification of the Convention and its Optional Protocol in Finland. The work of the working group and other related work are still ongoing, and the points below have to be interpreted accordingly.

a. Accessibility legislation: its place in the legal and regulatory framework

In Finland, lack of accessibility is not specifically defined as discrimination. Discrimination on the grounds of disability and health, among other reasons, is, however, banned under the Non-Discrimination Act. Discrimination can be direct or indirect. In practice, lack of accessibility may become direct or indirect discrimination, but only in the following contexts:

1. conditions for access to self-employment or means of livelihood, and support for business activities;
2. recruitment conditions, employment and working conditions, personnel training and promotion;
3. access to training, including advanced training and retraining, and vocational guidance;
4. membership and involvement in an organisation of workers or employers or other organisations whose members carry out a particular profession, including the benefits provided by such organisations.

Moreover, the Non-Discrimination Act binds the employer to take any reasonable steps to help a person with disabilities to gain access to work or training, to cope at work and to advance in their career. In assessing what constitutes reasonable, particular attention must be devoted to the costs of the steps, the financial position of the person commissioning work or arranging training, and the possibility of support from public funds or elsewhere towards the costs involved.

The Ministry of Justice has formed a working group to revise Non-Discrimination Act during this governmental period (2011-2014).

Finland's Disability Policy Programme 2010-2015 calls for strong inputs in the accessibility of the Finnish society over the next few years. With this programme, the aim is to strengthen the social, cultural, ecological and economic sustainability of the society as well as its justice and fairness. The objective is to ensure the design, realisation and implementation of services, environments and products in such a way that all people can use them.

Some of the measures included in the programme require the removal of existing barriers, whereas others call for functioning solutions for the future. The former set of measures is represented by the measure obligating all sectors of administration to reconstruct inaccessible facilities by the year 2020. The latter measures include the development of the monitoring of an accessible communications policy as well as the further development of accessibility of the electronic services of public administration and accessibility of public transport. Examples of the latter kind of measures also include guidance for accessible planning, development of legislation concerning new buildings, harmonisation of the interpretation of the accessibility legislation, the work to develop new and innovative solutions as well as the development of accessibility in relation to work and learning environments, social and health services and sports and culture.

The objective is to ensure continuous accessible chains of action. This means, for example, that one has the possibility to move smoothly and seamlessly between home, workplace, school, places of service and leisure activities as well as their near environments. This means also that all these facilities, places and means of transport between them as well as information about them must be accessible. The prerequisite for a non-discriminatory social development is that the principles of design for all are realised in the various parts of the action chain under the responsibility of various sectors of administration. Awareness about accessibility and the strengthening of accessibility should be raised to a similar kind of mainstreaming development in society that we currently have in terms of environmental awareness.

Built environment

The Land Use and Building Act (132/1999) defines the objectives land use planning in Finland. The first objective is to promote a safe, healthy, pleasant, socially functional living and working environment which provides for the needs of various population groups, such as children, the elderly and the disabled. The Act states that a building must, in so far as its use requires, also be suitable for people whose capacity to move or function is limited. The Land Use and Building Decree (895/1999) provides further regulations to ensure accessibility in different types of buildings. These include administrative and service buildings as well as commercial and service premises in other buildings to which everyone must have access for reasons of equality, and residential buildings with their building sites. This Section also covers buildings with work space which, for purposes of equality, must be designed and built so that they provide persons with restricted ability with sufficient opportunity to work, taking into account the nature of the work.

The Finnish Building Code lays out technical regulations and guidelines which supplement the Land Use and Building Act. The Building Code applies to new constructions; renovation and refurbishment are mainly outside the scope of the Building Code. Particularly the following decrees set out the requirements for the accessibility of public and residential buildings; F1 Barrier-free building (2005), F2 Safety in use of buildings (2001), G1 Housing design (2005).
(http://www.ymparisto.fi/default.asp?contentid=68171&lan=en).

At present, lack of accessibility in the built environment is mainly dealt with as a technical issue.

There are various guidelines concerning physical accessibility of buildings, as well as guide books on how to interpret building standards. The following organisations have given voluntary recommendations on the accessibility of communications, which are based on international standards:

- Advisory Committee on Information Management in Public Administration (JUHTA, Ministry of the Interior)
- Finnish Information Society Development Centre (TIEKE)
- Finnish Federation of the Visually Impaired (FFVI)

Finnish Design for All Network promotes accessibility of built environments, accessibility of communication and services, as well as usability of products. The DfA web portal includes

information, studies, tools and links to various areas of the accessibility. http://dfasuomi.stakes.fi/EN/index.htm.

Transport

The Ministry of Transport and Communications is preparing a transport policy report which is to be submitted to Parliament in spring 2012. The section concerning public transport emphasises the importance of accessibility in accordance with the accessibility strategy published by the Ministry in 2003. In recent years, accessibility has been stressed mainly in the conditions for transport purchases (railways) and in different legislative undertakings.

Technical regulations on transport equipment are mainly derived from European Union legislation and the Finnish legislation has been harmonised to better coincide with the legislation in other EU countries. There are technical regulations concerning equipment both for road traffic (city buses, railways) and water-born traffic (larger vessels).

Also the general legislation concerning passenger traffic is based on the EU legislation which the new Finnish Act for Public Transport (869/2009) only complements. The new act includes not only the obligation to set regional targets for the standard of the services (including accessibility), but also the obligation for certain quality of services by bus-service operators (including the obligation to report on the accessibility of services).

In Finland, the EU legislation on passenger rights applies. Provisions on the rights of persons with disabilities and persons with reduced mobility are included in the European Parliament and Council Regulations No 1107/2006 on air traffic, No 1371/2007 on train traffic, No 1177/2010 on water-born traffic and No 181/2011 on bus traffic. These regulations grant persons with disabilities the access to the above mentioned services, as well as and the arrangement of necessary assistance. However, the set of rights covered by different types of transport varies.

The only legislation that is solely national is the legislation concerning taxi traffic. The aim of the legislation has traditionally been to secure a sufficient level of services suitable for persons with disabilities. There are several regulations promoting the mobility of persons with disabilities. These regulations concern the training and education of taxi drivers and entrepreneurs (disability knowledge and skills), the granting of taxi licenses (there must be enough vehicles suitable for persons with disabilities), vehicles (there are different quotas and definitions for accessible taxis and taxis for persons with disabilities) and price (special supplements for assistance).

Information society

The Communications Market Act includes regulations on the public service obligation for the provision of general telecommunication services and on a decree on the minimum requirements for public telecommunication services provided for persons with hearing, speech and vision disorders.

The Act on Television and Radio Operations was amended as of 1 July 2011 so that national commercial channels were obliged to subtitle even Finnish and Swedish programmes. The decree complementing the act defines the percentage values for the increased need for

subtitling in 2011–2016. According to the effective decree, the public service broadcasting company YLE must subtitle all its programmes by 2016 (excluding music, sports and children's programmes).

The Government is carrying out the Action Programme towards a barrier-free information society for 2011-2015. The primary target groups of the Action Programme include government actors, product developers, service providers, R&D centres and different kinds of organisations. In addition, the programme can be used as a guideline by any other information society actor. The programme represents a step forward in implementing a barrier-free information society, and it will play a major role in developing the Finnish information society and communications policy over the next years.

The Action Programme aims at coordinating the development of information society accessibility; increasing people's information society skills and capabilities; developing increasingly multi-channel services and technology-neutral communications; improving the usability of hardware, software and auxiliary devices; improving the accessibility and comprehensibility of online content; supporting research and development activities and improving the accessibility in public procurements. The measures and targets of the Action Programme are defined annually by a working group monitoring the implementation of the programme.

Assistive technology

Services for assistive technology are regulated by several different pieces of legislation. Municipalities bear the main responsibility for providing the services. The National Insurance Institute of Finland, insurance and employee insurance companies, employment administration and State Treasury pay for the assistive devices that they are responsible for.

Disabled students and other students in need of special support are entitled to receive – free of charge – special assistive devices and services which they need to allow them to take part in their classes. Such aids are for example computers, lifts or special desks. Severely disabled students at upper secondary school or in grades 7-10 of comprehensive school are entitled to the assistive devices required for their studies (such as computers and low vision aids), under condition that these are specified in a special vocational training plan approved in accordance with the individual rehabilitation plan the Social Insurance Institution of Finland (KELA) assumes has been drawn up.

b. General law, technical regulations and standards

See point a.

c. Role of national, European and international standards

See point a.

With regard to the design of lifts suitable for disabled users, the Building Code F1 'Barrier-free building' (2005) refers to the EU Directive on lifts (95/16/EC), the EU Directive on machinery (98/37/EC) and the Standard EN 81-70:2003.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The Ministry for Foreign Affairs has, in May 2011, set up a working group to prepare the measures necessitated by the ratification of the Convention and its Optional Protocol in Finland. Its work is still ongoing.

e. Services regulated for accessibility

See point a.

f. Goods regulated for accessibility as part of a service

See point a.

g. Goods regulated for accessibility

See point a.

The City Council of Helsinki has decided that the municipal public transport system (buses, trams and metro as well as stops and stations) must be accessible for all people.

h. Enforcement of accessibility legislation

See point a.

Before granting a building permit, the local building control authority examines the compliance of the plans with the accessibility legislation. The building control authority may also require a more detailed separate report on accessibility as a precondition for the building permit.

i. Non-compliance and litigation

In Finland, complaints can be made by anyone to the Chancellor of Justice and to the Parliamentary Ombudsman. The Chancellor of Justice supervises the lawfulness of the actions of Government ministers and public officials. He also monitors the implementation of basic rights and liberties and human rights. The Parliamentary Ombudsman of Finland monitors public authorities and officials to ensure that they observe the law and fulfill their duties in the discharge of their functions.

For example, the Parliamentary Ombudsman decisions 657/4/03 and 619/4/03 concern access to the voting site. Even though the Ombudsman did not find any unlawfulness in these two cases, the two central election boards in question were reminded that persons with physical disabilities need to be ensured both voting secrecy and unimpeded access to the voting site. The legal basis was the Constitution of Finland (731/1999), Section 6: Everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, *disability* or other reason that concerns his or her person.) The decisions of the Chancellor of Justice and the Parliamentary Ombudsman are not subject to appeal.

France

I. **Contexte général de l'accessibilité:**

La loi n°2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées garantit l'accès aux droits fondamentaux de toute personne handicapée, et retient le principe d'une cité accessible à tous en 2015 dans la plus grande autonomie possible. La France s'est fixé un objectif ambitieux: rendre l'ensemble des aspects de la vie quotidienne totalement accessible à toutes les formes de handicap d'ici 2015.

La loi du 11 février 2005 instaure l'accessibilité du cadre bâti, des transports et des nouvelles technologiques. L'accessibilité, jusqu'alors physique, est renforcée par l'inclusion des nouvelles technologies. Si ces textes s'adressent prioritairement aux personnes handicapées, ils concernent en fait la société dans son entier.

A ce stade, la question de l'accessibilité suscite davantage de l'inquiétude que de la mobilisation de la part des propriétaires concernés. Le sentiment général des associations est également à l'inquiétude : elles craignent que l'éloignement des dates butoirs ne démobilise les propriétaires et que les tentatives de contourner les obligations légales se multiplient. Les difficultés rencontrées sont principalement au nombre de deux :

- l'accessibilité est largement ressentie par les propriétaires et exploitants comme une contrainte technique supplémentaire et un coût supplémentaire : la mise en œuvre de cette politique nécessite un effort important de pédagogie, de mobilisation et d'accompagnement ;

- la réglementation en matière d'accessibilité est désormais très complète mais elle est également très complexe : sa mise en œuvre suppose donc une attention particulière en matière de formation.

Les objectifs de la France pour atteindre cet objectif d'accessibilité en 2015 sont :

- de faire partager le sens et les objectifs de la politique de mise en accessibilité par toute la société ;
- d'améliorer la formation et développer les connaissances sur l'accessibilité et la conception universelle ;
- d'accompagner, y compris financièrement, les collectivités locales dans la mise en accessibilité de leur patrimoine ;
- d'améliorer l'accès aux biens et aux services, dans une logique d'accès aux droits.

Concrètement, dans le cadre de la 2ème Conférence nationale du handicap de juin 2011 le Gouvernement a retenu des mesures[68] volontaristes visant en particulier à :

- accompagner le déploiement de l'accessibilité aux lieux de travail, aux vecteurs numériques et aux nouvelles technologies, par le lancement d'un plan métiers du handicap orienté vers le développement des métiers de l'accessibilité et de la conception universelle ;

[68] L'ensemble des mesures est consultable à l'adresse : http://www.solidarite.gouv.fr/IMG/pdf/Dossier_de_presse_conference_handicap-2.pdf

- améliorer l'accès aux soins des personnes handicapées, tant sur l'accessibilité de l'offre que des lieux de soins ;
- permettre l'accès du plus grand nombre à la culture et aux loisirs ;
- sensibiliser l'ensemble de la société à la conception universelle.

II . Principaux domaines concernés :

1. Domaine des transports :

Dans le domaine des transports, la loi introduit le concept de la chaîne du déplacement, qui éclaire la notion d'accessibilité. Cette chaîne comprend le cadre bâti, la voirie, les espaces publics, les systèmes de transport et leur intermodalité. Pour atteindre ce résultat, elle prévoit l'élaboration de documents de planification et de programmation des mesures à prendre et des travaux à réaliser : les schémas directeurs d'accessibilité (SDA) pour les transports et les plans d'accessibilité de la voirie et des espaces publics (PAVE) pour la voirie et les espaces publics. Elle instaure la concertation comme principe de base dans tous les processus d'élaboration des documents de programmation et de planification spécifiques à l'accessibilité (PAVE[69] et SDA[70]) ou portant sur l'organisation globale des déplacements tels que les plans de déplacements urbains (PDU).

Concernant la politique d'accessibilité des services de transports, la loi impose :

- un objectif de résultat : la mise en accessibilité de tous les services de transports collectifs d'ici février 2015. Lorsqu'il s'avère techniquement impossible (ITA [71]) de mettre en accessibilité les réseaux existants, doivent être mis à disposition des personnes handicapées ou à mobilité réduite des « transports de substitution » adaptés à ces personnes.

- un objectif de moyens : la loi oblige les acteurs à améliorer l'accessibilité de l'infrastructure des services de transport et du matériel roulant dans certaines occasions :
  - les travaux réalisés sur les arrêts de bus ou sur les gares doivent intégrer les prescriptions techniques d'accessibilité ;
  - les matériels roulants achetés pour l'extension des réseaux ou le renouvellement des flottes doivent être accessibles ;
  - les rénovations à mi-vie du matériel ferroviaire doivent intégrer l'accessibilité aux personnes handicapées ou à mobilité réduite.

- une procédure de dépôt de plainte : la loi de 2005 et les décrets qui en découlent prévoient que chaque autorité organisatrice de transport (AOT) mette en place une procédure de « dépôt de plainte » concernant les obstacles à la libre circulation des personnes à mobilité réduite. Il

69 *PAVE : plans de mise en accessibilité de la voirie et des espaces publics*

70 *SDA : schémas directeurs d'accessibilité*

71 ITA : impossibilité technique avérée

ne s'agit pas d'une « plainte » au sens pénal du terme mais d'un signalement des obstacles rencontrés.

Enfin, l'octroi d'aides publiques favorisant le développement des systèmes de transport collectif est subordonné à la prise en compte de l'accessibilité.

Pour conforter la mobilisation dans le domaine du transport, l'État apporte l'appui de son réseau scientifique et technique en publiant des guides méthodologiques et des recueils de bonnes pratiques, en conduisant des programmes de recherche et d'innovation dans les transports terrestres (PREDIT) et en organisant des journées de formation et d'échanges.

Il s'est également doté d'instances spécifiques :

- **le comité interministériel du handicap** a été créé pour définir, coordonner et évaluer les politiques menées par l'État. Il réunit tous les ministres concernés par la politique du handicap ;
- **l'observatoire interministériel de l'accessibilité et de la conception universelle,** qui réunit les représentants de tous les acteurs de l'accessibilité; il a pour mission d'évaluer l'accessibilité du cadre de vie, d'identifier les obstacles à la mise en œuvre des prescriptions législatives, de repérer les difficultés rencontrées au quotidien par les personnes handicapées et à mobilité réduite et de constituer un centre de ressources capitalisant, valorisant et diffusant les bonnes pratiques en matière d'accessibilité et de confort d'usage pour tous.

En application de l'article L. 114-2-1 de l'action sociale et de la famille, l'État doit organiser tous les trois ans une conférence nationale du handicap. La seconde en date du 8 juin 2011 a été l'occasion de dresser le bilan d'application de la loi dans toutes ses dimensions, de mesurer le chemin parcouru depuis la première conférence nationale de 2008 et de mieux identifier les domaines dans lesquels les progrès doivent encore être confirmés.

Les premiers résultats des politiques volontaristes des autorités organisatrices et des opérateurs sont déjà visibles et de bonnes expériences existent dans les départements.

Plus spécifiquement, d'un point de vue sectoriel :

- Concernant le réseau autoroutier concédé : l'accessibilité des personnes handicapées est actuellement diversement prise en compte, en fonction des maîtres d'ouvrage. Néanmoins, la loi imposant une accessibilité de l'ensemble des services en 2015, les sociétés concessionnaires d'autoroutes ont mis en place des programmes afin que l'échéance soit respectée sur l'ensemble du réseau autoroutier. Concernant l'accès aux aires de services, le renouvellement massif des bâtiments accueillant du public prévue dans les années à venir facilitera l'intégration des prescriptions réglementaires.

2. **Domaine du bâti :**

Le décret n° 2006-555 du 17 mai 2006 relatif à l'accessibilité aux personnes handicapées des établissements recevant du public, des installations ouvertes au public et des bâtiments d'habitation, a été pris pour application de cette loi. Il introduit les exigences réglementaires concernant l'accessibilité des bâtiments d'habitation collectifs (BHC) neufs et existants, des

maisons individuelles (MI) neuves, ainsi que des établissements recevant du public et des installations ouvertes au public (ERP-IOP) neufs et existants. Il définit les performances à atteindre par un bâtiment pour être accessible, ainsi que les actions qui doivent pouvoir y être réalisées par un usager handicapé. Ces exigences sont traduites en seuils réglementaires dans des arrêtés d'application parus en 2006 et 2007.

Depuis l'entrée en vigueur de cette loi, tous les bâtiments d'habitation collectifs neufs présentent des caractéristiques permettant leur utilisation par une personne handicapée.

De plus, les prestations offertes par l'ensemble des établissements neufs recevant du public sont accessibles dès la construction. Des règles supplémentaires sont définies pour certains types d'établissements spécifiques recevant du public. En outre, les ERP existants sont soumis à une obligation de mise en accessibilité à l'horizon 2015.

L'ensemble de ces dossiers font l'objet d'une instruction dans une commission consultative départementale de sécurité et d'accessibilité, à laquelle participent des associations de personnes handicapées, des représentants d'exploitant d'ERP et des représentants des services de l'État. Cette commission a pour objectif de prendre en considération la spécificité du projet et les potentielles contraintes de mise en accessibilité notamment pour les ERP existants.

Lorsque le montant des travaux réalisés dépasse 80% de la valeur de celui-ci, l'obligation de mise en accessibilité porte sur l'ensemble des parties communes ainsi que sur les logements touchés par les travaux dans la limite des contraintes du cadre bâti existant. De ce fait, toute réhabilitation lourde, entraîne la création d'un nouveau bâtiment d'habitation accessible moyennant de potentielles dérogations instruites par la commission consultative départementale de sécurité et d'accessibilité sus-mentionnée.

En 2007, le Ministère de l'enseignement supérieur et de la recherche a fait réaliser un guide méthodologique destiné à toutes les universités, puis, en 2009, un cahier des charges-cadre afin que les 148 établissements d'enseignement supérieur concernés fassent réaliser leur diagnostic d'accessibilité.

Par ailleurs, les constructions neuves et les réhabilitations lourdes inscrites dans les contrats de projets Etats-Régions (CPER) 2007 - 2013 contribuent à la mise en accessibilité du parc immobilier universitaire.

Le réseau des œuvres universitaires et scolaires, engagé depuis 2008 dans la mise en accessibilité de l'intégralité de ces structures, a en outre crée des résidences dédiées aux handicaps lourds à Grenoble, Toulouse, Nancy, Versailles et Créteil.

Enfin, un plan de rénovation de l'immobilier universitaire, opération Campus, a été lancé en 2008. Celui-ci permettra aux 10 campus lauréats de se rendre conformes aux normes d'accessibilité.

Le ministère des sports et le pôle ressources sport et handicap accompagnent les collectivités territoriales et les maitres d'œuvre dans la prise en compte de l'accessibilité dans les **équipements sportifs**. Ce dernier développe à cet effet des guides pratiques en matière d'accessibilité.

Un guide relatif aux piscines est déjà téléchargeable sur le site du pôle. Un guide relatif aux gymnases sera publié très prochainement et d'autres guides sont en préparation : stades, bases nautiques. Ces guides présentent d'une part les obligations réglementaires, d'autre part des préconisations.

3. **Domaine de la culture :**

3.1 **Accès au domaine de la culture :**

L'action des autorités françaises s'est traduite par plusieurs types d'interventions :

- **la formation à l'accessibilité :**

A cette fin, le Ministère de la Culture et de la Communication a déterminé la liste des diplômes, titres et certifications concernés par l'obligation de formation à l'accessibilité du cadre bâti aux personnes handicapées. L'ensemble des écoles nationales supérieures d'architecture intègre désormais cette thématique.

Au delà des diplômes d'architecture, cette obligation a été étendue aux professionnels participant à l'aménagement du cadre bâti et notamment aux designers d'objet et aux créateurs industriels, aux designers d'espace ou encore de la communication (graphique, multimédia).

Par ailleurs, une formation continue des professionnels est indispensable afin d'avoir une meilleure compréhension des enjeux de l'accessibilité. Ainsi, a été mis en œuvre, depuis 2006, un accompagnement des professionnels de la culture qui repose sur un plan de formation à la mise en conformité du cadre bâti. L'intérêt de ces formations est double :

- former les professionnels du cadre bâti du ministère aux besoins des personnes handicapées et à la nouvelle réglementation,

- sensibiliser les associations représentatives des personnes handicapées à la problématique de préservation du patrimoine.

- **La mise à disposition de guides pratiques :**

Le Ministère de la Culture et de la Communication a entrepris la réalisation d'une série de guides pratiques de l'accessibilité. Trois ouvrages ont d'ores et déjà été publiés :
- un premier de portée générale (2007),
- un deuxième consacré au spectacle vivant (2009),
- un troisième dédié à l'accueil des personnes handicapées mentales dans les lieux de culture (2010).

Cette collection s'enrichira prochainement de guides portant notamment sur les expositions accessibles, les bibliothèques et handicap et le cinéma et l'audiovisuel et handicap.

- **L'accessibilité aux établissements culturels** :

Un objectif en cours de réalisation est de rendre les établissements culturels accessibles à tous et pour tous.

Ainsi, depuis la loi du 11 février 2005, le Ministère de la culture et de la communication agit pour que soient rendus accessibles les établissements nationaux d'enseignement supérieur

« culture », les établissements nationaux « patrimoines », les établissements nationaux de diffusion de la création artistique et les établissements territoriaux.

- **Une mobilisation accrue des établissements publics « culture » :**

La Réunion des établissements culturels pour l'accessibilité (RECA) regroupe une vingtaine d'établissements publics engagés dans la réalisation de mesures permettant d'améliorer l'accueil des personnes handicapées dans les établissements culturels.

- **L'accès à la création artistique :**

La constitution de réseaux pour l'accès à la création artistique est encouragée et soutenue. Le ministère de la culture et de la communication a inscrit la prise en compte de l'accessibilité au sein de la directive nationale d'orientation des directions régionales des affaires culturelles, qui déclinent en région le soutien aux associations œuvrant en faveur de l'accès aux pratiques artistiques des personnes handicapées.

Cette action s'est développée au plan national dans les secteurs du théâtre et de la musique notamment par le soutien aux associations œuvrant en faveur de l'accès aux pratiques artistiques des personnes handicapées : l'Association Musique et situations de handicap (MESH), le Centre de Ressource Théâtre et Handicap (CRTH), Accès Culture.

Enfin, en 2007, le prix « musées pour tous, musées pour chacun » a été créé afin de distinguer une réalisation d'excellence en matière d'accessibilité pour les visiteurs handicapés, quel que soit le type de handicap. Cette réalisation prend la forme d'aménagements durables, de documents d'aide à la visite ou encore d'actions de médiation permettant ou facilitant l'accessibilité. En 2010, le Ministre de la Culture et de la Communication a exprimé son souhait de voir ce prix étendu à l'ensemble du champ des institutions culturelles du ministère. Ainsi, a été mis en place le prix « patrimoines pour tous, patrimoines pour chacun » afin d'impliquer l'ensemble des établissements patrimoniaux (Archives, musées de France, monuments historiques, Villes et Pays d'Art et d'Histoire) dans la mise en place d'une accessibilité généralisée de référence en direction de toutes personnes en situation de handicap.

3.2 **Accès aux médias :**

Des solutions volontaires se sont développées sous l'impulsion du Gouvernement français et du Conseil supérieur de l'audiovisuel, en accord avec les professionnels du secteur.

En France, de nombreuses dispositions ont été introduites dans la réglementation audiovisuelle afin de rendre les programmes télévisés accessibles aux personnes souffrant d'un handicap.

S'agissant des personnes sourdes ou malentendantes, la loi n° 2005-102 du 11 février 2005 a posé le principe général d'adaptation de la totalité des programmes télévisés des principales chaînes, à l'exception des messages publicitaires et de quelques dérogations justifiées par les caractéristiques de certains programmes, dans un délai maximum de cinq ans suivant la publication de la loi.

Plus récemment, des dispositions relatives à l'adaptation des programmes télévisés aux personnes aveugles ou malvoyantes par le recours à la technique dite de l'audiodescription ont également été introduites par la loi n° 2009-258 du 5 mars 2009 relative à la communication

audiovisuelle et au nouveau service public de la télévision dans la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication.

L'article 7 de la directive du 10 mars 2010 encourage le développement de l'accessibilité des services de médias audiovisuels aux personnes souffrant de déficiences visuelles ou auditives. Le Conseil supérieur de l'audiovisuel a décidé, dans le cadre de sa délibération n° 2010-57 du 14 décembre 2010 relative à la protection du jeune public, à la déontologie et à l'accessibilité des programmes sur les services de médias audiovisuels à la demande, de recommander aux éditeurs et distributeurs de SMAD de rendre les programmes accessibles aux personnes sourdes, malentendantes, aveugles ou malvoyantes.

3.3 **Accès à la lecture :**

La loi du 1er aout 2006 relative aux droits d'auteur et droits voisins dans la société de l'information, loi dite DADVSI, a introduit dans le code de la propriété intellectuelle une nouvelle exception au droit de reproduction et de représentation des auteurs et des titulaires de droits voisins au bénéfice des personnes handicapées.
Cette exception permet, sans autorisation préalable, ni rémunération des ayants droit, la reproduction et la représentation d'œuvres protégées sur des supports adaptés aux personnes handicapées, effectuées à des fins non lucratives par des personnes morales et par des établissements ouverts au public. Cette disposition permet l'accès aux supports physiques comme numériques. Pour exemple, la Bibliothèque nationale de France a inauguré, fin mars 2010, une plate-forme sécurisée de dépôt et de transfert des fichiers numériques ayant servi à l'impression des œuvres (PLATON).

Enfin, Frédéric Mitterrand, Ministre de la Culture et de la Communication et Roselyne Bachelot, Ministre des Solidarités et de la Cohésion sociale, ont traité de l'accessibilité au cinéma et à l'audiovisuel pour les personnes en situation de handicap à l'occasion d'une séance de travail de la Commission Nationale Culture Handicap le 26 janvier 2012. A cette occasion, le Ministre de la Culture et de la Communication a annoncé aux associations représentant les personnes en situation de handicap plusieurs mesures dont notamment:

- la mise en place d'une aide incitative du CNC pour que le sous-titrage et l'audio-description des films s'imposent progressivement dès leur sortie en salle ;
- le lancement de deux missions : l'une sur les métiers de l'audiodescription, l'autre sur la coordination de l'information sur les oeuvres sous-titrées et audio-décrites;
- la mise en place d'un groupe de travail afin d'accompagner la petite et moyenne exploitation cinématographique dans la mise en accessibilité des cinémas;
- la rédaction en cours d'un nouvel ouvrage de la collection Culture et Handicap consacré précisément à l'accessibilité au cinéma**.**

III- **Mesures envisageables**

Six ans après le vote de la loi du 11 février 2005, et afin d'assurer le rendez-vous de 2015, la priorité de la France en matière d'accessibilité concerne les secteurs suivants :

- les lieux de travail des secteurs publics et privés accessibles aux travailleurs handicapés,

- les nouvelles technologies d'information, de communication et de consommation,

- la santé,

- la formation de l'ensemble des professionnels concernés par la thématique du handicap,

- la culture et les loisirs,

- les transports.

La mesure la plus importante consiste à faire de l'accessibilité un « mot d'ordre » ou un principe général de société de « l'accès à tout pour tous ». Ce principe s'applique à l'ensemble de la population d'une société. Cette accessibilité doit pouvoir s'appuyer sur 4 piliers indispensables qu'une politique publique doit prévoir :

- L'accessibilité pour tous sans exclusion. La loi prend en compte toutes les formes de handicap, et concerne les personnes handicapées et les personnes à mobilité réduite, y compris de manière temporaire.

- L'accessibilité de l'ensemble de la chaîne des déplacements. Pour la première fois, une loi considère de façon intégrée le cadre bâti, les espaces publics, la voirie, les systèmes de transport et leur inter-modalité. L'enjeu est bien d'éliminer tout obstacle dans le cheminement des personnes atteintes d'une quelconque déficience.

- Des changements progressifs jusqu'en 2015. La loi impose des résultats selon un calendrier précis de mise en œuvre et elle prévoit des sanctions.

- Une accessibilité concertée. La loi est le fruit de la concertation avec les associations représentant les personnes handicapées.

En effet, s'il est « aisé » de concevoir des infrastructures et bâtiments neufs en tenant compte des handicaps, reprendre des infrastructures existantes peut s'avérer économiquement rédhibitoire dans certains cas. Par exemple, sur autoroute, l'aménagement de certains refuges permettant l'accès aux postes d'appels d'urgence n'est matériellement pas possible ou nécessiterait des investissements colossaux. Ainsi des mesures devraient être prises pour pallier ce type de situation. Par ailleurs, la difficulté réside davantage dans les moyens qui peuvent être débloqués par les différents maîtres d'ouvrages afin de réaliser les travaux nécessaires. Cette question ne se pose pas sur le réseau autoroutier concédé, mais elle peut devenir cruciale pour d'autres maîtres d'ouvrages.

L'ensemble de ces acteurs doivent dépasser le seul critère de coût lié à la mise en accessibilité des biens et des services. Au-delà de cet aspect financier, c'est l'ensemble d'une société qui est rendue accessible non pas à une catégorie de population mais à l'ensemble de la population constituant cette société. C'est un investissement à long terme d'intérêt national, voire européen, qui doit permettre une société inclusive pour une population.
Dans le domaine des transports, il est important de favoriser la concertation avec les associations comme avec les professionnels, tout au long des projets et de choisir un mode d'organisation permettant d'intégrer au mieux les avis, contraintes et revendications de chacun et :

- communiquer vers les maîtres d'ouvrage en utilisant par exemple la presse professionnelle, en diffusant des guides et en valorisant les bonnes pratiques ;
- attirer leur attention sur le traitement des espaces de transition entre le bâti, la voirie et les transports et l'entretien et l'exploitation des aménagements ;
- promouvoir la formation des services techniques et des professionnels qui interviennent sur l'espace public et la formation en général;

- sensibiliser les citoyens dans le cadre de comités de quartiers, de démarches de plans de mobilité et par l'utilisation de cartes de Gulliver ;
- associer le plus possible les réseaux scientifiques et les constructeurs.

Plus spécifiquement, dans le domaine routier, un manque de normalisation a été constaté concernant les bandes de guidage pour les personnes aveugles ou mal-voyantes. Différents systèmes sont actuellement testés par plusieurs maîtres d'ouvrage, mais la diversité des systèmes ne facilite pas leur reconnaissance et usage par les personnes handicapées. Il serait donc utile que les expérimentations puissent rapidement converger pour permettre une harmonisation des pratiques.

Enfin, les pouvoirs publics doivent règlementer pour les constructions neuves. L'existant doit être amélioré en cas de modification dans des mesures raisonnables.

Dans le domaine du bâti, deux grands axes prioritaires pourraient être développés à l'avenir :

- La formation des professionnels aux notions d'accessibilité ;
- La prise en compte des besoins réels des usagers en favorisant la concertation dès l'amont des projets.

Les petites et moyennes entreprises doivent avoir une meilleure connaissance des besoins des personnes en situation de handicap et mieux inclure la notion de conception universelle dans les biens et services. Elles doivent travailler en concertation avec les associations de personnes handicapées et à mobilité réduite, comme c'est actuellement le cas dans plusieurs villes européennes.

Concernant les constructeurs ou opérateurs de transport, le développement de la formation aux métiers liés à l'accessibilité des personnes en situation de handicap doit se poursuivre par la mise en place de nouveaux cursus de formation par exemple, voire l'émergence de nouveaux métiers.

La mise en place de plans de communication est indispensable, d'une part pour mieux faire connaître les besoins des personnes handicapées et à mobilité réduite et d'autre part, faire évoluer les mentalités.

Pour le transport maritime, depuis l'entrée en vigueur de la règlementation française sur l'accessibilité, de nombreuses PME ont su se positionner sur des marchés en ce qui concerne:

- la décoration intérieure (contraste pour les malvoyants)
- l'éclairage
- les affichettes et panneaux en braille etc…

Les petites et moyennes entreprises, par leur réactivité et leur capacité d'innovation, doivent être le support d'une politique de mise en accessibilité dans le domaine du bâti.

Germany

Equal access to the physical environment, means of transport, services and facilities as well as to information and communication technologies are essential conditions enabling people with and without disabilities to live together in a self-determined way in all areas of life.
In its schemes on accessibility, Germany pursues a broad approach with particular emphasis on the creation of accessibility in all areas of life. The Federal Republic of Germany has a number of laws and regulations on accessibility to implement the constitutional dictate of Article 3, para. 3, sentence 2 of the Basic Law that "No person shall be disfavoured because of disability".

Under the provisions of the Act on Equal Opportunities for Persons with Disabilities (BGG) providing for the prohibition of discrimination against disabled persons by public authorities and the creation of accessibility as well as under the equal opportunities legislation of the federal states, the government and the states are obliged to ensure comprehensive accessibility.

The goal of the Equal Opportunities Act is: constructional and other facilities, means of transport, technical utensils, information processing systems, acoustic and visual sources of information and communication facilities as well as other designed areas of life are to be accessible to and useable by persons with disabilities without particular obstacles in the customary manner and as a matter of principle without the assistance of others. In the sense of "design-for-all", the special focus lies on the characteristic "usable …. as a matter of principle without the assistance of others". This particularly strengthens the self-determination and personal responsibility of persons with disabilities. The regulations for the creation of accessibility are the core element of the Federal Act on Equal Opportunities for Persons with Disabilities which acted as model for the equal opportunity legislation of the 16 federal states. Moreover, the requirements of this Act are also relevant for other areas, e.g. the provision of benefits and services in the field of rehabilitation. This applies, in particular, also to rehabilitation services provided by the social insurance funds. Ten years after their introduction, the effectiveness of the provisions and instruments of the Equal Opportunities Act shall be reviewed. An evaluation to this effect is scheduled for 2013. On the basis of this evaluation, a potential need for amendments will be decided on.

The creation of accessibility is a dynamic process which can only be gradually implemented, taking account of the principle of proportionality and the means that are available. The standards of accessibility to be called on are subject to constant change. Specifically for individual regulatory areas, they are established by recognised technical regulations (such as the DIN standards of the German Institute for Standardisation) and - on the basis of the Act on Equal Opportunities for Persons with Disabilities - also via programmes, plans and agreed goals. Because, due to the long lifespan of current infrastructure facilities and vehicles, any necessary adjustments can only be made step by step, constructional and other facilities, means of transport, information processing systems and communication facilities are being successfully designed such that they can be used by persons with disabilities without particular difficulty and as a matter of principle without the assistance of others.

The access to justice for people with disabilities is guaranteed by German law. Corresponding provisions are, for example, contained in the Courts Constitution Act (GVG) and the Code of Criminal Procedure (StPO). The German Sign Language has been recognised as a language in its own right. In all proceedings before German courts and in administrative procedures with federal authorities, persons with hearing and speech impairments have the right to choose to

communicate either through German Sign Language, sound-accompanying signs or through other technical communication aids. Any costs arising in this regard are to be borne by the authorities or courts.

Blind and visually disabled persons participating in administrative procedures have the right that documents enabling them to exercise their rights be made accessible to them. The form of such documents depends on the possibilities of perception of the persons involved. Documents can, for example, be made accessible by being read out, with the help of sound recording devices, in Braille or capital letters, electronic form or by other means. The persons concerned are not to be charged with additional costs associated with the provision of these documents. The same applies to court proceedings.

In the Coalition Agreement of the Federal Government for the 17th legislative period it was agreed to draw up a National Action Plan (NAP) to implement the UN Convention. It was adopted by the Federal Government on 15 June 2011. With the NAP, a long-term overall strategy was drawn up for the implementation of the Convention. It is a package of measures rather than a legislative package and, in particular, aimed at closing existing gaps between the legal situation and the practice. More than 200 plans, projects and activities show that inclusion is a process that includes all areas of life. An important measure, for example, is ensuring access to medical care. All persons with disabilities are to be provided with unlimited access to every kind of health care and health services. The NAP therefore includes the objective of making a sufficient number of medical practices accessible over the next ten years. Together with the federal states and the medical profession, the federal government is going to develop an overall concept to give incentives for the creation of barrier-free access to or barrier-free equipment of practices and hospitals. The federal government's action plan is supplemented by other action plans of the federal states, municipalities, rehabilitation providers, disability and social organisations as well as providers of services for persons with disabilities and private sector companies. Some of these plans have already been adopted.

Accessibility and taking account of the "design-for-all" have become increasingly important criteria for companies, also with a view to the demographic trend of an ageing society. Accessibility opens up new consumer groups and thus, in addition to enhancing the participation of disabled persons, also new market opportunities for companies. Public relations and the provision of information on the implementation of accessibility in different areas of life are of crucial importance. Market research is therefore a major precondition for the development and supply of barrier-free goods and services. In this context it is important to identify products and services of special interest and to promote market research in these areas in a targeted way. Such research must include persons with disabilities. Many products are developed on the basis of scientific innovation or as a result thereof. Therefore, the training of experts involved in product development should contain elements to raise awareness of the subjects "accessibility" and "design-for-all".

With regard to information and the stimulation of change in the public's mindset, a lot of importance has been attached to the dissemination of good examples. For the above mentioned reasons, small and medium-sized enterprises (SME) should participate in this process. Since 2009, the Federal Ministry of Economics and Technology has organised conferences, particularly with SMEs, to make companies aware of the "design-for-all". A lot of good examples could be identified and published as a result. In 2012, further conferences will be held on this topic. But goods and services for persons with disabilities are not only in high demand by companies but also by the public sector - e.g. in social assistance.

Retail quality labels could support this process. In Germany, the government-supported initiative „Economic Factor Age“ developed the “Generation-Friendly Shopping” quality mark in cooperation with the German Retail Federation (Deutscher Handelsverband) and other institutions and organisations. The quality mark is awarded to stores catering to the needs of persons with a handicap, for example by ensuring an optimal design of their store entrance and arrangement of goods and by labelling their products with clearly legible price tags. Suitable measures should be adopted to sensitize consumer counselling services for accessibility as an distinctive characteristic of products and services. The involvement of people with disabilities is crucial for the success and acceptance of these measures.

Greece

The Greek constitutional law (article 4) defines that all people are equal before the law and that all Greek women and men have equal rights and obligations. According to that article, the same principles apply also to disable people.

Facilitation and accessibility

The General Secretary of Public Administration and Electronic Government with its circular letters mention the necessity of serving people with disability in priority and urging all public sector services to ensure accessibility to disable people.

Circulars of the Ministry of Interior define that public sector services, institutions and local authorities' services should provide for the accessibility of the built environment to people with disabilities. The Law 2831/2000 contains special clauses for the buildings to be accessible by people with disabilities. These clauses are related to issues such as the accessibility to entry-exit points of buildings, to sidewalks, elevators, post mail boxes and etc.

The Ministry of Environment, Physical Planning and Public Works has organised a "Committee of Accessibility" which recommend to the Minister issues that have to do with the implementation of the Law 2831/2000. Among others, members of this Committee are people from the National Confederation of Disabled People (ESAMEA).

The Athens Urban Transport Organisation's (OASA- www.oasa.gr) provides information about the accessibility to and the use of all means of transport (bus, trolley, metro, tram, train). In addition, the related infrastructure such as airports, bus and railway stations are accessible to people with disabilities. Most of city's transportation means are equipped with ramps in order to facilitate the boarding of people with disabilities using a wheel-chair.

Although there is no specific legislation about the e-accessibility and the participation of disable people in electronic government society, institutions or disability organisations develop websites in order to cover the special needs of this category of people.

A network of sports facilities accessible for athletes with disabilities has been developed; a network of sidewalks refurbished with ramps and tactile guide and also an accessible beach in Athens are available to disabled people.

More steps should be taken as well in the direction of comprehensive and systematic promotion of accessibility across the full range of policies and to raise awareness in particular of the sensitive group of children.

All Greek authorities, ministries etc. promote the right of disable people to accessibility in all areas of their daily and professional life. Article 9 of the UNCRPD is a guideline and all efforts are made under its principles.

a. Accessibility legislation: its place in the legal and regulatory framework

Circulars of the Ministry of Interior define that public sector services, institutions and local authorities' services should be provided for the accessibility of the built environment to people with disabilities. The Law 2831/2000 contains special clauses for buildings to be

accessible by people with disabilities. These clauses are related to issues such as the accessibility to entry-exit points of buildings, to sidewalks, elevators, post mail boxes and etc.

The Ministry of Environment, Physical Planning and Public Works has organised a "Committee of Accessibility" which recommend to the Minister issues that have to do with the implementation of the Law 2831/2000.

b. General law, technical regulations and standards

The existing legislation covers the basic requirements for the development of goods, products and services accessible to disabled people. Then, circulars produced by the Ministries, formulate, where appropriate, special conditions that must be followed for the development and implementation of accessible goods / services. For example, Law 2831/2000 Article 28 refers to special arrangements to accommodate people with disabilities to buildings, new and existing, and in public spaces. The Ministry of Public Works with a series of circulars required public bodies to take appropriate measures to implement the law. These circulars define technical details.

c. Role of national, European and international standards

The Greek legislation on accessibility follows international standards and has been defined from regulations produced by international bodies, e.g. mainly E.U., U.N, CoE. Although current legislation covers this issue, it seems there is a need for updating it after the upcoming ratification of the U.N. Convention on rights for people with disabilities.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Signing the U.N. Convention has not yet led to any changes regarding accessibility legislation, but it is expected that the ratification will affect current legislation, although it already covers all main topics that should be included in legislation regarding accessibility.

e. Services regulated for accessibility

The law 2831/2000 Article 28 provides special arrangements to accommodate people with disabilities.
More specifically, paragraph 1 defines that areas of new buildings should ensure both horizontal and vertical access by people with disabilities. These buildings are the buildings used by the public: public Services, public entities, private legal entities of the public sector, civil society organizations, local authorities first and second tier or uses, rollup public, education, health and social care, offices and trade as well as in parking lots of these buildings.

f. Goods regulated for accessibility

The Athens Urban Transport Organisation's (OASA-www.oasa.gr) provides information about the accessibility to and the use of all means of transport (bus, trolley, metro, tram, train). In addition, the related infrastructure such as airports, bus and railway stations are accessible to disabled people. Most of the city's means of transport are equipped with ramps in order to facilitate the boarding of people with disabilities using wheel-chairs. Besides means of transport, all goods and services either produced for or provided to the public should be

harmonised with internal legislation and E.U. directives and regulations, e.g. telephones, ATM's, doors, elevators, tables etc.

g. Enforcement of accessibility legislation

For particular buildings, the responsible departments for the implementation of accessibility in public spaces are the units of Accessibility and the Technical Services of the Municipalities. Other bodies responsible for implementation of accessibility in public buildings are the units of accessibility of the ministries, public entities, regions and local authorities, first and second degree. Monitoring of the implementation of accessibility works carried out by the Inspector General of Public Administration, who in that jurisdiction, directs and coordinates all the control mechanisms of the state to determine the motivation and compliance of public bodies and municipalities in implementing the projects accessibility. In particular, the control and policing of points of accessibility of public spaces and parking spaces shall be the responsibility of the concerned municipal police.

h. Non-compliance and litigation

Complaints may be submitted with a signed claim to the Ombudsman. A claim could be brought either by any directly concerned natural or legal person or association of persons. After the investigation, the Ombudsman, if required by the nature of the case may draw the conclusion which informs the relevant minister and the competent services, and mediates in any suitable way to solve the problem.

At the same time, any person can go to court, asking either the compliance of public or private entities with existing legislation on accessibility or to claim compensation for any damage.

Hungary

a. Accessibility legislation: its place in the legal and regulatory framework

The Hungarian law on the rights and equal opportunities of persons with disabilities (ACT XXVI of 1998 7/A. §) recognised the equal right to accessible public services. To implement this law the accessibility of public services is obligatory. The legislation defines accessibility in a complex way, so not just the accessibility of buildings is obligatory but the accessibility of information and services are also obligatory. This obligation refers to governmental, self-governmental and private public service providers; the earliest connecting deadline was 31. December 2008, and the latest was 31. December 2013.

The law declares in a separate paragraph, that people with disabilities must be provided with equal chances to access information of general interest, furthermore to information that refers to the rights of people with disabilities and (refers to) the services provided for them.

Paragraph 27 shows the human right viewpoint of the law, and declares: "Any person that has been treated unfairly on the grounds of his/her disability, he/she shall be entitled to all the rights that are to be enforced when personal rights are violated". This refers to all the rights named/declared under the law, so if there is a lack of accessibility, - after the deadline expires - the defaulter can be sued.

b. General law, technical regulations and standards

The Hungarian law on the rights and equal opportunities of persons with disabilities (ACT XXVI of 1998) recognises the right of accessible services and the requirements of suppliers. The law on Hungarian Sign Language and the use of Hungarian Sign Language (ACT CXXV of 2009) recognises the ICT accessibility of deaf people. The Hungarian law about the construction and protection of the built environment (ACT LXXVIII of 1997) and its implementation regulation, the governmental regulation about the national settlement planning and building requirements (253/1997.) contain the technical specifications of the physical accessibility.

We try to build the most modern requirements in the tendering packages during the implemented accessibility projects financed by EU and national resources. (About this we inform more in the answer belongs to the point c).

c. Role of national, European and international standards

In 2007, the legal predecessor of the Ministry of National Resources has put forward a Manual aiming to realize equal accessibility, which was updated in 2009 based on the new building acts. This expert document on architecture contains a broader system of requirements than the effective legislative provisions in the field of realizing accessibility, such as the W3C recommendation on web accessibility or other ICT standards where no relevant legal regulation has been formulated yet. The application of the Manual in cases of development projects financed by the European Union is obligatory.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Hungary ratified the UN Convention on the Rights of Persons with Disabilities and the related Optional Protocol in 2007. The main impact of the ratification is the declaration of the law on Hungarian Sign Language and the use of Hungarian Sign Language (ACT CXXV of 2009). This law recognises −inter alia− the communication rights of deaf and deaf-blind people and their rights to free sign language interpreting service, and learning through Sign Language, and TV programmes have to be subtitled, and during formal –judicial, police, etc. –processes obligatory to use Sign Language interpreter.

This Convention inspired the modification of the governmental regulation about the national settlement planning and building requirements (253/1997.) in 2009, which enlarge the technical and architectural specifications in connection with the physical accessibility.

We will take into consideration the principles of the Convention when reviewing the Hungarian law on the rights and equal opportunities of persons with disabilities (ACT XXVI of 1998). On the basis of the professional trends, national and international experiences we will update the legislation about the accessibility.

e. Services regulated for accessibility

The accessibility obligation of the ACT XXVI of 1998 refers to the further public services:

- all public power activity- including all kinds of authority, governmental, administrational and judicial activity- furthermore the activity of the parliament, organisations subordinate to the parliament, the Constitutional Court, parliamentary commissioners, the prosecution, home defence and security organisations practicing their competence.
- public media, education, public education and collection, culture, science, social, child welfare, child protection, health, sport, youth, and employment services, cares and activities provided by institutions run by the state.
- all activities of local and minority governments practicing their competence- including especially the authority and other administrational activities- and according to the 2nd point services, cares and activities provided by local and minority governments, NGOs and parochial institutions, and institutions financed by them.
- service activity provided in all kinds of customer services, furthermore
- service activity based on all kinds of authority permit or authority obligation, that serves the public care of a settlement or a part of a settlement, is not restricted and cannot be restricted.

f. Goods regulated for accessibility as part of a service

There is no legislation in force in connection with the accessibility of the goods.

g. Goods regulated for accessibility

There is no accessibility legislation for manufactured goods in Hungary at the moment.

h. Enforcement of accessibility legislation

In accordance with the legal regulations in force, compliance with accessibility provisions during the construction of a new building or the reconstruction of an already existing one is

verified by the building authorities in each case in advance. In principle, granting a building permit must be denied in all cases where fulfilling the requirements is not guaranteed. In practice however, it poses a serious problem that the experts of the building authority are not well-informed enough about accessibility requirements and numerous mistakes derive from inefficient construction.

The effective provisions do not impose classic sanctions on accessibility legislation. Non-compliant providers will first and foremost have to face the previously mentioned possibility of litigation. Moreover, the Equal Treatment Authority may investigate whether maintainers have fulfilled legal obligations in a given case. In cases of a violation, the Authority may impose a fine.

In our plans, reviewing the legal framework to provide accessibility will also extend to the legal consequences of non-compliance.

i. Non-compliance and litigation

The Hungarian law on the rights and equal opportunities of persons with disabilities (ACT XXVI of 1998 27. paragraph) declared "Any person has been treated unfairly on the grounds of his/her disability, he/she shall be entitled to all the rights that are to be enforced when personal rights are violated". This means in practice, that the defaulter can be sued because of violation of individual rights.

Furthermore, in the case of breaking the law considering the accessibility legislation, plaintiffs can turn to the Commissioner of Fundamental Rights (ombudsman) and to the Equal Treatment Authority.

According to the Hungarian law on the rights and equal opportunities of persons with disabilities (ACT XXVI of 1998 25. paragraph (7)) "The National Council on Disability Affairs and the national organisations for advocating the rights of persons with disabilities may initiate court proceedings against anybody violating the rights of persons with disabilities as encoded in legislation in order to enforce such rights, even if it is not possible to establish the identity of the particular disabled person who has experienced the insult."

Ireland

a. Accessibility legislation: its place in the legal and regulatory framework

Equality (anti-discrimination) legislation, the Equal Status Acts 2000 to 2008, provides that anyone selling goods, providing services, selling or letting accommodation, educational institutions and clubs must do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, where without these it would be impossible or unduly difficult to access goods, services, accommodation etc. This is subject to nominal cost.

The Disability Act 2005 obliges public bodies to make their buildings, services communications, and information as well as heritage sites accessible for people with disabilities and is supported by statutory codes of practice and also practical guidelines. It also establishes requirements for a complaints process with appeals to the national Ombudsman. Programmes of works have been undertaken and committed in sectoral plans (disability action plans produced by key Government Departments under the Disability Act).

Part M of the Building Regulations also covers accessibility and applies to new buildings (other than private houses) which have to have mandatory Disability Access Certificates; and over time to public areas of public sector buildings.

b. General law, technical regulations and standards

Legislation provides specific requirements for the public sector as stated above and provides for the Disability Access Certificate for all sectors. It is also a subject of regulations, i.e. in the case of new buildings, Part M of the Building Regulations sets out general requirements, and the accompanying Technical Guidance Document lists specifications for particular aspects of a building (e.g. doorway and corridor widths) that would satisfy the accessibility specifications.

c. Role of national, European and international standards

2011 Irish legislation on the legal requirement for Energy Suppliers in relation to Universal Design is set out in Section 3 (3) of The European Communities (Internal Market in Electricity and Gas) (Consumer Protection) Regulations of 2011 (S.I. No. 463 of 2011). This section states that suppliers must apply the principles of Universal Design to:

- all products and services offered or provided to final customers, and
- communications with final customers.

In early 2012 the National Standards Authority of Ireland (NSAI) produced the first global guidance standard for Energy suppliers in Ireland. This was specifically based on the universal design of how the energy suppliers (electricity and gas) communicate to their customers – verbal, written and electronic based communication. The National Disability Authority's Centre for Excellence in Universal Design and the office of the Commission for Energy Regulation in Ireland co-chaired the production of this guidance standard with all the key stakeholders from energy suppliers in Ireland and diverse user group representations from age, size ability and disability.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Since signing the Convention, updating and strengthening of Building regulations, and introduction of mandatory Disability Access Certificates for new buildings have occurred as part of the National Disability Strategy, the key vehicle for advancing policies in relation to people with disabilities.

e. Services regulated for accessibility

Equality legislation covers both public and private sectors. The Equal Status Acts 2000 to 2008 apply to people who:

- Buy and sell a wide variety of goods,
- Use or provide a wide range of services,
- Obtain or dispose of accommodation,
- Attend at, or are in charge of, educational establishments,
- There are separate provisions on discriminatory clubs.

Disability legislation is specific to the public sector only. The Disability Act 2005 regulates for access to public buildings and heritage sites and access to services and information provided by public bodies.

Regulations for the building sector, Part M of the Building Regulations, apply to both public and private sectors.

f. Goods regulated for accessibility as part of a service

Equality legislation states "goods and services" without specifying the nature of those goods and services. Disability legislation provides for accessibility to be taken into account in public procurement of goods and services, again without specifying the nature of goods involved.

g. Goods regulated for accessibility

The Public Transport Regulation Act 2009 specifically requires that improved access to transport systems and in particular to public transport services by people with disabilities be achieved.

In 2010 the Irish government introduced S.I. No. 248/2010,the Taxi Regulation Act 2003 (Wheelchair Accessible Hackneys and Wheelchair Accessible Taxis - Vehicle Standards) Regulations 2010. This regulation covers:

- applications for the grant of a wheelchair accessible hackney or a wheelchair accessible taxi licence;
- applications for the renewal of a licence ; and
- renewal of a wheelchair accessible hackney or a wheelchair accessible taxi licence.

The Merchant Shipping Act 2010 covers passenger vessels to ensure that they are accessible to people with disabilities. This is based on the EU Regulation 1177/2010 on the rights of passengers travelling by Sea and Inland Waterways.

The Irish statutory Centre for Excellence in Universal Design is working with the National Standards Authority in relation to universal design standards for services. Work to date has included recent adoption of a SWIFT standard for improved energy services to customers, including those with disabilities. The national regulatory body for the energy sector is working to achieve compliance.

h. Enforcement of accessibility legislation

For accessibility of goods and services generally (equality legislation), the Equality Authority provides advice and information and can guide complainants, the Equality Tribunal adjudicates on complaints, and can make an award of monetary compensation to the complainant, to be paid by the offending organisation.

Disability legislation governing access to public services, premises and information provides that individuals can appeal to a statutory Inquiry Officer, or ultimately to the Ombudsman, who can recommend that appropriate action be taken by the public body.

With regard to accessibility of new buildings, an award of a Disability Access Certificate is required before the building can be occupied. This is the role of Local Authorities.

i. Non-compliance and litigation

Individuals can bring a complaint to the Equality Tribunal (for complaints regarding general accessibility of goods/services) and the remedy is usually damages awarded to the complainant. Awards may be appealed to the Courts. The Equality Authority can join the complainant in taking the case.

Individuals can bring a complaint, under the Disability Act, on accessibility of public services to the head of the Public Body who must then appoint a statutory Inquiry Officer to investigate the complaint and advise on remedial steps to be taken. Should the complainant be dissatisfied with the outcome of this process they have the right to refer it to the Ombudsman.

Italy

a. Accessibility legislation: its place in the legal and regulatory framework

General provisions on accessibility of infrastructures (built environment) are included in the law n. 104/1992 (Statutory law to promote the assistance, the social integration and rights of persons with disabilities), which provides for all designs of public buildings and private buildings open to the public to comply with the legislation regarding the removal of architectural barriers. Authorizations to build depend on the same legislation.

The Consolidated Building Act (*Testo Unico Edilizia*, approved by *Decreto del Presidente della Repubblica* n. 380/2001 and related provisions (e.g. law n. 13/1989) provides for the removal of architectural barriers in private and public buildings and relevant sanctions.

Detailed technical regulations on accessibility of public buildings and private buildings open to the public are included in Presidential Decree n. 503 of 24 July1996.

Law n. 4/2004[72] provides for specific measures aimed at enhancing access to ICT tools and devices for persons with disabilities. The Law states that measures to favour ICT accessibility belong to the measures to implement equality principles enshrined in the Constitutional Law (art. 3). Therefore it regards the granting of equality conditions.

Law n. 104/1992 establishes that municipalities should identify suitable ways to provide individual transport for persons with disabilities who are not able to use public transport, by drawing up mobility plans foreseeing alternative services.

Law n. 37/1974 provides for guide dogs to be allowed free of charge on public transport. Recent public means of transport such as train buses and coaches are equipped with special facilities for passengers with disabilities and with reduced mobility. All European directives and regulations concerning accessibility of public transport have been implemented, in particular Regulation (EC) n. 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 which is expected to pave the way for similar regulations in the field of bus and maritime transport.

It should be noted also that Decree of the Ministry of Cultural Heritage and Activities of 28 March 2008 adopted the Guidelines for the elimination of architectural barriers in places of cultural interest.

In the Italian law accessibility is designed primarily to overcome architectural barriers as well as all physical obstacles that are a source of discomfort for the mobility of everyone and especially for those who have a reduced or impaired mobility, permanently or temporarily; limiting or preventing anyone from convenient and safe use of parts, equipment or components or represented by the lack of measures and indicators that allow the orientation and recognition of places and sources of danger to anyone and in particular for the blind, partially-sighted and deaf.

[72] For the English version see the following link: http://www.pubbliaccesso.it/normative/law_20040109_n4.htm

The concept of architectural barrier is, therefore, very extensive and articulated and includes elements of different nature, which may cause perceptual or physical limitations, such as particular conformations of the objects and places that may be a source of disorientation, fatigue, discomfort or distress. Architectural barriers are therefore not only narrow steps or passages, but also slippery, uneven or bumpy paths and roads, stairs without handrails, steep ramps, lobbies without seating systems or protection from the weather, the lack of guidance or indications that helps identify any source of danger, and so on. Physical barriers are an obstacle to "anyone", not only for particular categories of persons with disability, but for all potential users.

Specific initiatives are adopted by the regions on the base of their responsibility (since 2001) for local governance of social policies.

b. General law, technical regulations and standards

See item a.

Regarding L. 4/2004 and ICT accessibility the Law is accompanied by an implementation regulation and technical rules contained in secondary norms (Regulation DPR 75/2005 for English version see http://www.pubbliaccesso.it/normative/implementation_regulations.htm and Ministerial Decree 8 July 2005 http://www.pubbliaccesso.it/normative/DM080705-en.htm) which set technical requisites and guidelines. So, on the one hand, the Law provides for principles, and guidelines regarding training, responsibilities of e.g. public managers regarding ICT procurement etc.; on the other hand, implementation regulation gives operative indications concerning the assessment of accessibility etc.

c. Role of national, European and international standards

See item a.

Regarding L. 4/2004 and ICT accessibility, international guidelines such as WCAG (Web Content Accessibility Guidelines released by W3C) are taken into account as point of reference. Under this aspect it is worth mentioning that in consideration of the release of the WCAG 2.0, the technical requisites (Annex A of DM 5 July 2004) are undergoing a revision (already notified to European Commission according to EC Directive 98/34).

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Italy is in the first phase, checking the effectiveness of national legislation in relation to the principles of the UNCRPD. The national Law n. 18/2009 provides the establishment of a National Observatory in order to monitor the condition of people with disabilities. The National Observatory, which met for its official session on December 16th, 2010, to monitor the condition of people with disabilities will also assure the implementation of the activities provided by the Article 33.2 of the UN Convention. On July 2011 six working groups, of which one has to examine issues related to accessibility, were formed within the Observatory, in order to deal with all major areas of reference set by the UN Convention.

e. Services regulated for accessibility

Transport, education, tourism, cultural activities, electoral services.

Regarding ICT accessibility Law 4/2004 mainly targets public administrations websites and public procurement of ICT devices. (The compliance to accessibility provisions is also stated in the Digital Administration Code legislative Decree 2005/82 as modified by legislative Decree 235/2010 as compulsory obligation for public administration websites).

As for Digital tools used in Education (Digital content for education and learning) specific provisions are contained in the Ministerial decree 30 April 2008 – only in Italian http://www.pubbliaccesso.it/normative/DM300408.htm)

f. Goods regulated for accessibility as part of a service

Article. 7 of Law no. 104/1992 provides that the National Health Service is obliged to ensure assistance and the supply of any equipment, tool, prostheses and technical aids necessary for the treatment of impairments, in order to make sure that poor persons with disabilities have the opportunity to benefit from equipment and help to promote personal mobility. In this area, reference can be made to Ministerial Decree 27 August 1999, n. 332, dealing with types and modes of prostheses and services free of charge, by the NHS. For the other types of equipment, tool, prostheses and technical aids not specifically listed under that provision, is possible to obtain a tax advantage.

.

g. Goods regulated for accessibility

People with disabilities can obtain a special license to drive a vehicle adapted to their specific needs, after authorization by a Local Medical Committee (ASL), responsible for ensuring the driving capacity (Article 116, c. 5, *Codice della Strada*). Moreover, Article 27 of Law no. 104/1992 introduces a 20% subsidy on costs to modify the driving systems, and several forms of tax benefits are listed for the purchase of a vehicle for people with disabilities or their families (reduced VAT, income tax deduction, exemption from payment of road fees and exemption from property transfers). In addition regions introduced contributions for purchasing vehicles for people with disabilities.

At the national level, regarding the possibility for people with disabilities to benefit from aids, equipment, technology for mobility, Decree of the President of the Republic n. 917 of December 22, 1986 (*Approvazione del T.U. sulle imposte dei redditi*) provides the possibility to deduct 19% of the costs incurred for the purchase of necessary means for personal mobility, and ICT and technical means designed to promote personal autonomy and the possibility of real integration of disabled people. E.g.: wheelchairs, artificial limbs, guide dogs for blind people, vehicles adapted to the needs of people with disabilities. Furthermore, a special VAT (4% instead of 20%) is reserved for orthopedic appliances or special vehicles with engines or other mechanism of propulsion, stair lifts, prostheses and aids related to permanent functional impairment (Law n. 263 of May 29, 1989). Law n. 30 of 28 February 1997 establishes a special VAT for purchasing technical and ICT aids designed to promote the autonomy of people with disabilities.

h. Enforcement of accessibility legislation

Law no. 104 of February 5, 1992, states that any project to be implemented in public or private buildings (when open to public) are subject to control by the municipality which has to verify their compliance to local regulations.

Regarding ICT accessibility, art. 9 of DPR 75/2005 (implementation regulation of L. 4/2004) states that each administration has to appoint a person responsible for ICT accessibility and it foresees a monitoring activity by a public body (former CNIPA, now DigitPA). Disciplinary sanctions can be applied to public managers who do not respect the requirements of the law.

More recently (December 2009), in order to have a more effective compliance to the law leveraging on users involvement in a full Web 2.0 way, the "Observatory for the Accessibility of Public Administration Websites" has been launched. Through the portal www.accessibile.gov.it , any citizen can complain regarding lack of accessibility (or usability) of public websites, but he/she can also give evidence to good practices. Through the website is also possible to monitor how the reports are handled until the cases are solved. Moreover, www.accessibile.gov.it has become a tool to spread the culture of web accessibility by giving space to news, examples, guidelines and good practices.

i. Non-compliance and litigation

In order to ensure equality and non discrimination of people with disabilities in every field of social life, including accessibility, Italy adopted Law no. 67, March 1, 2006 (*Measures for the judicial protection of persons with disabilities who are victims of discrimination)*. In defining the concept of anti-discrimination, Article 2 refers to the principle of equal treatment from which it follows that there can be no discrimination against persons with disabilities.

As for the procedural aspects of the protection, article 3 refers to article 44 of Legislative Decree no, 286, July 25, 1998 (*Consolidated text of provisions governing immigration and the status of the foreigner).* According to art. 44, when dealing with any form of discrimination from a single person or a public administration, anyone can file a case in civil courts to obtain the adoption of any necessary measure to remove the effects of that discrimination.

Non-execution of judge's orders can imply imprisonment until three years. The procedure ends with the executive order to terminate any behavior, conduct or act of discrimination, and to undertake any necessary measure to remove the effects of discrimination.

The intervention of the court is therefore not limited to modifying what had already happened, but also aimed to prevent discrimination in the future, thanks to positive actions for substantial equality of all people with disabilities.

Associations entitled to protect the rights of persons with disabilities (art. 4), identified by the Decree of the President of the Council of Ministers 21 June 2007, n. 181 (*Associations and entities qualified to act for judicial protection of persons with disabilities, victims of discrimination)* can also act on behalf of the disabled person after delegation of the party concerned, under form of public act or private writing (Art. 4, paragraph 1). In case of collective discrimination, associations and organizations are empowered to act without delegation (Art. 4, paragraph 3).

Latvia

a. Accessibility legislation: its place in the legal and regulatory framework

At the national level any discrimination is prohibited by the Constitution. However non-discrimination principles on the grounds of disability have been incorporated into different national laws, for example regarding access to education, consumer rights, health sector, social security, employment, etc.. Thus the responsibility regarding accessibility falls into scope of respective branch ministries.

Policy planning documents relevant for the topic, approved in 2011:
Action Plan for Implementing the Basic Principles on Policy for Elimination of Disability and its Consequences 2005-2015", adopted in 2006. The plan includes measures to foster equal rights of persons with disabilities in different spheres of life.
On 25 May 2011, the Cabinet of Ministers approved "***The Electronic Government Development Plan for 2011–2013***"[73] has been prepared in 2011 (order No.218) covering measures to: reduce the administrative burden and increase efficiency of the organizational process in the public administration; develop electronic services tailored to the needs of population and enterprises; develop state information systems and the ICT infrastructure, fostering internet access; facilitate public involvement in the policy-making process. It is developed for further implementation of Information Society Development Guidelines and continuity of e-Government Development Programme 2005-2009 and developed with regard to the objectives set in the Malmö Declaration and European eGovernment Action Plan 2011-2015.
The plan comprises 192 measures and its aim is to provide available public services to citizens in a convenient and simple way, through electronic data exchange between public administration and local government entities, while increasing government efficiency and reducing its costs. It is planned to create and develop more than 220 e-services within the framework of the Plan, including for citizens with disabilities. Implementation of the Plan is proceeding according to the time schedule approved in the Plan. In 2011 20 e-services have been developed, in 2012 there are planned to develop more than 150 e-services.

In line with National development documents setting the objectives to facilitate the e-skills to benefit from the digital society on 18th May 2011, the Cabinet of Ministers approved the "Electronic Skills Development Plan for 2011-2013" (order No.207)[74] taking into account the objectives set in the "Digital Agenda for Europe" as well as related national policy documents. The Plan is a short-term policy planning document and its aim is to promote the development of an information society allowing the population of Latvia to learn general e-skills commensurate with their education and professional activity levels during the period from year 2011 to 2013. The plan sets the objectives to raise the awareness and motivation of the necessity of e-skills as one of the eight key competences which are fundamental for individuals in a knowledge-based society.
The main target groups of the Plan are government employees, the unemployed and job seekers, retirees, long- term social care institution residents, disabled persons, prisoners according to Digital Agenda for Europe *Action 066: Implement by 2011 long-term e-skills and digital literacy policies and promote relevant incentives for SMEs and disadvantaged groups*.

[73] http://polsis.mk.gov.lv/view.do?id=3718

[74] http://polsis.mk.gov.lv/view.do?id=3662

Measures for facilitating e-skills of other target groups are foreseen in other national development planning documents.
The Plan's implementation has started. One of the tasks in the Plan is to hold the annual European E-skills Week with the aim to promote e-skills and ICT profession by involving and informing all groups of population, including entrepreneurs.

b. General law, technical regulations and standards

Built environment

The accessibility of the built environment in construction policy is regulated by the Construction law, which defines „accessibility of the environment" and also determines that a structure shall be designed and constructed so as to ensure the accessibility of the environment.

Currently there are two regulations of the Cabinet of Ministers in force- Regulation No 567 „Regulation on Latvian Building code LBN 208-08 „Public buildings and structures"" and Regulation No409 „Regulation on Latvian Building code LBN 211-98 „Multi-storey Multi-apartment Residential Buildings"" that include requirements of ensuring physical accessibility for persons with disabilities. In Regulation No567 the chapter "A*ccessibility in public buildings for people with disabilities"* provides ensuring requirements of physical accessibility in public buildings. In Regulation No409 the chapter "*Requirements of comfort for disabled persons"* provides requirements of physical accessibility in residential buildings, if there are anticipated apartments for families having disabled people with movement impairments.

Transport

Public transport

Currently an intensive work is underway to incorporate the main requirements for passenger rights into national law in accordance with the European Parliament and Council Regulation of 16 February 2011 (EU) No 181/2011 on bus passengers' rights and amending Regulation (EC) No 2006/2004, including, inter alia, provisions for disabled persons and persons with reduced mobility.

Procedures for the provision and use of public transportation services are determined in the Regulations "The order of provision and utilization of public transport services" which determine that all information in a bus about bus stop place shall be accessible in visual form and carried in audio form. Categories of passengers who have the right to pay lower fees for public transportation services provided along basic routes in a network of routes, as the procedure of paying lower fees and the amount by which the said fees are to be lowered are determined in the Regulation "Categories of passengers who have the right to pay lower fees for public transportation services provided along basic routes in a network of routes".

Environmental requirements established in the assignment of the planning architecture and referred to the Cabinet Regulations „General Building Regulations" are taken into consideration when designing and building the state roads network.

The national standard LVS 448:2008 "Railway applications. Passenger platforms for 1520 mm railway lines" lay down general requirements, which is harmonised with the EC decision 2008/164/EC of21 December 2007, concerning the technical specification of interoperability relating to "persons with reduced mobility" in the trans-European conventional and high-speed rail system. Standard requirements provide the upgrade of platforms height from 200 mm to 550 mm height from the rail surface.

Air transport

In the field of aviation 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 including European Civil Aviation Conference (ECAC) Doc 30 is applicable to the Republic of Latvia. Latvian Civil Aviation Agency exercises the supervising of application.

Sea transport

The Directive 2003/24, which amends Directive 98/18/EC on safety rules and standards for passenger ships engaged on domestic voyages, has been implemented by the Regulations of the Cabinet of Ministers No145 "Regulations Regarding the Safety of Ro-Ro Passenger Ships and High-Speed Passenger Craft" adopted on 14 February 2006. The Directive includes specific requirements for persons with reduced mobility, in particular access to the ship, signs, messages relay systems, alarms and additional requirements, designed to ensure mobility on board ships. The issue of accessibility to new ships for international services Latvia as member state of the International Maritime Organisation should follow to the Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs regulated by the International Maritime Organisation.

In Latvia the European Parliament and Council Regulation (EU) No 1177/2010 on the rights of passengers travelling by sea and inland waterway was adopted on November 24, 2010, (will be applied from 18/12/2012) therefore amending Regulation (EC) No 2006/2004.

In the issue of accessibility to new ships for international services Latvia as member state of the International Maritime Organisation should follow to the Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs regulated by the International Maritime Organisation.

ICTs and communications

In the field of information and communication technologies, Universal service directive 2002/22/EC and its amendment 2009/136/EC is transposed in the Electronic communications law and Electronic mass media law, ensuring the principle of equivalence of choice and access, access to European single emergency number 112, must carry obligations**.**

The Postal Law stipulates that secograms (postal items, which contains notifications or printed papers prepared in a special manner, using the writing system for the blind – Braille, as well as other information carriers addressed to the blind) are exempted from payment for postal services.

Regulations of the Cabinet of Ministers, No.171 "Procedures by which Institutions Place Information on the Internet" (adopted 6 March 2007) prescribes the procedures, by which institutions shall place information on the Internet in order to ensure availability thereof. In addition, in websites of institutions must be a section "easy to read", hence covering more citizen groups that are able to comprehend the information. In the regulations there defined a range of technical requirements for websites, that gives the possibility to perceive the information in several ways (in written form, as well as in the form of pictures and sound). And websites shall provide for a possibility to select the font size[75].

The Electronic Documents Law foresees that state and local authorities are obliged to accept electronically signed documents from individuals and legal entities, therefore, for many

[75] http://www.likumi.lv/doc.php?id=154198

services persons can apply by sending a digitally signed request to the official e-mail of the competent authority. Many of them a person can also receive electronically.

In order to reduce the administrative burden on enterprises and citizens and ensure good governance principles in accordance with the State Administration Structure Law and the Administrative Procedure Law, the Ministry of Environmental Protection and Regional Development examining drafts of regulatory acts and policy planning documents developed by other ministries and giving official opinions afterwards, urges institutions to include principles of electronically available services both applying and receiving, also including advantages (faster or cheaper receive for the electronic channel) etc, and to reduce the administrative burden on businesses and citizens. In 2011, there are given 146 official opinions on legislation and policy planning documents developed by other ministries.

The Ministry of Environmental Protection and Regional Development developing its own legislation, takes into consideration mentioned principles and includes them into the policy and regulatory acts.

To provide the observation of principles stated by State Administration Structure Law, the regulations of the Cabinet of Ministers, No.357 „Procedures by which institutions cooperating provide information electronically, as well as provide and certify the trueness of such information" (approved on 13th April, 2010) prescribes procedures, basic principles and available methods for cooperation between institutions electronically providing the information at their disposal and confirmation of such information.

The regulations of the Cabinet of Ministers Nr.792 (adopted on 11th October, 2011) "Regulations on action program" Infrastructure and Services" appendix 3.2.2.2 activity "Development of Public Internet Access Points"" provides for development of new public Internet access points or significant improvement of existing public Internet access points in local governments, in order to increase possibilities for Internet access to widest range of society groups, promoting access to electronic and other services, and information provided by public administration and commercial companies. The available total funding for the activity is 3 million LVL. Implementation of the activity ensures the Ministry of Environmental Protection and Regional Development as the responsible authority and the State Regional Development Agency as a cooperation authority.

Within the framework of the activity it is planned to create around 547 new or improve existing public internet access points – in each city (except Riga), municipality or municipality's territorial unit (town, rural territory) not more than one public Internet access points.

Mentioned regulations on the implementation of 3.2.2.2 activity has set a criterion for provision of horizontal priority "Equal Opportunities" - a project being appraised on this criterion, the project will receive extra points if it foresees specific actions to ensure equal opportunities, including providing services to persons with functional disabilities.

c. Role of national, European and international standards

When developing national standards international and best practices are being used to develop national standards. European Standards foreseen in EU Regulation are being incorporated and adopted as national standards.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Currently the future strategic document "Basic Principles of Implementation of the Convention on the Rights of Persons with Disabilities for 2013-2019" is being elaborated in close cooperation with line ministries and DPO's, it is foreseen that this document will also include certain proposals for measures and amendments to the legal acts to promote accessibility.

e. Services regulated for accessibility

See above.
Additional amendments to the legal acts regarding access to goods and services are under debate currently.

f. Goods regulated for accessibility as part of a service

See above.

g. Goods regulated for accessibility

See above.

h. Enforcement of accessibility legislation

Supervision (control) exists regarding construction process.

i. Non-compliance and litigation

In case of discrimination or non-compliance individual person or an NGO can file a case in court.

Lithuania

a. Accessibility legislation: its place in the legal and regulatory framework

The Law on Equal Opportunities (Official Gazette, 2008, No. 76-2998) prohibits all types of direct and indirect discrimination on grounds of age, sexual orientation, disability**,** race, ethnicity, religion or beliefs at work, educational institutions and in the sphere of services and goods.

According to Article 8 of this act, following the principle of equal opportunities, sellers or manufacturers of goods and providers of services must, irrespective of consumers' gender, race, nationality, language, origin, social status, faith, beliefs, views, age, sexual orientation, disability, ethnicity or religion:

i. create equal conditions for all consumers to obtain the same products, goods and services including provision with housing and applying equal terms and guarantees for the same products, goods and services of the same value;
ii. while providing information on or while advertising products, goods or services to consumers, ensure that such information does not convey humiliation or scorn or restriction of rights or giving privileges on the grounds of gender, race, nationality, language, origin, social status, faith, beliefs, views, age, sexual orientation, disability, ethnicity or religion and that such information does not form a public attitude that an individual has an advantage or disadvantage due to the aforementioned grounds.

Provisions of the Law of Social Integration of the Disabled require those with duties under the Law to make adjustments to special needs of disabled in the fields of: provision of information, health care, accessibility, education, transport, etc.

The Law also provides that the Ministry of Environment is responsible for the preparation of construction technical regulations for the adaptation of environment to the needs of the disabled and for supervising the implementation of such regulations.

In the 11 Article of The Law of Social Integration of the Disabled for provision of accessibility are responsible:

- For adaptation of facilities for disabled persons' special needs are responsible local authorities;
- For territorial planning and design of buildings and public works buildings, housing and the environment, public transport facilities for passenger service, and their infrastructure, information environmental adaptation are responsible local authorities, owners and users of the objects.

Article 34 of the Republic of Lithuania Law on Education establishes that access to education shall be ensured for persons with special needs by adapting the school environment and by providing special pedagogical, psychological and special assistance.

The Law On Fundamentals of Protection of the Rights of the Child (Official Gazette, 1996, no. 33-807) provides that public buildings, streets and transportation means, which are to be used by a disabled child, shall be adapted to the special needs of a disabled child. The Law also provides that adapted accommodations shall be installed within institutions intended for these children. State and municipal executive institutions shall ensure according to their

competence and potential that requirements indicated in parts one and two of this article, would be implemented.

The Law on Construction stipulates that during the design, construction, reconstruction or major renovation of buildings (except blocks of flats under renovation) and engineering constructions, it is necessary to adapt them to the special needs of disabled according to the Law of Social Integration of the Disabled.

The responsibilities to provide reasonable accommodation for disabled persons are embedded in The Law on Equal Opportunities. In The Law on Equal Opportunities there is embedded that employers „shall take appropriate measures to enable a person with disabilities to have access to employment, to work, to seek career or to undergo training, including reasonable accommodation, if those measures shall not cause disproportionate burden to employer". This provision regulates only employer's duty, but not in the area such as social protection, education, provision of goods and services.

In Lithuania there is a Programme for the Adaptation of Housing of the Disabled (hereinafter referred to as the Programme) which also contributes to improvement of accessibility for the disabled. The purpose of the Programme is to seek independence and social integration of the disabled, meeting their special needs and adapting housing and its environment to their special needs. The Programme is targeted at disabled with physical impairment and having difficulty moving around the house who need an adaptation of housing.

Article 14 of The Law on Education of Republic of Lithuania establishes that access to education shall be ensured for persons with special needs by providing special pedagogical, psychological and special assistance.

b. General law, technical regulations and standards

Information regarding accessibility in Lithuanian legislation is provided in point a.

Adaptation of constructions and territories to disabled people's needs in Lithuania is enshrined in construction technical regulations (CTR): Orders of the Minister of Environment on Construction Technical Regulations:

CTR 2.03.01:2001-Constructions and Territories. Requirements for needs of the Disabled;
CTR 2.02.02:2004-The Buildings of Public Service;
CTR 2. 02-01-2004-Residential Buildings;
CTR 2.02.09:2005-Deatched Residential Buildings;
CTR 2.06.02:2001-Bridges and Tunnels. General Requirements;
CTR 2.06.01:1999-Transport Systems of Cities, Towns and Villages;
CTR 1.05.06:2010-Designing of the Structure;
CTR 1.07.01:2010-Documents authorising construction works
CTR 1.07.01:2010-Completion of Construction

In Lithuania the Information Society Development Committee under the Ministry of Transport and Communications prepared Methodological Recommendations for the development and testing of web sites adapted to the needs of disabled people. According to the aforementioned Recommendations, state and municipal authorities are obliged to adapt web sites for disabled. The Information Society Development Committee once a year performs an analysis to ascertain whether the web pages are adapted for the disabled.

c. Role of national, European and international standards

Lithuania does not develop purely national accessibility standards. All European Standards and several international ones in the area of accessibility are adopted as national standards.

Accessibility for disabled and persons with reduced mobility to transport services are regulated by European Union regulations which are binding in Lithuania:

- Regulation of the European Parliament and of the Council concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004;
- Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations;
- 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;
- Regulation of the European Parliament and of the Council on the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Measures to improve access to the environment for people with disabilities are included in the National Programme for Social Integration of the Disabled 2003-2012 and its implementation measures. New National Programme for Social Integration of the Disabled 2013-2019 are being prepared now. Measures for improving accessibility are going to be included in it. In 2011 workshops on universal design were organized in Lithuania for architects, designers and other specialists. The material for workshops was prepared according to international documents (including the UNCRPD).

e. Services regulated for accessibility

See point a.

In Lithuania lawyers, notaries and bailiffs must ensure that disabled persons have access to their services. The bailiff's office should be established on the first floor of the building. If there is a lift for disabled, the office can be on other floors of the building. Anyway, access to services provided by lawyers, notaries and bailiffs has to be ensured. The Lithuanian Chamber of Bailiffs and the Ministry of Justice are responsible for controlling that offices meet all requirements regarding accessibility for disabled people.

f. Goods regulated for accessibility as part of a service

According to Lithuanian national law, when implementing equal treatment, a seller or producer of goods or a service (commercial or public) provider, without regard to gender, race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion, must:

1. provide consumers with equal access to the same products, goods and services, including housing, as well as apply equal conditions of payment and guarantees for the same products, goods and services or for products, goods and services of equal value;

2. when providing consumers with information about products, goods and services or advertising them, ensure that such information does not convey humiliation, contempt or restriction of rights or extension of privileges on the grounds of gender, race, nationality, language, origin, social status, belief, convictions or views, age, sexual orientation, disability, ethnic origin or religion and that it does not form public opinion that these qualities make a person superior or inferior to another.

g. Enforcement of accessibility legislation

A person who considers himself wronged by failure to apply equal treatment shall have the right to appeal to the Equal Opportunities Ombudsman. An appeal to the Equal Opportunities Ombudsman shall not preclude the possibility of defending rights in court. Associations or other legal persons which have, in accordance with the legal act regulating their activities, the defence and representation in court of persons discriminated against on a particular ground as one of their activities may, on behalf of the person discriminated against, represent him in judicial or administrative procedures in the manner prescribed by laws. In the course of the investigation or upon completion of the investigation, the Equal Opportunities Ombudsperson may take a decision:

1. to refer the investigation material to a pre-trial investigation institution or the prosecutor if features of a criminal act have been established;
2. to address an appropriate person or institution with a recommendation to discontinue the actions violating equal rights and to amend or repeal a legal act related thereto;
3. to hear cases of administrative offences and impose administrative sanctions;
4. to dismiss the complaint if the violations indicated in it have not been corroborated;
5. to terminate the investigation if the complainant withdraws his complaint or when there is a lack of objective evidence about the committed violation or when the complainant and offender conciliate or when acts that violate equal rights cease to be performed or when a legal act that violates equal rights is amended or repealed;
6. to admonish for committing a violation;
7. to suspend the investigation if the person, whose complaint or actions, in reference to which a complaint has been made, are under investigation, is ill or away;
8. temporarily, until taking the final decision, to ban an advertisement if there is sufficient evidence that the displayed or intended to be displayed advertisement can be recognised as inciting ethnic, racial, religious hatred or hatred on the basis of sex, sexual orientation, disability, beliefs or age and would do serious harm to the public interests, would humiliate human honour and dignity and would pose threat to the principles of public morals;
9. to impose an obligation on operators of advertising activity to terminate an unauthorised advertisement and to establish the terms and conditions for the discharge of this obligation.

In Lithuania, the Department for the Affairs of Disabled at the Ministry of Social Security and Labour (hereinafter – Department) inspects buildings' compliance with design solutions, which should fulfil the requirements to meet the needs of disabled. In the case of renovated (modernized) buildings, the Department for the Affairs of Disabled doesn't inspect buildings' compliance with design solutions. According to the CTR (Construction Technical Regulation) "Completion of Construction" in the Commission for completion of constructions should be involved representative or authorised person of the Department, who inspects that constructions would be adapted to the needs of disabled. If there are violations of the CTR,

the responsible body shall be punished according to the Republic of Lithuania Code of Administrative Violations. Sanctions are applied by The State Territorial Planning and Construction Inspectorate under the Ministry of Environment or the Court.

The following institutions control that the requirements set in legislation are properly implemented: municipalities and the State Territorial Planning and Construction Inspectorate under the Ministry of Environment according to their competence.

h. Non-compliance and litigation

Victims of discrimination have the right to appeal to the Equal Opportunities Ombudsman or defend their rights in court. Associations or other legal persons which can, in accordance with the legal act regulating their activities, defend and represent in court persons discriminated against on a particular ground, may, do so in judicial or administrative procedures in the manner prescribed by laws.

The Equal Opportunities Ombudsman does not have litigation powers and cannot represent victims of discrimination in court.

A person who has suffered discrimination has the right to claim compensation for economic and non-economic damages from the persons guilty thereof in the manner prescribed by laws.

Luxembourg

a. Accessibility legislation: its place in the legal and regulatory framework

There is an accessibility act dated March 2001 (*Loi du 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public*) which regulates the accessibility of the built environment. The regulations, that are specified in a grand-ducal regulation dated November 2001 (*Règlement grand-ducal modifié du 23 novembre 2001 portant exécution des articles 1 et 2 de la loi du 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public*), only apply to public or publicly funded buildings and facilities which have been newly built or substantially renovated.

Furthermore, there is the 2008 (22 July 2008) act regarding the accessibility of public spaces to persons with disabilities who are accompanied by an assistance dog (22 July 2008) and the 2008 Grand-Ducal regulation (19 December 2008) regarding the limitations to the access of persons with disabilities accompanied by assistance dogs to those places.

Lack of accessibility has been considered discrimination since the 2006 act on equal treatment (*Loi du 28 novembre 2006 sur l'égalité de traitement*) but only in regard to workplace discrimination. Since the ratification of the Convention by the Grand-Duchy of Luxemburg (*Loi du 28 juillet 2011*) steps have been undertaken to incorporate the concept of reasonable accomodation, as well as the denial of reasonable accomodation as a form of discrimination, into relevant legal documents.

b. General law, technical regulations and standards

Cf. point c.

Furthermore a series of accessibility measures aim to guarantee that persons with disabilities enjoy equal opportunities and the full participation in all aspects of life. These various measures are the following:

- National accessibility concept and the label "Accessibility Plus"
- The Standards Guide (Guide des norms) which is a reference document on accessible construction and which gives clear explanations of the legal provisions
- The label "EureWelcome" resulting from an interregional collaboration supported by INTERREG
- ECA – European concept for Accessibility
- ECA for Administrations

The question of accessibility is a constant concern in Luxembourg.

c. Role of national, European and international standards

In the Grand-Duchy, the legislator develops its own national standards (cf. accessibility act and regulation). In the context of accessibility there is also compilation of non-mandatory norms (cf. "Guide des normes"). Those norms and directives coexist with the legal standards and they go more into details than the legal standards.

If there is more precise information needed on a special subject where there are no clear legal provisions, the authorities tend to turn to the relevant DIN rules of the "Deutsches Institut für

Normung e.V.". This is often the case regarding the installation of special lifts, tactile materials for the floor or road traffic signal systems for blind persons.

These are the relevant DIN rules:

- DIN EN 81-70:2003 + A1:2004: Safety rules for the construction and installations of lifts - Particular applications for passenger and goods passengers lifts - Part 70: Accessibility to lifts for persons including persons with disability;
- DIN 32984: 2011-10: Tactile materials for the floor at public places
- DIN 32981: 2002-11: Additional equipment for road traffic signal systems to ensure that they can also be used by blind persons

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

During the first trimester 2012 the Luxemburg Government has accepted and presented a new national 5-year action Plan for the implementation of the UN-CRPD. This action plan announces some major changes in accessibility legislation during the next 5 years. These changes will mainly broaden the scope of the 2001 accessibility act.

e. Services regulated for accessibility

As indicated in point a., presently, the regulations only apply to public or publicly funded buildings and facilities which have been newly built or substantially renovated. The exhaustive enumeration of those services can be found in art.1 and 2 of the following grand-ducal regulation: "Règlement grand-ducal modifié du 23 novembre 2001 portant exécution des articles 1 et 2 de la loi du 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public".

f. Goods regulated for accessibility as part of a service

Some of the legal and regulatory provisions relate to the accessibility of goods, as e.g. those about the parking lots, the toilets, bathtubs, kitchen worktops or the telephone booths. (cf. *Règlement grand-ducal modifié du 23 novembre 2001 portant exécution des articles 1 et 2 de la loi du 29 mars 2001 portant sur l'accessibilité des lieux ouverts au public)*

g. Goods regulated for accessibility

The accessibility of doors, elevators, stairs and other central elements of a building is regulated in the 2011 accessibility act and its corresponding regulation ("règlement"). As for goods like busses or trains, the government makes sure of their accessibility by integrating accessibility criteria in their public calls for tender.

h. Enforcement of accessibility legislation

Currently, the enforcement is of administrative nature. There is one administration department « *service national de la sécurité dans la fonction publique* » that is responsible for examining compliance with the provisions of the 2001 accessibility act. As the provisions of that particular act apply to public or publicly funded buildings and facilities, a permit to build an edifice or to exploit a service in such a building is only granted if the conditions set out in the accessibility act are fulfilled.

i. Non-compliance and litigation

In Luxembourg, in case of a persisting disagreement with the administration, you may bring the matter before the Mediator (Ombudsman). As the 2001 Accessibility Act applies to public or publicly funded buildings and facilities, one can of course call upon the ombudsman if one feels victim of a case of noncompliance with the relevant act.

At the present day, the bill provides no consequences, no penalty and no fines, for non-compliance with accessibility legislation. But that is most likely going to change in the near future. As a matter of fact, the accessibility legislation and the accessibility standards are going to be revised and that will probably be one of the modifications.

Malta

a. Accessibility legislation: its place in the legal and regulatory framework

Articles 12 and 13 of the Equal Opportunities (Persons with Disability) Act (Cap. 413) provide for rules on access of disabled people on an equal basis with others with regards to access to premises and the provision of goods, services and facilities.

The Act also allows for the test of reasonableness which takes into consideration the nature and cost of the required accommodation, the financial resources of the person or organisation required to carry out the accommodation, and the availability of public funds to cover the expenses (Article 20).

b. General law, technical regulations and standards

Rule on Access for all are provided for by the Equal Opportunities (Persons with Disability) Act, (Cap. 413), while in relation to physical accessibility to buildings this is monitored through the 'Access for All Guidelines' referred to in point e.

c. Role of national, European and international standards

The 'Access for All Design Guidelines' which deal with accessibility to buildings were developed locally with reference to accessibility standards used in other countries.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Bill no. 85 of 2011 "Various Laws (Disability Matters) (Amendment) Act, 2011", which is currently being debated in the Maltese Parliament, is aimed at bringing Maltese legislation in line with UNCRPD, thus paving the way to Malta's ratification thereof. The Bill includes amendments to the Equal Opportunities (Persons with Disability) Act (Cap. 413) and it will further strengthen existing legislation, by including 'and use' in the provision of goods, services and facilities (Article 15 of the Equal Opportunities (Persons with Disability) Act (Cap. 413).

e. Services regulated for accessibility

As mentioned above, Articles 12 and 13 of the Equal Opportunities (Persons with Disability) Act (Cap. 413) refer to physical accessibility of buildings as well as access to the provision of goods, facilities, and services.

Indeed, Article 12 refers to access to premises it shall be unlawful for any person to discriminate against another person on the grounds of the disability of such other person or a disability of any of his family members by refusing amongst other to allow access to, or the use of any premises, or of any facilities within such premises

On the other hand, Article 13 refers to the provision of goods and services to qualified persons with disablity and stipulates the following:

(1) Save as provided for in sub-article (3), no qualified person with a disability shall, on the grounds of disability, be excluded from participation in or be denied the benefits

of the programmes or activities of any person or body in relation to the goods, facilities or services to which this article applies or be discriminated against by any person or body providing such goods, facilities or services which the qualified person seeks to obtain or use.

(2) This article applies to the provision (whether on payment or not) of goods, facilities and services to the public or any article of the public and includes in particular, but without prejudice to the generality of the foregoing -
    (a) access to and use of any place which members of the public or a section of the public are permitted to enter;
    (b) the provision of property rights and of housing;
    (c) accommodation in a hotel, boarding house or similar establishment;
    (d) facilities by way of banking, insurance or for grants, loans, credit or finance;
    (e) participation in occupational and other pension schemes;
    (f) facilities for education;
    (g) facilities for entertainment, sports or recreation;
    (h) facilities for transport or travel by land, sea or air;
    (i) the services of any profession or trade, or of any local or other public authority;
    (j) membership of associations, clubs or other organisations;
    (k) enjoyment of civic rights and performance of civic duties; and
    (l) such ther facilities and services as the Minister may prescribe by regulations made under this Act.

(3) The provisions of sub-articles (1) and (2) of this article shall not apply where compliance with such provisions in relation to a qualified person with a disability would be impracticable or unsafe and could not be made practicable and safe by reasonable modification to rules, policies or practices, or the removal of architectural, communication or transport barriers or the provision of auxiliary aids or services.

(Please see also point d. regarding the addition of 'use' in Article 13 through the Disability Matters Amendment Bill.)

f. Goods regulated for accessibility as part of a service

Kindly refer to point e.

g. Goods regulated for accessibility

In general, manufactured goods are not regulated for accessibility in Malta.

In terms of access to buildings, the 'Access for All Design Guidelines' produced by the National Commission Persons with Disabilities covers accessibility of buildings, including all areas and facilities within, as well as outside areas.

These Guidelines are constantly updated and a third edition will become operational as of 1 June 2012. The overriding objective remains that of providing a comprehensive guide to the achievement of a physical environment that is inclusive, accessible and adheres to the principles of universal design. In brief, the main aim is towards the achievement of an environment that does not inherently feature obstacles and barriers to anyone, irrespective of ability, age or physical condition. It is acknowledged that no set of guidelines can hope to take

account of all imaginable possibilities encountered in the physical environment; cognisant of the fact that essentially all buildings and physical environments are unique. In this context, these guidelines aspire to provide general guidance to the minimum standards of most of the elements and structures likely to form part of the physical environment and that would allow a disabled person to independently enter and make use of the facility. In essence, they provide a framework to direct creative efforts in providing an accessible environment in new and existing buildings.

h. Enforcement of accessibility legislation

In relation to accessibility of buildings to be used by the public (including places of work), the National Commission Persons with Disability assesses development applications submitted to the Malta Environment and Planning Authority in order to assess their conformity with the Access for All Design Guidelines. If the application is not compliant with such Guidelines, the National Commission Persons with Disability can object to the granting of building permit and inform the Malta Environment and Planning Authority accordingly.

Also, as previously mentioned, Articles 12 and 13 of the Equal Opportunities (Persons withDisability) Act (Cap. 413) provide for access to premises and also the provision of goods and services to qualified persons with a disability. In this regard, by virtue of Articles 32 and 33 of the Act, the National Commission Persons with Disability may initiate investigations or deal with complaints on the breach of the provisions of the Equal Opportunities (Persons with Disability) Act (Cap. 413). Procedure for the Investigation of Complaints Regulations (LN 13/01 and LN3/02) lays down the procedure to be adopted by the National Commission for Persons with Disability in investigating complaints including the possibility to formally request remedial action. This happens when the Commission concludeds that an unlawful act constitutes a breach of any provision of the Act; in the event of non complaince there is the possibility of appealing to the Civil Courts to order the necessary remedial action to be undertaken immediately.

i. Non-compliance and litigation

As stated in the previous reply, Articles 32, 33 and 34 of the Equal Opportunities (Persons with Disability) Act (Cap. 413) stipulates the rules for the dealing with complaints, investigations and enforcement of the provisions of the Act

Articles 33 and 34 of the Act and Procedure for the Investigation of Complaints Regulations (LN 13/01 and LN3/02) provide for the situations when the National Commission for Persons with Disability may refer an alleged discrimination to the Civil Courts. Such referral by the Commission does not prevent any person having a legal interest in the matter to, either personally or through his/her legal representative, bring a civil action related to an alleged unlawful act of discrimination and make a request for compensation of damages thereto.

Moreover, the proposed Disability Matters Amendments Bill, which is currently in Parliament, proposes to also allow disability NGOs the power to seek remedial action.

The Netherlands

a. Accessibility legislation: its place in the legal and regulatory framework

In the Netherlands there is legislation which deals with accessibility in various domains, such as:

The Act on equal treatment on the ground of disability or chronic disease (Wgbh/cz). This Act combats discrimination of persons with a disability in the fields of education, labour, housing and public transport. The three domains first mentioned are in force. The last domain will be in force after technical regulations will be published in 2012. An important element in this Act is the duty to provide for reasonable accommodation, when needed and appropriate. The lack of doing so is considered to be forbidden discrimination.

The Act on social support (Wmo). This Act compels local authorities to promote participation of all citizens including persons with disabilities. Where (physical or social) inaccessibility occurs, the authorities have to provide compensation. Domains include housing, mobility, leisure.

The 2003 Building Code (Bouwbesluit) regulates usability (including accessibility) of new or renewed public buildings. The regulations cover functional requirements depending on the use of the building or parts of it.

Several Acts regulate the public transport system. Regulations for accessibility are part of these general acts. Due to lifetime cycle of buildings, buses, trains, trams, metro and ferries a stepwise approach to full accessibility is chosen.

The Act on sheltered Workplaces (WSW) guarantees and effectuates the right to employment for those who are only capable to work in an adapted environment. The WSW aims to protect and to stimulate the capacity to work under regular conditions. The local authorities are concerned that as much indicated inhabitants as possible find jobs under adapted conditions. Besides several reintegration measures might be used.

A regulation based on the Media act (Mediawet) rules that since 2011 95 % of the Dutch-language programmes of the national public broadcasting service are subtitled for persons with hearing impairments; programmes of commercial broadcasters should be subtitled for 50 % of the Dutch–language programmes. Most of the programmes in other languages are subtitled for the general public. Apart from this, the Netherlands government considers the accessibility of the media for persons with visual impairments of utmost importance. So far the choice has been not to regulate this via the Media act. The government has chosen to approach the national public as well as commercial broadcasters to underline the importance of sufficient accessibility for persons with visual impairments and also requested them to provide information about what measurements already have been or will be taken to reach this goal. The results so far are very positive.

Several regulations support the participation of pupils with a disability in education. Such regulations include the earlier mentioned building code, the provision of (technical) aids and a special budget for indicated pupils with a disability who attend regular education at the level of primary, secondary and vocational education. Institutions for higher education have a legal duty to provide for education for all students with disabilities, who meet the admission

demands for all. The earlier mentioned Wgbh/cz obliges them to provide for reasonable accommodation, when needed and appropriate.

Besides legislation, there are also several guidelines, handbooks and action plans with respect to accessibility. In the list below, some of them are mentioned:

Buildings

- Guidelines for layout and design of governmental buildings - In general buildings in use by the government will be accessible according to the standards of the International Accessibility Symbol.
- The hallmark living (Keurmerk Wonen) gives guidelines of the layout of neighbourhoods (including accessibility like lowered kerbstones).
- The Handbook on accessibility gives instructions to designers on size and measurements for accessible buildings and public space outdoor (publ. by Misset in cooperation with user organizations)
- Guidelines on the construction and design of specific buildings like schools, catering industry, shops. These guidelines give examples to implement the Building code mentioned above.

Public Transport

- Voertuigenreglement (as an implementation of directive 2001/85/EC) regulates accessibility of buses.
- Several Handbooks governing voluntary adjustments in or on bus stops, taxis, walking routes and train-transport (the latter still in progress).
- A Memorandum gives standards and guidelines for railway stations. It also contains standards on accessibility.
- Implementation schedule on accessibility: schedule in which the accessibility of railway stations and trains will be improved. For instance, the minister of Transport will send an Action Plan to Parliament in spring 2012 concerning the full accessibility of trains by 2030.

Access to the internet

- Guidelines on accessible internet sites including accessibility. The Ministry of the Interior and Kingdom Affairs integrated accessibility into basic guidelines used for public websites (www.webrichtlijnen.overheid.nl) The Web Guidelines are based on the principle of 'universal design'. A website that complies with the Web Guidelines is accessible to all users (search engines, browsers, mobile phones) and people with disabilities. Moreover, implementation of web guidelines when building a new website does not cost more than building them from the same site without web guidelines. For government websites the web guidelines are already mandated since September 2006. For provinces, water boards and municipalities the web guidelines are mandatory since 2010.

b. General law, technical regulations and standards

Accessibility requirements are not provided in general law. See point a.

c. Role of national, European and international standards

The Dutch Normalisation Institute develops standards in the field of accessibility. Special attention is paid to implementing the ISO/CEN-Guide on design for all.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Until now legislation and regulations have not been changed as a consequence of implementing the UN CRPD. Accessibility is a factor that has been given attention in several domains. For instance, the code on equal treatment in public transport on the basis of disability or chronic disease was already in progress, independently of article 9 of the UN-convention.

e. Services regulated for accessibility

See point a. In addition, some initiatives of close cooperation between government and civil society can be mentioned.

On December 3, 2009, the then Minister of Health, opened the information point "AllesToegankelijk.nl" (All Accessible). In “all accessible” both entrepreneurs and organizations of people with disabilities, government and research institutes work together to improve the accessibility of goods and services for people with disabilities. “All Accessible” is an important part in spreading knowledge and increasing awareness and support towards an accessible Netherlands.

“All Accessible” provides information and is also a platform that connects supply and demand accessible to everyone who want to know more about accessibility and focuses specifically on entrepreneurs.

f. Goods regulated for accessibility as part of a service

This is not applicable in the Netherlands.

g. Goods regulated for accessibility

See point a.

h. Enforcement of accessibility legislation, non-compliance and litigation

In the Netherlands, cases concerning the non-compliance of accessibility legislation can be brought to court as well as to a quasi-judicial body, i.e. the Dutch Equal Treatment Commission. This Commission is an independent organisation that was established in 1994 to promote and monitor compliance with equal treatment legislation. The Commission also gives advice and information about the standards that apply. When the Commission (CGB) receives a request for an opinion about alleged differentiation, it investigates whether the equal treatment law has been violated.

Everyone in the Netherlands can ask the Commission for an opinion or advice about a specific situation concerning unequal treatment. Petitioning the Commission is free of charge and legal representation is not required. The Commission does not have to wait for petitions to be

filed; it is also entitled to investigate on its own initiative in specific areas where systematic or persistent patterns of discrimination are suspected. Unlike court verdicts the opinions of the Commission are not legally binding. In practice the opinions have a great moral significance and are followed up in most cases.

One can also bring a case to court for unequal treatment as a consequence of lack of accessibility, for instance when there is no reasonable accommodation provided to make the service/good accessible. Depending on the specific circumstances of the individual case, various remedies are available, e.g. damages, enforcing accessibility etc.

Poland

a. Accessibility legislation: its place in the legal and regulatory framework

On 1 August 1997 the Sejm of the Republic of Poland adopted a Resolution – Charter of Rights of Persons with Disabilities, whereby it reiterates the rights conferred by the Constitution of the Republic of Poland, Convention on the Rights of the Child and the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities. This document defines the rights of persons with disabilities to live a life that is independent, self-reliant, active and free from any aspects of discrimination. It provides a list of ten rights[76] pointing at the crucial areas where vigorous action needs to be taken by the Government and local authorities to carry into effect the rights of persons with disabilities. In particular it calls for action to ensure access to goods and services allowing full participation in public life, school education, work conditions accommodated as necessary, life in environment free of functional barriers including access to public offices, polling stations, public utilities, use of means of transport at ease, access to information and communication.

Accessibility requirements are considered mainly as technical issues. The general accessibility requirements are set up in various legal acts and the special, more detailed accessibility requirements of technical nature are defined in legal regulations.

Legal obligations and rules on accessibility for persons with disabilities concern mainly the built environment and various services.

The definition of reasonable accommodation regarding employment has been included in the Act on Vocational and Social Rehabilitation and Employment of Persons with Disabilities and lack of such reasonable accommodation is considered as violation of the rule of equal treatment in employment - in the light of antidiscrimination provisions of the Act – Labour Code.

---

[76] The list, included into the **Resolution – Charter of Rights of Persons with Disabilities,** mentions disabled persons` right to:

1. access to goods and services which enable them to fully participate in the social life
2. access to medical treatment and care, early diagnosis, medical rehabilitation and education
3. access to comprehensive rehabilitation aiming at social adaptation
4. education in integrated systems or in special schools or to education on an individual basis, if necessary
5. psychical and pedagogical assistance and other kind of specialized assistance enabling personal development
6. work on the open labour market or in an adjusted environment when such a requirement results from their disability
7. social security - taking into account the necessity of bearing higher costs related to disability and taking these costs into account in the tax system
8. life in functional barrier-free environment, including:
   - access to public buildings
   - use of public transport
   - access to information
   - possibility of interpersonal communication
9. a self-governing representation and to consult draft legislation concerning people with disabilities
10. full participation in public, social, cultural, artistic and sports life as well as in recreation and tourism appropriately to individual needs and interest.

In 2011, provisions concerning needs of persons with disabilities, particularly persons with reduced mobility, were included in special regulations: on the technical conditions to be met by buildings and facilities of the underground (issued according to the Act – Law on Construction) and by trams and trolleybuses and their necessary equipment (issued according to the Act – Transportation Law). The Act on Public Collective Transport, which came into force on 1 March 2011, determines the rules of organization and operation of regular passenger carriage in public road, railway, other rail vehicle (for example tram), rope, cable and field, sea and inland waterway transport, carried out on Polish territory and in border areas. It obliges to take into account the needs of persons with disabilities and persons with reduced mobility as concerns defining requirements for means of transport and organization of transport services. The Act provides that transport plans should be prepared by the Minister of Infrastructure and self-government bodies on any level, taking into account inter alia the need for sustainable development of public transport, in particular the needs of disabled persons and persons with reduced mobility, in the field of transport services.

b. General law, technical regulations and standards

Provisions obligating to ensure access for persons with disabilities to various buildings or services are included in general law, i.e. in the legal acts, and the special accessibility requirements are defined in legal regulations, implementing these acts. For example:

- The Act on Spatial Planning and Management and the Act - Law on Construction introduced the obligation to consider the needs of persons with disabilities when planning and building any new buildings and other constructions of public use and multi-family dwelling-houses and also when modernizing or remodelling existing ones. Technical standards that buildings and related installations should fulfil are set out in the regulation implementing the Act – Law on Construction in force since 1995. The special technical and construction provisions concerning public roads, road engineering facilities, railway structures and railway crossings with public roads, which ensure that they are accessible for persons with disabilities, are included in other various regulations implementing the Act - Law on Construction.
- There are also other special technical provisions defining accessibility requirements included in regulations implementing various acts, such as the Regulation on the technical conditions to be met by the hotel facilities and other facilities in which hotel services are provided, implementing the Act on Tourism Services.
- Special requirements concerning school buses are defined in the Regulation of Minister of Infrastructure on the technical conditions for vehicles and the scope of their necessary equipment, issued by virtue of the Act – Road Traffic Law.
- Provisions concerning needs of persons with disabilities were included in the Regulation of the Ministry of Infrastructure on technical conditions to be met by trams and trolleybuses and their necessary equipment (issued according to the Act – Transportation Law).

c. Role of national, European and international standards

The accessibility legislation in Poland mainly makes use of international or European standards. For example:

- Poland applies provisions of the Regulations No. 107 of the United Nations Economic Commission for Europe (UN/ECE) on uniform provisions concerning the approval of

vehicles category M2 and M3 with respect to their general construction. Appendix 8 of the Regulations sets out requirements for technical equipment facilitating access for passengers with reduced mobility which are harmonized in this respect with the applicable requirements of the EU Directive 2001/85/EC. These requirements should be applied by the 42 countries that are parties to the Agreement, done at Geneva on 20 March 1958.

- Websites (particularly of public administration bodies) should meet the requirements of e-accessibility defined by W3C Consortium in guidelines WCAG 1.0 and WCAG 2.0.

For information on Polish standards see point g. below.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The awareness on accessibility has been raised thanks to dissemination of information concerning not only provisions of the UN Convention on the Rights of Persons with Disabilities but also other EU documents as well as the Recommendation Rec(2006)5 of the Committee of Ministers of the Council of Europe to member states on the "Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015". This might probably contribute to:

- better implementation of the provisions concerning needs of persons with disabilities and persons with reduced mobility, included in EU regulations and national special regulations adopted in accordance with the EU legislation regarding rights of passengers (in 2011 the technical conditions to be met by buildings and facilities of underground and by trams and trolley buses and their necessary equipment were defined in two regulations of the Minister of Infrastructure);
- improvement of access for persons with disabilities to enjoyment of the right to vote (the new Act-Election Code entered into force on 1 August 2011; the Act provides, inter alia, for: ensuring the accessibility of information concerning election and the accessibility of polling stations for people with reduced mobility, the possibility for a voter with a severe or moderate degree of disability to vote by post or to delegate somebody to vote on his/her behalf, possibility to vote using overlays to vote cards prepared in Braille).

e. Services regulated for accessibility

The Act on Spatial Planning and Management and the Act - Law on Construction introduced the obligation to consider the needs of persons with disabilities in new construction projects, but also when modernizing existing buildings as well as multi-family dwelling housing. Technical standards that buildings and related installations (including parking lots) should fulfil are set out in the regulation implementing the Act – Law on Construction in force since 1995. These standards are to be applied when planning, building or remodelling.

The services in the following areas are regulated by additional legal provisions ensuring accessibility for persons with disabilities:

- public transport (the Act – Transportation Law, according to which carriers are obliged to ensure proper conditions of safety and hygiene as well as comfort and due

services for users, and should undertake actions facilitating the use of means of transport by travellers, particularly by persons with reduced mobility and disabled persons;, the Act on Public Collective Transport, which obliges to take into account the needs of persons with disabilities and persons with reduced mobility as concerns defining requirements for means of transport and organization of transport services; the Act – Air Law, which - in Annex No 2 to the Act - set up the system of fines for breach of provisions of the Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air; this system of fines came in force on 18 September 2011),

- telecommunication (the Act - Telecommunication Law provides that telecom operators are obliged to ensure disabled persons access to services of general access, also by providing the necessary facilities particularly for blind and dim-sighted persons, persons using hearing aids, deaf or dumb persons and wheelchair users. Special requirements in this field are included in the regulation implementing provisions of the Act),
- post (the Act – Postal Law introduces an obligation for operators providing general access postal services to undertake adaptations enabling persons with disabilities' access to services),
- audio-visual media (since 1 July 2011 the amended Act on Radio and Television Broadcasting obliges television broadcasters to ensure the availability of programs for persons with visual or hearing impairments by introducing appropriate facilities such as audio description, subtitling for the deaf and sign language translations; at least 10% of the quarterly time of broadcasting, with the exception of advertising and telesales, should have such facilities),
- health (the Regulation of the Minister of Health of 2 February 2011 on requirements to be met with regard to technical and sanitary facilities and equipment of health care institutions, issued according to the Act of 15 April 2011 on Medical Activity),
- education (the Act on System of Education provides that the system ensures any citizen the right to education and sets up various obligations for public authorities to enable people's enjoyment of this right; for example it sets up an obligation for local self-government to provide students with disabilities, in the age 5-21, free transportation and care during transport to the nearest school),
- higher education (The Act – Higher Education Law stipulates that among main tasks of university or other school is creating conditions for people with disabilities to participate fully in the process of education and research; terms and procedure of recruitment for entrance exams should take into account the specific needs of candidates who are disabled, and the statute of study have to specify how to adapt the organization and proper implementation of the educational process to the specific needs of students who are disabled, including adapting the conditions of study to the type of disability. Moreover, the Act provides (in art. 164.3) that didactic classes for students may also be conducted with the use of methods and techniques of distance education. This creates possibilities particularly for persons with reduced mobility to use e-learning courses. There is a special scholarship for disabled students, in the amount depending on student’s degree of disability, available irrespective to social scholarship),
- hotel industry (the Regulation on the hotel facilities and other facilities in which hotel services are provided, issued according to the Act on Tourism Services),
- information provided by entities implementing public tasks (the Act on Informatization of Activities of Entities Performing Public Tasks - by the virtue of the amendment of the Act, which came into force in June 2010, the definition of minimal

requirements for ICT systems, on which Council of Ministers is authorized to issue regulations, was completed bearing in mind the need to ensure access to information resources for persons with disabilities; the Act on Access to Public Information),
- sports facilities (there is an obligation, introduced by the Act - Law on Construction, to take into account the needs of persons with disabilities when planning and building any new sports buildings and facilities, in a way similar to other constructions of public use, and also when modernising or remodelling existing ones),
- contacts between persons with disabilities and public administration organs or services (the Act of 18 August 2011 on sign language and other means of communication).

A number of universities establish their standards for actions enabling persons with various kinds of disabilities to study. Some activities in this area are financially supported by the State Fund for Rehabilitation of Persons with Disabilities (PFRON).

f. Goods regulated for accessibility as part of a service

Ensuring accessibility of services is a matter of general law (i.e. of the legal acts). And the special accessibility requirements are defined in legal regulations, implementing these acts, that have more technical nature, or often in the Polish standards.

The Act on System of Education provides that the system ensures any citizen the right to education and sets up various obligations for public authorities to enable people enjoyment of this right. There are available manuals and auxiliary books for blind students (in Braille) and for partially-sighted students (in enlarged print), as well as manuals for special education of students with mental retardation and deaf students.

g. Goods regulated for accessibility

There are, *inter alia*, special accessibility legal provisions concerning:

- construction of school busses (defined in the Regulation of Minister of Infrastructure on the technical conditions for vehicles and the scope of their necessary equipment, issued by virtue of the Act – Road Traffic Law),
- technical conditions to be met by trams and trolleybuses and their necessary equipment, taking into account needs of persons with disabilities (included in the Regulation of the Ministry of Infrastructure issued according to the Act – Transportation Law).

Goods are manufactured in Poland in accordance with the Polish standards issued by the Polish Normalization Committee. There are for example several Polish standards defining requirements for technical aids for persons with disabilities manufactured as medical devices in accordance with the provisions of Directive 93/42/EEC.

The classification of technical aids that are used by persons with disabilities, based on their basic function, has been introduced by the Polish Standard PN-EN ISO 9999:2007. The classification covers the following eleven classes: aids for individual therapy; aids for exercising; orthotics and prostheses; aids for personal care and protection; personal mobility aids; household aids; equipment and adaptation of home and other premises; aids enabling communication and information; aids to use the products and goods; aids and equipment to improve the environment, tools and machines; aids for recreation.

Polish standards associated with the accessibility of transport regards to "Technical aids for the blind and visually impaired. Sound signaling on pedestrian crossings with traffic lights. PN-Z-80100:2004 "and "Accessibility of objects and facilities for persons with disabilities. Signs of public information PZ-Z-80101:2007".

h. Enforcement of accessibility legislation

Enforcement of accessibility requirements is done mainly in the field of construction and technical equipment and has administrative nature.

Construction supervision, i.e. control and monitoring system of construction processes, is exercised by the General Inspector of Construction Supervision (on the central level) and bodies of architectural and construction supervision (on voivodship and powiat levels) as well as of specialized construction supervision which control *inter alia* compliance of architectural and construction solutions with relevant legal provisions, standards and principles of technical knowledge.

The Act - Law on Construction provides that buildings must be designed and constructed in the manner specified in the regulations, providing, among others, conditions necessary for persons with disabilities, in particular wheelchair users, to use buildings and other constructions of public use and multi-family dwelling-houses. As concerns such buildings, derogations from the technical and construction provisions may not result in reducing the accessibility for persons with disabilities.

A construction project must be approved by the competent authority. The project should include information concerning accessibility for persons with disabilities. Any deviation from the approved construction project, related to ensuring the conditions necessary for use of the building by persons with disabilities, constitute a significant deviation from the project and as such require a decision on changing the building permit.

It is necessary to notify the relevant construction supervision body of completion of the construction which requires a building permit. The construction supervision inspectorate can then carry out the mandatory inspection of construction. The check includes, among other things, verifying compliance with the architecture and construction project in providing the conditions necessary for use of the building by persons with disabilities, as concerns public use buildings and multi-family dwelling housing. If irregularities are found, apart from the refusal of the decision to permit the use of an object, it shall impose a fine provided for in the Act - Law on Construction.

The General Inspector of Construction Supervision and voivodship inspectors of construction supervision are relevant authorities for construction products. A construction product may be placed on the market if it is suitable for use in the performance of works, to the extent corresponding to its functional characteristics and intended purpose and enables meeting basic requirements by the construction object. Who is marketing a construction product not suitable for use in the performance of works, is subjected to a fine.

Technical devices (for example lifts and lifting platforms for persons with disabilities), defined in the Act on technical inspection, are subjected to technical inspection during their designing, manufacturing (including manufacturing materials and components), installation,

repairing and modernizing, marketing and operating. The factory manufacturing technical devices should have the appropriate permission issued by the competent technical inspection authority.

Who allows to operate technical devices without obtaining the decision of the competent body of technical inspection unit on the release of device for use or marketing, or against the decision to suspend operation of a technical device or withdraw from the market, is subjected to a fine (according to the Code of Procedure in Cases of Misconduct) or penalty of restriction of liberty.

The Office of Electronic Communication has introduced the Senior Certificate and Certificate "Without Barriers" for telecommunication companies who offer special services for the elderly and persons with disabilities.

i. Non-compliance and litigation

A case on non-compliance of accessibility legislation, considered as violation of the rule of non-discrimination and equal treatment, may be brought, by the individual person or by an NGO, to court or to the Ombudsman, officially called the Human Rights Defender.

The Human Rights Defender, who safeguards human rights and freedoms specified in the Constitution and other legislative acts, as well as safeguards implementation of the rule of equal treatment, investigates whether there has been an infringement on the legal regulations or rules of social coexistence and justice as a result of action or neglect by the bodies, organizations or institutions obliged to comply with and implement such freedoms and rights. After investigation of a case, the Human Rights Defender may, among others:

- address the motion to the body, organization or institution, if he considers its action as an infringement of the human and civil freedoms and rights,
- request to start civil legal proceedings or take part in such ongoing proceedings with the rights of a public prosecutor.

Community organizations, including non-governmental organizations representing the interests of persons with disabilities, are granted with special procedural rights in the Polish law:

- According to the Code of Civil Procedure, in cases regarding the protection of consumers, the community organizations whose statutory objectives include the protection of equal status and the principle of non-discrimination may, upon the consent of the citizens, institute actions on behalf of the citizens, and may, upon the consent of the claimant, join the proceedings at any stage thereof. Such organisations, even if they do not participate in proceedings, may present to the court an opinion which is essential to the case in the form of a resolution passed by their duly authorised bodies.
- According to the Administrative Procedure Code, in a case concerning an individual person, a community organization shall have the right to file a demand to initiate proceedings and to be admitted to participate in proceedings if the statutory objectives of that organization justify it and it is in the social interest. A state administration agency, acknowledging the demand of the community organization as well-founded, shall decide on initiating the proceedings ex officio, or on admitting the organization

to participate in the proceedings. Denial to initiate proceedings or to admit the community organization to participation in the proceedings may be subjected to complaint. The community organization shall participate in proceedings enjoying all the rights of the party to the proceedings.

Furthermore, a state administration agency, initiating the proceedings in a case concerning an individual person, shall notify a community organization of the proceedings if it decides that the organization can be interested in these proceedings on account of its statutory objectives and if it is in the social interest. A community organization even if it does not participate in the proceedings may, with the approval of a state administration agency, submit its opinion in the case, expressed in the resolution or in the declaration of its statutory body, to that agency.

Any person against whom the principle of equal treatment has been infringed is entitled to compensation. In matters of breach of the principle of equal treatment provisions of the Act - Civil Code apply.

Portugal

a. Accessibility legislation: its place in the legal and regulatory framework

Portugal has an anti-discrimination law, Law No. 46/2006 of 28th August, which legislates on matters relating to discrimination in general, and also with discrimination in the areas of accessibility.
However, in technical terms, the issues of accessibility are legislated by Decree-Law No. 163/2006 of 8th August.

b. General law, technical regulations and standards

See point g.

c. Role of national, European and international standards

The Portuguese legislation in the field of accessibility has national concepts, but also complies with European standards. It should be noted in the introduction of the European Card in Portuguese legislation, the European Directive on buses, measures the European Concept of Accessibility of the European Commission, Air Transport - new rights for people with reduced mobility.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The ratification of UN Convention on the Rights of Persons with Disabilities is after the entry into force of legislation that regulates accessibility. Thus, it is the intention of Portugal to make changes to Decree-Law No. 163/2006 of 8th August

e. Services regulated for accessibility

By 2006, the existing legislation in Portugal on accessibility was applicable only to government services. With the entry into force of Law No. 46/2006 of 28th August and Decree-Law No. 163/2006 of 8th August, the government departments and private entities have become the subject of regulation.

f. Goods regulated for accessibility as part of a service

The Decree-Law No. 163/2008 of 8th August contains a set of technical standards to improve accessibility for people with reduced mobility, in particular, on public roads, buildings and establishments in general, and also buildings, establishments and facilities for specific use and, finally, accessible routes.

g. Goods regulated for accessibility

The legislation in force in Portugal on accessibility laws in general and abstract. However, the transport, telecommunications and other services conform to technical standards applicable to each sector.

h. Enforcement of accessibility legislation

Complaints relating to discrimination in the area of accessibility, and taking into account the Law No 46/2006 of 28th August and Decree-Law No. 163/2006 of 8th August, can be treated in an administrative form, which is the submission of a complaint, the process of opening a misdemeanour procedure and, if confirmed, imposing a fine. They can also be treated with legal recourse to the courts.

i. Non-compliance and litigation

Individual citizens, non-governmental organizations of disabled persons or other entities can file complaints for violation of legislation on accessibility, which can be from the civil courts in general or even with the Ombudsman.

Romania

a. Accessibility legislation: its place in the legal and regulatory framework

The Law no. 448/2006 Regarding the Protection and Promotion of the Rights of Disabled Persons, with further completions and modifications, (http://www.anph.ro/eng/news.php?ida=5) has a chapter (chapter IV) dedicated to accessibility: that foresees in view of ensuring the access of disabled persons to the physical, informational and communicational environment.

b. General law, technical regulations and standards

- The Norm 051/2001 for the adaptation of the civil buildings and the urban space to the needs of persons with disabilities was approved by the Order no 649/2001 of Minister of Public Work, Transport and Home. In the present the Norm is the subject of modifications, the deadline for the new Norm is the end of 2012.
- The Norm sets the minimum quality conditions required by the users (persons with disabilities) from the civil buildings, buildings for public utility and the afferent urban space, in accordance with Law 10/1995 (the Law of quality in constructions).
- The Guide regarding the designing the web pages for the authorities and institutions of central and local public administration. The Guide is addressed to public administrations using ICT.
- http://www.mcsi.ro/Minister/Domenii-de-activitate-ale-MCSI/Tehnologia-Informatiei/Ghiduri-IT-%281%29/Realizarea-paginilor-web-pentru-autoritatile-si-in

c. Changes in legislation/regulation linked to the implementation of the UN CRPD

Romania will harmonize the national legislation with the UN Convention on the Rights of Persons with Disabilities by the end of 2012.

d. Services regulated for accessibility

Physical environment:

- The public utility buildings, the ways of access, the dwelling buildings constructed using public funds, the common transportation means and their stations, the cabs, the railway transport wagons for the travellers and the platforms of the main stations, the parking spaces, the public streets and roads, the public telephones, the informational and communicational environment shall be adapted according to the legal provisions in the field, so as to allow the free access of disabled persons.
- The buildings in the patrimony and the historical buildings shall be adapted, observing the architectonic characteristics, according to the specific legal provisions.
- The authorities provided by law shall issue the building permit for the public utility buildings subject to the observance of the legal provisions in this field, so as to allow the free access of disabled persons.

Transport:

- In order to facilitate the free access of disabled persons to transport and travel, the local public administration authorities shall take measures for:
    i. the adaptation of all the common transportation means in circulation;

ii. the adaptation of all the stations of common transportation means according to the legal provisions, including the marking by tactile pavement of the access spaces to the entry door in the means of transport;
iii. the mounting of the bill boards corresponding to the needs of the persons with a visual and hearing handicap in public transportation means;
iv. the printing in capital letters and contrasting colours of the routes and numbers of the transportation means.

- All the taxi operators shall ensure at least a car adapted to the transport of the disabled persons using the wheel chair.
- The refusal of taxi drivers to ensure the transport of the disabled person and walking device shall be deemed as discrimination.
- adapting the pedestrian crossings on the public roads and streets according to the legal provisions, including the marking by tactile pavement;
- the installation of visual and sound signalling systems at the intense traffic crossroads.
- guide dogs accompanying persons with a severe disability shall have a free and free of charge access to all the public places and in the means of transport.
- The railway infrastructure administrators and the railway transport operators shall:
  i. adapt at least one wagon and the main train stations in order to allow the access of the disabled persons using the wheel chair;
  ii. mark by a contrasting tactile pavement the ways to the embarking platforms, counters or other utilities.
- In the parking spaces next to public utility buildings and in the organized ones, at least 4% of the total number of parking lots shall be adapted, reserved and signalled by an international sign, but not less than two lots, for the free of charge parking of the means of transport for disabled persons.
- The disabled persons or the legal representatives thereof, upon request, may benefit from a card-permit for free parking lots. The vehicle transporting a disabled person owning a card-permit shall benefit from free of charge parking.
- In the parking spaces of the public field and as close to the domicile as possible, their administrator shall distribute free of charge parking lots to the disabled persons who requested and need such parking.

<u>Communications and informational environment:</u>

- Publication houses shall make available the electronic matrixes used for printing magazines and books to the authorized legal persons requesting them to transform them in a format accessible to the persons with sight or reading deficiencies, according to the copyright and related rights, as subsequently amended and supplemented.
- Public libraries shall establish sections with books in formats accessible to the persons with sight or reading deficiencies.
- Telecom operators shall:
  i. adapt at least one booth to a public telephone battery according to the legal provisions in force;
  ii. provide information on the cost of services in forms accessible to disabled persons.
- Banking services operators shall make available to disabled persons at their request, account statements and other information in accessible formats.
- The employees of the operators of banking and mail services shall assist in the filling in of forms, at the request of disabled persons
- The owners of hotels spaces shall:
  i. adapt at least one room for the housing of the disabled person using the wheel chair;

ii. mark by tactile pavement or carpets the entry, the reception desk and own the tactile map of the building;
iii. mount elevators with tactile signs.

- The local and central authorities and institutions shall ensure, for the direct relations with the persons with a hearing or deafblind handicap, authorized interpreters of the mimic and gesture language or of the specific language of the deafblind person.
- The public local and central authorities and the private law or public local and central institutions shall provide information and documentation services accessible to disabled persons.
- The public relation services shall display and dispose of information accessible to the persons with a visual, hearing and mental handicap
- The public authorities shall take measures for:
  i. - making accessible their own web pages, in view of improving the accessing of electronic documents by the persons with a sight and mental handicap;
  ii. - the use of pictograms in all the public services;
  iii. - the adaptation of telex and telefax telephones for the persons with a hearing handicap.

In the purchase of equipment and software, the public institutions shall take into account the observance of the accessibility criterion.

e. Goods regulated for accessibility

The public authorities shall take measures for:

- making accessible their own web pages, in view of improving the accessing of electronic documents by the persons with a sight and mental handicap;
- the use of pictograms in all the public services;
- the adaptation of telex and telefax telephones for the persons with a hearing handicap.

In the purchase of equipment and software, the public institutions shall take into account the observance of the accessibility criterion.

Telecom operators shall:

- adapt at least one booth to a public telephone battery according to the legal provisions in force

The railway infrastructure administrators and the railway transport operators shall:

- adapt at least one wagon and the main train stations in order to allow the access of the disabled persons using the wheel chair

Visual and sound signalling systems at the intense traffic crossroads.

All the taxi operators shall ensure at least a car adapted to the transport of the disabled persons using the wheel chair.

The local public administration authorities shall take measures for:

- the adaptation of all the common transportation means (buses, trams) in circulation.

f. Enforcement of accessibility legislation

The Law no. 448/2006 Regarding the Protection and Promotion of the Rights of Disabled Persons, with further completions and modifications is mentioning in Chapter IX / Legal Responsibility the facts which are deemed as minor offences and sanctioned by fines: http://www.anph.ro/eng/news.php?ida=5 (e.g. the parking of other means of transport on the parking lots adapted, reserved and signalled through an international sign for disabled persons; the issuance of disability degree certificates breaching the criteria, etc).

The Social Inspection, a governmental structure, is responsible with the control of the implementation of accessibility.

g. Non-compliance and litigation

A person can bring a case on non-compliance of accessibility legislation to court. The claim can be brought by an individual, or an NGO. The court can decide to give a sanction by fine and by binding to make the service accessible.

Slovakia

a. Accessibility legislation: its place in the legal and regulatory framework

Railway transport

The issue of access for persons with disabilities to railway transport services is governed by regulation (EC) no. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations (hereinafter referred to as the "Regulation"). The regulation lays down the obligation for railway undertakings or the infrastructure manager to provide disabled persons and persons with reduced mobility the right to carriage on a non-discriminatory basis. Disabled persons and persons with reduced mobility are entitled to information on the accessibility of rail services and on the conditions of access to carriages and on facilities in trains. It also establishes the obligation for railway undertakings and infrastructure managers in accordance with the technical specifications for interoperability (TSI) to ensure the accessibility of stations, platforms and other facilities for disabled persons and persons with reduced mobility. The TSI PRM also applies fully in the purchase of new and the upgrading of existing rolling stock. They establish the obligation to ensure accessibility of vehicles for people with reduced mobility and disabled persons. Station managers are obliged to provide assistance to persons with reduced mobility and disabled persons for the purpose of boarding/alighting from a service for which they have purchased a transport ticket. In the case of the complete or partial loss of or damage to mobile equipment or other special equipment used by disabled persons or persons with reduced mobility, no limit on compensation is applied from the side of the railway undertaking.

Road transport

On 10 November 2011 there entered into force technical regulation "TP 10/2011 – Design of barrier-elimination measures for persons with reduced mobility and orientation on roads", which is the methodology for creating barrier-free measures, lays down requirements for the design of barrier-elimination measures for persons with reduced mobility and orientation on roads and provides specimen graphic prints of barrier-elimination measures for persons with reduced mobility and orientation, with a description and reasoning for the use of specific solutions. Severely disabled persons are entitled to exemption from paying for motorway toll stickers. Under § 6(6)(ch) of Act no. 135/1961 Coll. on roads, as amended, no payment is made in the case of motor vehicles and vehicle combinations for which a financial contribution is provided to persons with severe disability for increased costs associated with the operation of a passenger motor vehicle under § 8 of Act no. 447/2008 Coll. on financial contributions for compensation of severe disability and amending certain laws.

Electronic communications and postal services

Government Resolution no. 360 of 13.5.2009 approved the National Policy for Electronic Communications for 2009 to 2013, which sets out the strategy for the development of electronic communications networks and services in the Slovak Republic, in particular in the field of the harmonisation of the regulatory framework, the development of competition, use of the frequency spectrum, privacy and security, crisis management and critical infrastructure, international cooperation and development of innovative services. In accordance with the National Policy for Electronic Communications for 2009 – 2013 and with the Strategy for the Transition from Analogue to Digital Terrestrial TV and Radio Broadcasting in Slovakia, 2011 saw the digitalisation of terrestrial television. Digital technology provides possibilities on the basis of which even persons with severe disabilities benefit from television in such a degree

that was not achievable with analogue solutions. Digital television broadcasting allows such services as closed captioning and narration, and allows greater functionality in the form of advanced electronic programme guides.

In the framework of the transition to digital broadcasting in accordance with § 67 (4) of the Digital Broadcasting Act, from 15.3.2011 to 31.8.2011 the MTCRD SR provided a one-time non-repayable grant to purchase equipment for receiving digital television, regardless of reception platform, in Slovakia. Grant applications could be submitted by severely disabled persons who are beneficiaries of payment in material distress, or persons assessed jointly with beneficiaries.

The standing of disabled persons is covered by Act no. 351/2011 Coll. on electronic communications, which entered into effect on 1.11.2011. The act, in the field of regulating consumer relations in electronic communications in certain cases, specifically emphasises the standing of disabled customers. This concerns in particular the extension of obligations on undertakings providing electronic communications to provide information for disabled persons on services intended for them, the obligation to take measures to ensure equal access to services for end users with disabilities. There is also the possibility here for the SR Telecommunications Regulatory Authority to impose an obligation to provide free information on cost control for an electronic communications service provided to a disabled customer. In the case of universal service, the SR Telecommunications Regulatory Authority may impose the obligation to lease or sell, if a disabled user so requests, a specially equipped telecommunications terminal appropriate to his disability for the price of a standard telecommunications terminal, or to ensure barrier-free access to selected public payphones.

On the basis of an intergovernmental agreement, the Universal Postal Convention (SR Ministry of Foreign Affairs Notice no. 50/2010 Coll. on the acceptance of Acts of the Universal Postal Union), the Slovak Postal Service (Slovenská pošta, a. s. hereinafter referred to as "Slovak Post"), provides a domestic and international Postal Service for visually impaired users for free posting of items identified as a "blind literature" weighing up to 7000 g. The content of these items may be documents prepared for the blind (Braille script) or pressed relief Latin (Klein script), blocks with Braille labels, audio recordings on electromagnetic and optical media, special papers for the blind, but only if they are posted by an institution for the blind, or if they are addressed to such an institution.

Construction and housing policy

The main policies, principles and requirements ensuring a barrier-free environment and accessibility of buildings in the Slovak Republic are incorporated into the following generally binding legal regulations:

- Act no. 50/1976 Coll. on zoning and the building code (the Building Act) as amended;
- Decree no. 532/2002 Coll. laying down details on general technical requirements for construction and general technical requirements for buildings used by persons with reduced mobility and orientation (which replaced the previous Decree no. 192/1994 Coll.).

Education

Accessibility in education pursuant to Article 9 of the Convention on the Rights of Persons with Disabilities (hereinafter referred to as the "Convention") is codified in Act no. 365/2004 Coll. on equal treatment in certain areas and protection against discrimination, amending certain other laws (the Antidiscrimination Act) as amended at all levels of education. Its principle is reflected in generally binding legal regulations of the education sector, governing

the admission of pupils to schools and their education. The basic right to accessibility of education for pupils with disabilities in schools providing pre-primary, primary and secondary levels of education is laid down in the provisions of § 6 (3) and § 9 (4) of Act no. 596/2003 Coll. on central government in education and school authorities and on the amendment of certain acts, as amended. The provisions of § 144(2) and (3) of Act no. 245/2008 Coll. on education (the Schools Act) and on the amendment of certain acts as amended guarantee their right to specific forms and methods in education corresponding to their needs and the right to use special textbooks and special didactic and compensatory aids, sign language, Braille and alternative ways of communicating. Further particulars regarding the admission of pupils with disabilities to schools, their graduation and the organisational arrangements of their education, besides the above-mentioned Act no. 245/2008 Coll. on education (the Schools Act) and on the amendment of certain acts as amended, are governed also in particular by its following implementing regulations: SR Ministry of Education Decree no. 320/2008 Coll. on primary schools as amended by Decree no. 224/2011 Coll., SR Ministry of Education Decree no. 282/2009 Coll. on secondary schools as amended by Decree no. 268/2011 Coll., SR Ministry of Education Decree no. 318/2008 Coll. on the completion of study at secondary schools as amended by SR Ministry of Education, Science, Research and Sport Decree no. 209/2011 Coll.

Culture

An important step in creating stable elements in the care of culture for people with disabilities and of the accessibility of cultural services is SR Act of Parliament no. 434 of 26 October 2010 on the granting of subsidies by the Ministry of Culture of the Slovak Republic (hereinafter the "Ministry of Culture"). The act provides for the purpose, scope, method and conditions for granting subsidies by the Ministry of Culture. In § 2 – Purpose of granting subsidies – as follows: paragraph (1). The Ministry may in the respective budgetary year provide subsidy from the state budget for these purposes: in point f) – cultural activities of disabled or otherwise disadvantaged groups. Promotion of the availability of cultural services is often dependent on the creation of financial mechanisms and limits in this field.

b. General law, technical regulations and standards

Railway transport

In the code of carriage of a passenger rail carrier there is codified its obligation in connection with the infrastructure manager to provide free assistance upon boarding/alighting from a train if the passenger gives prior notification of their intended destination.

Road transport

On 10 November 2011 there entered into effect the technical regulation "TP 10/2011 – Design of barrier-elimination measures for persons with reduced mobility and orientation on roads"

Water transport

The issue of non-discrimination and the exercise of rights of persons with disabilities and persons with reduced mobility in water transport is governed by Regulation (EU) No 1177/2010 of the European Parliament and of the Council.

Construction and housing policy

The main policies, principles and requirements ensuring a barrier-free environment and accessibility of buildings in the Slovak Republic are incorporated into the following generally binding legal regulations:
– Act no. 50/1976 Coll. on zoning and the building code (the Building Act) as amended;
Decree no. 532/2002 Coll. laying down details on general technical requirements for construction and general technical requirements for buildings used by persons with reduced mobility and orientation (which replaced the previous Decree no. 192/1994 Coll.).

The provisions of the Building Act relating to basic requirements for constructions are taken from Council Directive 89/106/EEC (from Annex 1). The act mandated also general technical requirements for buildings used by persons with reduced mobility and orientation, which are detailed in Decree no. 532/2002 Coll.. Zoning documentation, architectural designs and construction projects must meet the conditions specified by this Decree, whereby the attributes of barrier-free access in the most basic features will be achieved; typological principles for making environments and buildings accessible are set out in a manner compatible with standards of other European countries.
General technical requirements for buildings used by persons with reduced mobility and orientation apply, irrespective of the building owner, to

- apartment buildings and other buildings for housing,
- an apartment, if it is to be used by a person with reduced mobility and orientation (a special-purpose apartment),
- a house, if it is to be used by a person with reduced mobility and orientation (a special-purpose house),
- a non-residential building in the part intended for use by the public,
- a building in which there is envisaged the employment of persons with reduced mobility and orientation (building with a sheltered workplace),
- an engineering construction in a part intended for use by the public.

c. Role of national, European and international standards

Water transport
The issue of non-discrimination and the exercise of rights of disabled persons and persons with reduced mobility in water transport is governed by international European standards.

Electronic communications and postal services:
The MTCRD SR in connection with the rights of disabled people was actively involved in the commenting process, voting and translation of European standards adopted in the system of Slovak Technical Standards, listed in the attached Table 1.

Construction and housing policy
The provisions of the Building Act relating to basic requirements for constructions are taken from Council Directive 89/106/EEC (from Annex 1). The act mandated also general technical requirements for buildings used by persons with reduced mobility and orientation, which are detailed in Decree no. 532/2002 Coll.. Zoning documentation, architectural designs and construction projects must meet the conditions specified by this Decree, whereby the attributes of barrier-free access in the most basic features will be achieved; typological principles for making environments and buildings accessible are set out in a manner compatible with standards of other European countries.

Education

Accessibility in education is codified in national legislation in accordance with European standards.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Electronic communications and postal services

In accordance with the Convention on the Rights of Persons with Disabilities, Slovak Post is making barrier-free entrances for persons with reduced mobility and orientation in newly-opened post offices in accordance with the SR Ministry of Environment Decree no. 532/2002 Coll. laying down details on general technical requirements for construction and general technical requirements for buildings used by persons with reduced mobility and orientation (§ 57). Slovak Post at its leased and own premises in which barrier-free entrances have not been constructed is gradually making them and will continue to do so in the framework of the planned reconstruction and modernisation of post offices. Slovak Post also provides persons with disabilities, by agreement, all financial services and pension payments by means of a postman.

e. Services regulated for accessibility

Railway transport

The Regulation and Rail Transport Act provide for the provision of access to railway transport services for disabled persons and persons with reduced mobility on a non-discriminatory basis.

Air transport

The issue of non-discrimination and the application of rights of persons with disabilities and persons with reduced mobility in air transport was addressed by Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006, which creates rules for the protection and provision of assistance services for persons with disabilities and persons with reduced mobility in air transport, with the aim of protecting them against discrimination and of ensuring that they are provided assistance services.

Construction and housing policy

General technical requirements for buildings used by persons with reduced mobility and orientation apply, irrespective of the building owner, to:

- apartment buildings and other buildings for housing,
- an apartment, if it is to be used by a person with reduced mobility and orientation (a special-purpose apartment),
- a house, if it is to be used by a person with reduced mobility and orientation (a special-purpose house),
- a non-residential building in the part intended for use by the public,
- a building in which there is envisaged the employment of persons with reduced mobility and orientation (building with a sheltered workplace),
- an engineering construction in a part intended for use by the public.

Social affairs

The commitments made by signingthe Convention are reflected in Act no. 447/2008 Coll. on financial contributions to compensate for severe disability and on the amendment of certain acts, in particular through the provision of a financial contribution for personal assistance, where personal assistance ensures also help by means of interpreting in sign language,

articulation and tactile interpreting, as well as by means of a financial contribution for transport, a financial contribution for the acquisition of aids, a financial contribution for purchasing a passenger motor vehicle, a financial contribution to offset increased expenses associated with the operation of a passenger motor vehicle, a financial contribution for purchasing lifting equipment, a financial contribution for modification of an apartment, a financial contribution for modification of a house, a financial contribution for modification of a garage. In accordance with the Social Services Act (§ 9 of Act no. 448/2008 Coll.) providers of social services, both public and non-public (private) are required to meet general technical requirements for construction and general technical requirements for buildings used by persons with reduced mobility and orientation under a special regulation (the Building Act and implementing decree). Compliance with the barrier-free accessibility in the provision of social services is one of the criteria for evaluating the quality of a social service provided. In the interest of ensuring accessibility for persons with disabilities to various services in the framework of social services an interpreting service is provided (in sign language, articulation and tactile interpreting), escort and reading services (§§ 43 and 44 of the Social Services Act) to these people by professional social services staff.
http://www.employment.gov.sk/legislativa.html (Social Services Act)

Healthcare

The availability of health care in relation to severely disabled persons in Slovakia is not regulated, but is based comprehensively on an anti-discrimination approach. With regard to the needs of severely disabled persons, the obligation for compliance of the material and technical equipment of healthcare facilities pursuant to barrier-free access and movement within these facilities is established by Edict of the Ministry of Health of the Slovak Republic no. 09812/2008-OL on minimum requirements for staffing and material-technical equipment of individual types of healthcare facilities as amended, laid down under § 8(2) of Act no. 578/2004 Coll. on healthcare providers, health care workers, professional organisations in health care and amending certain laws as amended. The edict is published in the Journal of the SR Ministry of Health part 32-51, of 28 October 2008, Volume 56, link: *http://www.health.gov.sk/?vestniky-mz-sr*. This legislative material obliges healthcare facilities to provide barrier-free access and to enable patients with reduced mobility and orientation to move via horizontal communications, ramps or elevators. At individual departments there must be at least one shower cabinet accessible for persons with reduced mobility and also for a wheelchair with an immobile patient. Toilets for patients must have a door that can be opened outwards and at least one toilet cubicle must be accessible for patients with reduced mobility and orientation. The basic material equipment and instrumentation of a department must include at least one bed for persons with reduced mobility, including an antidecubitus bed. Through the law on the scope and conditions of payment for medicinal products, medical aids and dietary foods on the basis of public health insurance the Ministry of Health of the Slovak Republic sets out the scope and terms of payment for medicinal products, medical aids and dietary foods on the basis of public health insurance. In relation to people with disabilities, this consists primarily in maintaining the greatest affordability through regulation of the amount of supplementary payments, by setting prescription, indicative and quantitative restrictions that reflect the special needs of these patients.

Education

A support service for enabling or improving the accessibility of education for pupils with disabilities is the legislatively established position of teaching assistant at a nursery school,

primary school and secondary school, including special schools. During higher education students with disabilities have the possibility to use the assistance of a coordinator for education of students with disabilities.

f. Goods regulated for accessibility as part of a service

Railway transport
The Regulation and Rail Transport Act provide for the provision of access to railway transport services for disabled persons and persons with reduced mobility on a non-discriminatory basis.

Education
Textbooks and textbook transcripts in formats suitable for pupils with visual impairments (textbooks in Braille, electronic textbooks).

g. Enforcement of accessibility legislation

As regards the issue of enforceability of rights in the field of access for persons with disabilities, anyone has the right to seek court protection of their rights, if they feel that their rights have been infringed through non-compliance with the principle of equal treatment on the grounds of their disability. They may also demand that the party who failed to comply with the principle of equal treatment refrain from such conduct, and, if possible, rectify the unlawful state or provide adequate redress. If adequate redress were not to be satisfactory, the aggrieved party may claim non-pecuniary damages in cash (§ 9 of Act no. 365/2004 Coll. the Antidiscrimination Act), as well as damage compensation.

Everyone has the right to protection of their rights also out of court, for example through mediation, by lodging complaints with public authorities, or by means of the Office of the Ombudsman.

Authorities are also involved in the enforceability of law in the field of access to products, facilities, services or an environment with regard to persons with disabilities. The competent authorities may impose fines for failure to comply with obligations imposed in relevant legislation, carry out compliance checks, and may refuse to issue or may revoke a licence.

For example, under § 43 of Act no. 514/2009 Coll. on rail transport as amended, the competent authority may impose on a rail undertaking a fine in the case that it fails to comply with the rights of passengers under a special regulation (Regulation of the European Parliament and Council. 137/2007 on the rights and obligations of rail passengers), or if it does not create conditions to improve passenger comfort and ease of movement and travel of select groups of passengers, passengers with child pushchairs and transport of guide dogs, for example through the fact that it does not provide guidance and information essential for passengers on rail vehicles for their safe carriage according to the carriage contract, including passengers with impaired hearing or sight.

In the field of construction, it is worth mentioning that the Building Act sets out basic general technical requirements for buildings used by persons with reduced mobility. The intention pursued is not simply the constitutionality of legislation, but also the possibility of better control and enforceability of law from the side of building authorities, since pursuant to § 43e of the Building Act “general technical requirements for construction, including general

technical requirements for buildings used by persons with reduced mobility and orientation specify requirements for the zoning-technical solution of a construction, the building-technical and purpose solution of buildings, under which legal persons, individuals, central and local governments are obliged to proceed in siting, designing, permitting, implementing, approving, using and removing buildings".

Implementing legislation, Decree no. 532/2002 Coll. lays down details on general technical requirements for construction and on general technical requirements for buildings used by persons with reduced mobility and orientation.

Railway transport
Supervision over the application of Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations is carried out by the Railway Regulatory Authority. If the case of a violation of the carriage code, the person affected has the right to turn with their complaint directly to the carrier, or to the Slovak Trade Inspectorate.

Water transport
As a result of Regulation (EU) No 1177/2010 of the European Parliament and of the Council, Act no. 338/2000 Coll. on inland waterway vessels is to be amended.

Education
The task of supervision over compliance with accessibility in education is performed by the State Schools Inspectorate.

Culture
The Ministry of Culture promotes the availability of library, museum and gallery services for persons with disabilities by means of implementing measures deriving from the government strategy papers: Strategy for Development of Slovak Libraries for 2008 – 2013 – measure no. 3.7: support for the availability of libraries for disadvantaged groups, including persons with disabilities (the document was approved in SR Government Resolution no. 943 of 7 November 2007), as well as by means of the Strategy for Development of Museums and Galleries to 2011 (the document was approved in SR Government Resolution no. 1078 of 20 December 2006). In objectives 4.1 and 4.5 there are detailed the measures supporting equal opportunities for disadvantaged groups including people with disabilities.

h. Non-compliance and litigation

Judicial system
"A person who has knowledge that accessibility legislation is being violated has the right to file a complaint to state authorities performing supervision and monitoring and to seek redress – this may concern, for example, barrier-free access issues, availability of websites for the visually impaired, etc. If the rights of a person are directly violated, that person is entitled to file at the competent court litigation to protect their rights, most usually a claim for protection against discrimination under the Anti-Discrimination Act.

There applies the general rule that anyone can claim their rights at court, if they are or have been subject to infringement of their rights, legally protected interests or freedoms through a failure to comply with the principle of equal treatment. In court proceedings a person may

require an offender to refrain from such conduct, if possible to rectify the unlawful state or provide adequate redress.

If through a violation of accessibility regulations, constituting a breach of the principle of equal treatment, there could be infringed the rights, legally protected interests and freedoms of a large or uncertain number of persons, or if through such a violation a public interest could otherwise be seriously endangered, the right to claim protection of the right at court pertains also to a legal entity established by law or whose aim or subject of activity is protection against discrimination. A legal person may seek in particular a decision that the principle of equal treatment has been infringed, and that the party who failed to comply with the principle of equal treatment refrain from such conduct and, if possible, rectify the unlawful state.

Protection of rights in connection with legislation and its potential conflict with international treaties by which the Slovak Republic is bound may be appealed by a person, for example through a complaint to the Ombudsman, who is entitled to submit to the Constitutional Court of the Slovak Republic a petition for commencing proceedings on the accordance of legislation if a generally binding legal regulation contravenes a fundamental right or freedom awarded to a natural person or legal person.".

Education

Any failure to comply with a right to accessibility in education of persons with disabilities is dealt with by an organisation at a higher management level, including the Ministry of Education, Science, Research and Sport of the Slovak Republic, the State Schools Inspectorate, the courts.

Culture

The Ministry of Culture is committed to protecting human dignity, fundamental rights and freedoms, to prohibiting the incitement of hatred and to preventing the spread of specific types of programmes by means of legislative measures. For the field of electronic media and video-on-demand, the protection of human dignity, fundamental rights and freedoms, the prohibition of incitement of hatred and prevention of the spread of specific types of programmes are permanently ensured by the provisions of § 19 of Act no. 308/2000 Coll. on broadcasting and retransmission and on the amendment of Act no. 195/2000 Coll. on telecommunications, as amended (hereinafter referred to as the "Broadcasting Act"). Under § 19(1) of the Broadcasting Act a video-on-demand service, a programme service and components thereof may not:

b) through the manner of their production and content infringe the human dignity and fundamental rights and freedoms of others,
c) promote violence and overtly or covertly incite hatred, denigrate or defame on the basis of gender, race, colour, language, faith and religion, political or other opinion, national or social origin, nationality or ethnic group,
d) promote war or describe cruel or otherwise in human conduct in a manner that inappropriately trivialises them, excuses them or approves of them,
e) depict without justification scenes of real violence, where there is unduly emphasised the actual course of dying or where there are depicted persons exposed to physical or mental suffering that is considered to be an infringement of human dignity; this applies even if the persons concerned have consented to such depiction.

The Council for Broadcasting and Retransmission (hereinafter referred to as the "Council") as the supervisory authority may impose on a broadcaster or a video-on-demand service provider

for a breach of obligations laid down in § 19 of the Broadcasting Act an obligation to broadcast a notice of the violation of the act, or to suspend provision of the programme, for at most 30 days. For a breach of such obligation the Council may concurrently impose on a broadcaster of a television programme service a fine from €3319 to €165 969, a broadcaster of a radio programme service a fine from €497 to €49 790, an Internet broadcaster a fine from €500 to €60 000 and a video-on-demand service provider a fine from €500 to €40 000. If a broadcaster, despite the imposition of repeated penalties, deliberately and seriously violates obligations laid down in § 19(1)(b) or (c) of the Broadcasting Act, the Council can revoke its licence.

Slovenia

a. Accessibility legislation: its place in the legal and regulatory framework

Slovenia has undertaken to respect prohibition of discrimination in relation to disability in all areas of human life, including accessibility. The basic rights for equalising opportunities arise from the Constitution of the Republic of Slovenia, in which Article 14 is worded as follows: "…everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance". The constitution explicitly emphasises the right to equality of persons with disabilities before the law and that nobody shall be discriminated against due to disability (Sendi and others, 2008 [77]).

The umbrella act regulating the area of protection of persons with disabilities is the 2010 Equalisation of Opportunities for Persons with Disabilities Act (ZIMI)[78]. The first chapter of the Act – elimination of discrimination against persons with disabilities – covers the area of access of buildings and facilities in public use, public transport, residence and goods / services provided by public. For this area, the strategic document "Action Programme for Persons with Disabilities 2017−2013)" [79] and the document "National guidelines to improve built environment, information and communications accessibility for people with disabilities"[80] are crucial.

On 7 December 2005 the Government adopted national Guidelines to improve accessibility for persons with disabilities to physical environment and information and communication, which are a comprehensive set of measures to be implemented by 2025. The objectives laid down in the National guidelines are based on a number of acts adopted by the Republic of Slovenia (such as in the area of environmental planning, building construction, accessibility to apartments, working environment and equipment, air and road transport, electronic communications, etc.). Access to services of public and private sectors and to the physical environment is considered to be the right of persons with disabilities and of all other functionally impaired persons. By this project the state aims at establishing accessible environment for living and work of all people and at providing all groups of people with equal opportunities both in the areas of education, culture and recreation and in the area of decision-making.

The technical aspect of managing the built environment, space and communications is regulated with the following: the Spatial Management Act[81], the Construction Act (ZGO-1)[82],

[77] R. Sendi, B. Černič Mali, B. K. Kebler, B. Tominc, S. Mijukič, B. Kobal, S. Smolej and M. Nagode, (2008). *Ukrepi za uresničevanje pravic invalidov do dostopa brez ovir, končno poročilo* (Measures for the implementation of the rights of persons with disabilities for obstacle-free access, final report). Ljubljana: Urban planning institute of the Republic of Slovenia.

[78] Official Gazette of the Republic of Slovenia, No. 94/2010

[79] Available at: http://www.mddsz.gov.si/fileadmin/mddsz.gov.si/pageuploads/dokumenti__pdf/api_07_13.pdf (10 December 2010).

[80] Official Gazette of the Republic of Slovenia, No. 113/2005

[81] Official Gazette of the Republic of Slovenia, No. 110/2002 (8/2003 corr.), amendments: Official Gazette of the Republic of Slovenia, No. 58/2003-ZZK-1 (Land Register Act) , 33/2007-ZPNaèrt (Spatial Planning Act) 108/2009-ZGO-1C (Act amending the Construction Act), 79/2010 Odl.US (Ruling of the Constitutional Court): U-I-85/09-8, 80/2010-ZUPUDPP (Spatial Planning of Arrangements of National Significance Act).

[82] Official Gazette of the Republic of Slovenia, No. 110/2002, amendments: Official Gazette of the Republic of Slovenia, No. 97/2003 Odl.US (Ruling of the Constitutional Court): U-I-152/00-23, 41/2004-ZVO-1

the Rules on the requirements for free access to, entry to and use of public buildings and facilities and multi-apartment buildings[83], and the SIST ISO/TR 9527 National standard – building construction: needs of persons with disabilities and other functionally impaired persons in buildings[84] and the Use of Slovenian Sign Language Act [85].

Accessibility is also one of the objectives of the housing policy, based on the implementation of the National Housing Programme[86].

b. General law, technical regulations and standards

The majority of provisions on accessibility are determined in the sectoral legislative provisions, while more detailed technical requirements are given in regulations or standards.

Example:
The Construction Act regulates the conditions for construction of all kinds of works, sets out the essential requirements and the fulfilment thereof regarding the characteristics of works, prescribes the method and conditions for pursuit of the activities (Article 1 of ZGO-1), while the Rules on railway stations and stops facilities[87] specify the equipment of railway stations and stops that enables passengers and other persons equal, independent and safe access to trains and movement at train stations.

c. Role of national, European and international standards

The Slovenian legislation is developed on the grounds of European recommendations and directives, and UN recommendations and documents from the area of human rights and provision of equal opportunities to persons with disabilities for inclusion in society and for overcoming obstacles.

Example:
With the Construction Act, Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market has been transposed into Slovenian law (Official Gazette of the Republic of Slovenia, No. 376 of 27 December 2006, p. 36); also, the Directive of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications has been transposed (Official Gazette of the Republic of Slovenia, No. 255 of 30 September 2005, p.22) (Article 2 of the Construction Act).

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

(Environment Protection Act), 45/2004, 47/2004, 62/2004 Odl.US (Ruling of the Constitutional Court): U-I-1/03-15, 102/2004-official consolidated text (14/2005 corr.), 92/2005-ZJC-B (Act Amending Public Roads Act), 93/2005-ZVMS (Veterinary Compliance Criteria Act), 111/2005 Odl.US (Ruling of the Constitutional Court): U-I-150-04-19, 120/2006 Odl.US (Ruling of the Constitutional Court): U-I-286/04-46, 126/2007, 57/2009 Skl.US (Constitutional Court Order): U-I-165/09-8, 108/2009, 61/2010-ZRud-1 (Mining Act), (62/2010 corr.).

[83] Official Gazette of the Republic of Slovenia, No. 97/2003, amendments: Official Gazette of the Republic of Slovenia, No. 77/2009 Odl.US (Ruling of the Constitutional Court): U-I-138/08-9.

[84] Official Gazette of the Republic of Slovenia, No. 92/1999, amendments: Official Gazette of the Republic of Slovenia, No. 97/2003

[85] Official Gazette of the Republic of Slovenia, No. 96/2002.

[86] Official Gazette of the Republic of Slovenia, No. 43/2000.

[87] Official Gazette of the Republic of Slovenia, No. 53/2002, amendments: 61/2007-ZVZelP (Railway Traffic Safety Act), 72/2009.

Ratification of the UN Convention on the Rights of Persons with Disabilities initiated the preparation and adoption of the Equalisation of Opportunities for Persons with Disabilities Act, the Electronic Communications Act[88] and amendments to the Vocational Rehabilitation and Employment of Disabled Persons Act[89].

e. Services regulated for accessibility

Unhindered movement of functionally impaired persons is guaranteed by Article 17 of the Construction Act (ZGO-1). The Act determines that all works in public use that are newly constructed, and works in public use that are reconstructed, must ensure that functionally impaired persons are able to access, enter and use the works without physical obstructions or communicational barriers.

The second paragraph of Article 17 lays down that every newly constructed or reconstructed works in public use, whose construction is carried out pursuant to the provisions of this Act and that does not have all its premises on the ground floor must be equipped with at least one lift or other appropriate device for such purposes.

With regard to the reconstruction of works in public use that are protected in accordance with regulations on cultural heritage, the essential requirements attained for the works may differ from those prescribed, but only under the condition that the deviation is not such that because of it there would be a threat to the safety of the works, to the lives and health of people, to traffic, to neighbouring works or to the environment (Article 17(3) of ZGO-1).

With regard to apartment buildings with more than ten apartments constructed pursuant to the provisions of this act, the requirement for ensuring unhindered access, entry and use must be fulfilled by at least one-tenth of all the apartments, and all joint premises intended for such apartments (Article 17(4) of ZGO-1).

Access, entry and use without physical obstructions or communicational barriers shall be ensured through project design and construction (Article 17(5) of ZGO-1).

In Article 2, the ZGO-1 defines that works in public use are works whose use is intended for all under the same conditions; such works are divided in terms of manner of use into public areas and non-residential buildings intended for public use. A public area is an area whose use is intended for all under the same conditions. A non-residential building intended for public use is a building whose use is intended for all under the same conditions. Public infrastructure works are civil engineering works that form a network serving a specific type of public utility of national or local importance or forms a network of general benefit to the public.

---

[88] Official Gazette of the Republic of Slovenia, Nos. 43/2004, 86/2004-ZVOP-1 (Personal Data Protection Act), 129/2006, 13/2007-official consolidated text, 102/2007-ZDRad (Digital Broadcasting Act), 110/2009, 33/2011.

[89] Vocational Rehabilitation and Employment of Disabled Persons Act (ZZRZI), Official Gazette of the Republic of Slovenia, Nos. 63/2004, 72/2005, 100/2005-official consolidated text, 114/2006, 16/2007-official consolidated text, 14/2009 Odl.US (Ruling of the Constitutional Court) : U-I-36/06-18, 84/2011 Odl.US (Ruling of the Constitutional Court): U-I-245/10-13, U-I-181/10-6, Up-1002/10-7, 87/2011.

The Use of Slovenian Sign Language Act, adopted in 2002, grants deaf persons the right to use Slovenian sign language, to be informed in techniques adjusted to their needs and lays down the scope and method of exercising the right to a sign language interpreter.

f. Goods regulated for accessibility as part of a service

The legislation referred to in point a. determines: accessibility of services provided in works in public use (in point e. in more detail); accessibility of public transport; public use of the Slovenian sign language (interpretation), and the right to assistive devices.

g. Goods regulated for accessibility

Based on legislation and public tenders, goods from the areas stated in point f. are adapted to and accessible to persons with disabilities, for example: books, medicinal products, public toilets, automated teller machines, phone booths, buses, vessels, aeroplanes, public transport ticket machines (in Ljubljana), and lifts.

h. Enforcement of accessibility legislation

The legislation contains penal provisions for non-implementing legal provisions and their violations; the transgressions are adjudicated by inspection services.

Example of penal provision:
Article 164 of the Construction Act determines that a fine of EUR 1,500 to EUR 30,000 shall be imposed upon a legal person if it "…fails to ensure that functionally impaired persons are able to access, enter and use a facility in public use of which it is the investor without physical obstructions or communicational barriers."

In article 96, the ZGO-1 lays down that in the procedure of issuing a permit for use, the relevant administrative body shall deny the issue of the permit if it establishes, inter alia, that the construction is non-compliant and the changes that arose during construction caused change in the location's conditions or other conditions and elements determined by the building permit that could affect health conditions, the environment, the safety of the works or a change in the prescribed essential requirements, provision of unhindered access and movement of functionally impaired persons.

i. Non-compliance and litigation

The right to judicial protection is declared in Article 23 of the Constitution, under which "Everyone has the right to have any decision regarding his rights, duties and any charges brought against him made without undue delay by an independent, impartial court constituted by law." (Kresal Šoltes, 2007[90]).

[90] K. Kresal Šoltes (2007): *Uveljavljanje in varstvo pravic* (Enforcement and protection of rights) in Barbara Kresal et al. (editor): *Vodnik po pravicah invalidov v slovenski zakonodaji*, (Guide to the rights of persons with disabilities in Slovenian law pp. 139-148. Ljubljana: Institute for Labour Law at the Faculty of Law, University of Ljubljana.

Anyone who believes that his right(s) were violated by an act or action of a state authority, local self-government body or bearer of public authorities, can turn to the Ombudsman, her four deputies or professional associates.
The Ombudsman can:

- warn the authority that has violated the right(s) to rectify the violation or the irregularity committed or even propose that it compensate for the damage caused;
- submit proposals for amendments to laws and other regulations to the Government or the Parliament;
- propose to all authorities that fall within her competence that they improve their operation and relations with clients;
- give her opinion on any case involving the violation of rights and freedoms. It does not matter what kind of proceeding is involved, or what phase the proceeding is at before the authority concerned.

The Ombudsman has no statutory powers in relation to the private sector and cannot intervene in cases in which rights are violated by, for example, a private company. In such cases, she can put pressure on state authorities, local self-government bodies and bearers of public authorities responsible for supervising the work of a private undertaking (Ombudsman's website[91]).

The Advocate of the Principle of Equality prevents and eliminates discrimination in Slovenia. He examines petitions or complaints concerning alleged cases of discrimination. He issues legally non-binding opinions on whether a person has been discriminated against in a certain situation (subject to unequal treatment because of personal circumstances). At the same time, he recommends to the offender ways to eliminate the violation, its causes and consequences. Through such non-formal intervention, the Advocate tries to eliminate the violation and provides help to improve future practice. When an issue cannot be resolved in this way, the Advocate may ask inspection authorities to prosecute for minor offences. A proceeding before the Advocate is cost-free and confidential. The Advocate also provides assistance to persons who were discriminated against during legal and other proceedings, i.e. by giving advice on legal remedies and how to use them before other state authorities. Anyone has the right to ask the Advocate for advice on whether their actions could result in discrimination, on how to act in order to avoid discrimination or how to more effectively respect the right to equal treatment. In addition, the Advocate provides general information on discrimination issues and the situation in this area in Slovenia (website of the Office for Equal Opportunities[92]).

[91] Available at: http://www.varuh-rs.si/ (9 February 2012).
[92] Available at: http://www.uem.gov.si/ (9 February 2012).

Spain

a. Accessibility legislation: its place in the legal and regulatory framework

The idea of integral accessibility that is promoted under the Law of Equal Opportunities, Non-Discrimination and Universal Accessibility of People with Disabilities (hereinafter referred to as LIONDAU; Ley de Igualdad de Oportunidades, No Discriminación y Accesibilidad Universal de las Personas con Discapacidad), means that the built environment has to be considered as a chain in which all links must be accessible, so that the accomplishment of the activities of a person with disability are not interrupted or impeded because one of the links in the chain, an environment or a space, is not accessible and does not let them advance along their journey by themselves.

The First National Plan of Accessibility contains the commitment of Governments in relation to the promotion of accessibility, which will be developed in successive three-year periods until 2012.

The Spanish Disability Strategy 2012-2020, approved in November 2011, is inspired by principles of Law 26/2011, 1 August, for the normative adaptation to the Convention on the Rights of Persons with Disabilities and Law 51/2003, 2 December, of equal opportunities, non discrimination and universal accessibility of people with disability (LIONDAU) that defines the concept of Universal Accessibility. One of the main objectives of this Strategy is Accessibility understood as the right of persons with disabilities to access the physical environment, transport, information technology and communications systems, and other facilities and services with the same conditions than the rest of the population. The first strategic measure on accessibility is to support the "European Accessibility Act" mentioned in the EU Disability Strategy 2010-2020.

In the Spanish legislative system, Autonomous Communities (Regional Governments) have the competencies for the development of laws to be applied within their territory. In particular, every Autonomous Community has its own accessibility legislation, which includes technical guidelines for its implementation.

Furthermore, in order to harmonize and to establish a general framework to be considered by all the regional authorities, the national government has issued the Law 51/2003 of equal opportunities, non discrimination and universal accessibility for people with disabilities.

In this Law 51/2003, lack of accessibility is seen as indirect discrimination. The technical issues related with its implementation are specified in several royal decrees and orders.

- Royal Decree 1417/2006, of 1 December, that establishes the Arbitral System for resolving complaints on equal opportunities, non discrimination and accessibility on the basis of disability.
- Royal Decree 366/2007 of 16 March, which sets forth the conditions of accessibility and non-discrimination of people with disabilities in their relations with the General State Administration.
- Royal Decree 505/2007 of 20 April, which sets forth the basic conditions of accessibility and non-discrimination of people with disabilities for accessing and using public spaces and buildings.
- Royal Decree 1494/2007, of 12 November, by which the Regulations on basic conditions for access for persons with disabilities to technologies, products and services related to the information society and social communication media are passed.

- Royal Decree 1544/2007, of 23 November, by which the basic conditions of accessibility and non-discrimination for access to and the use of means of transportation by people with disabilities are regulated.
- Royal Decree 173/2010, of 19 February, amending the Technical Building Code, approved by Royal Decree 314/2006 of March 17, in terms of accessibility and non discrimination of persons with disabilities.
- Royal Decree 422/2011, of 25 March, by which the Regulation on basic conditions for participation of persons with disabilities in political life and electoral processes are regulated.

All these regulations are available in both Spanish and English at http://sid.usal.es/spanishlawsondisability

Work is currently underway on the two Royal Decrees that are missing in order to complete the development of the LIONDAU, in accordance with what is foreseen in the aforementioned Law:

- Basic conditions of accessibility and non-discrimination for access to and the use of goods and services at the public's disposal.
- Training curriculum on universal access and the training of professionals.

b. General law, technical regulations and standards

In those areas where accessibility is regulated by a law as a general framework, its technical requirements are specified by different pieces of law within the Spanish legal system: Royal Decrees and Orders. Examples of these are listed under point g.

Besides, some technical standards are recognised as mandatory by law. An example of this is the UNE EN 81-70-2004 on accessibility to lifts for persons including persons with disability, which is included in the Spanish Technical Building Code, the normative framework that establishes the safety and habitability requirements of buildings set out in the Building Act.

c. Role of national, European and international standards

European standards are adopted and translated in Spain by AENOR, the Spanish Association for Standardization and Certification. AENOR also elaborates its own standards applicable only in Spain.

Some references (www.aenor.es):

- UNE 41510:2001 Accesibilidad en el urbanismo.
- UNE 41522:2001 Accesibilidad en la edificación. Accesos a los edificios.
- UNE 41520:2002 Accesibilidad en la edificación. Espacios de comunicación horizontal.
- UNE 41523:2001 Accesibilidad en la edificación. Espacios higiénico-sanitarios.
- UNE 41524:2010 Accesibilidad en la edificación. Reglas generales de diseño de los espacios y elementos que forman el edificio. Relación, dotación y uso.
- UNE 41500:2001 IN Accesibilidad en la edificación y el urbanismo. Criterios generales de diseño.
- UNE 200007:2007 IN Accesibilidad en las interfaces de las instalaciones eléctricas de baja tensión.
- UNE 153030:2008 IN Accesibilidad en televisión digital.
- UNE 139801:2003 Aplicaciones informáticas para personas con discapacidad. Requisitos de accesibilidad al ordenador. Hardware.

- UNE 139803:2004 Aplicaciones informáticas para personas con discapacidad. Requisitos de accesibilidad para contenidos en la Web.
- UNE-EN 81-70:2004 Reglas de seguridad para la construcción e instalación de ascensores. Aplicaciones particulares para los ascensores de pasajeros y de pasajeros y cargas. Parte 70: Accesibilidad a los ascensores de personas, incluyendo personas con discapacidad.
- UNE-EN 81-70:2004/A1:2005 Reglas de seguridad para la construcción e instalación de ascensores. Aplicaciones particulares para los ascensores de pasajeros y de pasajeros y cargas. Parte 70: Accesibilidad a los ascensores de personas, incluyendo personas con discapacidad.
- UNE-CEN/TS 81-82:2008 EX Reglas de seguridad para la construcción e instalación de ascensores. Ascensores existentes. Parte 82: Mejora de la accesibilidad a los ascensores de personas, incluyendo personas con discapacidad.
- UNE 139802:2009 Requisitos de accesibilidad del software
- UNE 170002:2009 Requisitos de accesibilidad para la rotulación.
- UNE 170002:2009 ERRATUM: 2009. Requisitos de accesibilidad para la rotulación.
- UNE 41501:2002 Símbolo de accesibilidad para la movilidad. Reglas y grados de uso.
- UNE-ISO/IEC 24751-1:2012 Tecnologías de la información. Adaptabilidad y accesibilidad individualizadas en aprendizaje electrónico, en educación y formación. Parte 1: Marco y modelo de referencia.
- UNE-ISO/IEC 24751-2:2012 Tecnologías de la Información. Adaptabilidad y accesibilidad individualizadas en aprendizaje electrónico, en educación y formación. Parte 2: Necesidades y preferencias para la prestación digital del "acceso para todos".
- UNE-ISO/IEC 24751-3:2012 Tecnologías de la Información. Adaptabilidad y accesibilidad individualizadas en aprendizaje electrónico, en educación y formación. Parte 3: Descripción de recurso digital "acceso para todos".

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

Spain has signed and ratified the UN Convention on the Rights of Persons with Disabilities. Taking this into consideration, relevant legislation has been revised and, when necessary, modified in order to comply with the Convention. All modifications came into force by adoption of the Law 26/2011 on the normative adaptation to the International Convention on the Rights of Persons with Disabilities, dated 1 August 2011 (Available at: http://www.boe.es/boe/dias/2011/08/02/pdfs/BOE-A-2011-13241.pdf)

In Spain everything regarding accessibility for people with disabilities concerning guides, orientations, etc. that have been drawn up in this field, have used the obligations set forth in Art. 9 of the UN Convention as a reference.

e. Services regulated for accessibility

The scope of the Law 51/2003 of equal opportunities, non discrimination and universal accessibility for people with disabilities, modified by the mentioned Law 26/2011, applies to the following services:

- Telecommunications and information society
- Urban built environment, infrastructures and buildings
- Transports
- Goods and services available to the public
- Communication with the public administration
- Access to justice
- Cultural heritage, in accordance with heritage legislation.

f. Goods regulated for accessibility as part of a service

Accessibility to goods used in the provision of services is considered under the scope of the Law 51/2003, as above listed. Details about its technical implementation are still under study.

g. Goods regulated for accessibility

- Technologies, services and products related with the information society and social communication means. Regulated by Royal Decree 1494/2007 (http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-19968)
- Means of transport, including buses, stations, etc. Regulated by Royal Decree 1544/2007 (http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-20785)
- Most of construction products, such as doors, etc., are regulated in the relevant accessibility legislation of the Autonomous Communities. Furthermore, provisions for accessibility in goods related with urban built environment, such as street furniture, as stated in Law 51/2003, are regulated by the Royal Decree 505/2007 (http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-9607)

h. Enforcement of accessibility legislation

The Law 51/2003 includes provisions in this regard under Chapter III "Promotion and defence". In particular, the law provides for two mechanisms of enforcement:

1. A system for infractions and sanctions for equal opportunities, non-discrimination and universal accessibility of persons with disabilities, passed to keep watch over the degree of fulfilment and efficiency of what has been set forth in both the LIONDAU and in the development of these regulations. Eleventh final provision, specified by Law 49/2007.

2. An arbitrating system. Article 17 of Law 51/2003, specified by Royal Decree 1417/2006.

Besides, accessibility legislation issued by the Autonomous Communities has its own system for infractions and sanctions. Apart from this, within the procedures for public works contracts (build environment and building), administrations has to examine accessibility requirements before granting permits.

i. Non-compliance and litigation

Any individual, NGO or state body can bring a claim to court. Besides to the arbitrating system above mentioned, claims can be brought to the Permanent Specialised Office (Oficina Permanente Especializada), a body of the National Disability Council, under the scope of the Spanish Ministry of Health, Social Services and Equality.

Sweden

a. Accessibility legislation: its place in the legal and regulatory framework

In Sweden lack of accessibility is seen as discrimination in the area of employment and of higher education.

The Swedish Discrimination Act prohibits discrimination in cases where the employer, by taking reasonable support and adaptation measures, can see to it that an employee, a job applicant or a trainee with a disability is put in a comparable situation to people without such a disability.

The Discrimination Act also prohibits discrimination in cases where an education provider, by taking reasonable measures regarding the accessibility and usability of the premises, can see to it that a person with a disability who is applying or has been accepted for education under the Higher Education Act (1992:1434) or for education that can lead to a qualification under the Act concerning authority to award certain qualifications (1993:792), is put in a comparable situation to people without such a disability.

A new Planning and Building Act entered into force in Sweden on 2 May 2011. The Act replaces regulation from 1987 and 1994 and includes significant improvements. For increased accessibility an assessment of the accessibility and usability of a building for people with impaired mobility or orientation is to be made at the planning permission stage. This will ensure that accessibility is provided for correctly from the very start.

The National Board of Housing, Building and planning is responsible for the general supervision of the planning and building administration within the country. The National Board issues for example regulations and general recommendations on the removal of easily eliminated obstacles.

b. General law, technical regulations and standards

Accessibility requirements are provided both in general law and in technical regulations or standards. Se under e. about the Planning and building Act (PBL) which includes accessibility and usability for persons with impaired movement or orientation as one of several technical requirements for construction works.

The work on standardisation is a basic precondition in the accessibility work in Sweden for example in the work on e-inclusion. Handisam has produced a proposed action plan for e-inclusion that highlights initiative areas within various policy areas, with the aim of contributing towards everyone being able to share in the information society and for this to be as easy as possible. Proposals for a future structure for following up e-accessibility have been prepared in an investigation.

Within the accessibility work, according to the Government, the State should set a good example in order to effectively achieve results. Authorities under the Government should therefore formulate and conduct their activities bearing in mind the goals of the disability policy. The Ordinance on the government authorities' responsibility for the implementation of the disability policies provides support for this work. According to the Ordinance (2001:526), government authorities must, by conducting inventories and drawing up action plans, work to

make their premises, their operations and information more accessible to persons with disabilities. The Ordinance has been important for the accessibility work, although other measures have also been of importance, such as regulations regarding easily eliminated obstacles.

The Act on Housing Adaptation Grants instructs the municipalities to provide grants for adaptation in order to increase the accessibility to and usability of existing housing for persons with disabilities or elderly people. Sweden's Government allocates approximately SEK 40 million annually in grants for the conversion of public meeting areas and non-governmental cultural premises. Around half of the total of 100 projects in 2009 used the funds they had been granted to make the premises accessible and usable for persons with disabilities.

Stringent demands are stipulated as regards the form and function of public information symbols, in order for them to make life easier for citizens. The Swedish Institute of Assistive Technology has developed graphic symbols in a national standard in order to increase the use of non-verbal information presentation in buildings and other public locations, particular consideration has been given to persons with various disabilities. This relates particularly to disabilities that affect vision, cognitive capacity or movement. They should be seen as part of the work of making society accessible for many more people. The symbols that are included in the new Swedish standard conform to the requirements for form and function that exist for the standardisation of public information symbols. All have been tested for comprehension in accordance with an international ISO standard for test methods (ISO 9186-1).

c. Role of national, European and international standards

The Swedish National Guidelines for Public Sector Websites give public sector organisations practical advice and examples on how to procure, create and evaluate websites and eServices in order to improve accessibility, usability, search ability and comply with the international standards and EU i2010 goals. The guidelines have had a huge impact on the accessibility and usability of public websites and eServices in Sweden.

EU law places demands on transporters and station managers regarding rights for persons with disabilities or reduced mobility; the Regulation on rail passengers' rights and obligations and the Regulation concerning the rights of disabled persons and persons with reduced mobility when travelling by air. These legal instruments establish that persons with disabilities and persons with reduced mobility are entitled to travel with the relevant form of transport and to receive assistance in conjunction with their journey.

For shipping, the Swedish Maritime Administration has issued national regulations and general advice about the adaptation of passenger vessels with regard to persons with disabilities. There is also EU legislation that regulates technical requirements for vehicles within the various transport types, which is intended for example to ensure that they are accessible to persons with disabilities.

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

In recent years, the government has intensified the work in the fields of an accessible civil service, easily eliminated obstacles in the built environment and accessible public transport.

The Swedish government is investigating the possibility to include discrimination on grounds of inaccessibility on other areas than working life and higher education.

e. Services regulated for accessibility

The Swedish Planning and Building Act (PBL) includes accessibility and usability for persons with impaired movement or orientation as one of several technical requirements for construction works. The requirements apply to buildings, plots, public locations and areas with facilities other than buildings. Swedish building regulations also contain detailed requirements regarding accessibility in housing. In all new and converted accommodation, for example, there must be accessible wet rooms. All new buildings must, for example, have accessible entrances, and newly built accommodation must have a turning area for indoor wheelchairs. The building regulations also require lifts in new and converted housing buildings of more than three floors, and for storage areas, mailboxes, laundry rooms, waste areas, refuse disposal and other accom-modation supplements to be accessible and usable. The requirement for lifts also exists for buildings that contain working premises to which the general public have access, as well as public premises.

A new Planning and Building Act entered into force on 2 May 2011. An assessment of the accessibility and usability of a building for people with impaired mobility or orientation is to be made at the planning permission stage. This will ensure that accessibility is provided for correctly from the very start. The municipalities are responsible for the requirements in the Planning and Building Act being satisfied on a local level. In order to drive through developments locally and regionally, the Government has supported municipalities in the creation of indicators and systems for open comparisons of accessibility and accessibility work for persons with disabilities.

More and more municipalities are already working voluntarily to observe accessibility issues in the production of detailed plans, in-depth overview plans and regular overview plans. The Swedish National Board of Housing, Building and Planning has been working since 2006 on guidance for municipalities regarding overview planning, for example via a series of publications that include accessibility. The National Board is responsible for the general supervision of the planning and building administration within the country. The National Board issues for example regulations and general recommendations on the removal of easily eliminated obstacles.

The Government and Parliament have decided on specific transport policy goals and funds for achieving an accessible and usable transport system. Among the 13 prioritised areas, the accessibility goal has been specified as follows: The transport system must be designed so that it can be used by persons with disabilities.

The Disability and Public Transportation Act (1979:558) contains provisions to the effect that the body that supervises public transport and the body that plans and exercises such transport must ensure that the services and the means of transport that are used are accessible to persons with disabilities as far as possible.

The Special Transport Services Act (SFS 1997:736) regulates an obligation for each municipality to arrange passenger transport for individuals who, due to a disability that is not only temporary, have significant difficulties in moving about themselves or in travelling by public transport.

Local and regional public transport is the responsibility of the country's municipalities, that are performing comprehensive work to adapt public transport to the needs of persons with disabilities. Public transport vehicles are accessible to an increasingly great extent: two-thirds of the buses operating local services are low-floor vehicles, and more than half of the buses have automatic stop announcements.

The State is speeding up the work in the municipalities by providing state grants for vehicles, terminals, stops, training, information and payment systems, pedestrian and cycle paths, wheelchair lifts, lifts, co-ordination measures, etc. As a rule, the State pays half the costs for each measure.

Over the past 10 years, government authorities have conducted a range of projects aimed at promoting the issue of making public transport accessible, as well as to integrate the work of the State, municipalities and the private sector. This relates to both physical measures in the infrastructure and vehicles, as well as 'softer' initiatives such as training personnel in how to treat persons with disabilities in an appropriate manner. These projects have been conducted in collaboration with the disabled people's movement.

There have also been major improvements aimed at increasing accessibility in the road transport system. More than half of all bus-stops in the national road network have been converted to make it possible for more and more persons with disabilities to travel by bus.

Identification of obstacles in the physical environment, both indoors and outdoors, and in both private and public properties, is performed by the municipalities. Various tools for analysing accessibility at an overall level are being developed in municipalities and regions.

A concrete example of measures that have been implemented are the regulations regarding public procurement. The Public Procurement Act stipulates that the technical specifications in tender documentation should, where possible, be determined with regard to the criteria in respect of accessibility for persons with disabilities or be formulated with a view to the needs of all users. The specifications should ensure that the properties of materials, goods and services are suitable for the area of application, both in the works contract and the service and supply contract.

The National Board of Health and Welfare has investigated whether persons with disabilities can apply for care and support on the same terms as the rest of the population. This has taken place by means of charting accessibility to Sweden's social welfare offices and healthcare centers. In this context, accessibility also refers to how accessible the environment is, as well as how usable services and products are for persons with disabilities. The conclusions of the charting process are that accessibility is high for persons with mobility disabilities, which indicates that the national regulations and the targeted information efforts in recent years have been effective. In the majority of healthcare centers and social welfare offices, however, there are major deficiencies as regards accessibility for persons with other types of disability, in particular impaired vision, impaired hearing and cognitive disabilities. This means that the Government needs to become clearer in its communication of what accessibility is.

The Government has implemented measures to drive through developments in order to break the cycle of isolation entailed by the inability to use IT. In addition to increased access to

broadband and new technical solutions, the Government has invested in increased usability and accessibility of established and new services for persons with disabilities.

For example, the Swedish Post and Telecom Agency (PTS) is developing electronic services for persons with disabilities in conjunction with affected players. PTS has conducted trials with 'streaming' talking books and talking newspapers on mobile phones. In a report that was submitted to the Government in autumn 2009, the Swedish Agency for Disability Policy Coordination, Handisam, submitted a proposed action plan for e-Inclusion, in the report "Rätt från början" ["Right from the beginning"]. Several measures from the action plan have already been implemented within various policy areas.

The Electronic Communications Act (2003:389) aims at ensuring that private individuals, legal entities and public authorities shall have access to secure and efficient electronic communications. Universal services shall always be available for everybody on equivalent terms throughout Sweden at affordable prices.

If it is necessary for the universal services to be available at affordable prices, the party that is considered appropriate for this may be ordered to, at an affordable price, provide access for people with disability to services according to the same extent and on equivalent terms as for other end-users and satisfy the needs of people with disability for such special services.

Access to universal services shall be safeguarded through procurement by the State if this is called for especially having regard to the costs for the provision of the service or the network.

The Discrimination Act (2008:567) also grants that a job applicant or a trainee with a disability is put in a comparable situation to people without such a disability. The provision is applicable in cases concerning the digital work environment.

f. Goods regulated for accessibility as part of a service

The Swedish National Guidelines for Public Sector Websites takes an integrated approach to usability, accessibility and standardization. The Guidelines support the procurement, development, and maintenance of a website or eService by a public administration so that it offers equal opportunity usage for all citizens. The guidelines contain criteria which cover the entire lifecycle of a website or eService. The guidelines are intended for several target groups and give recommendations concerning strategic planning as well as design, development and administration. As follows from the principle of mainstreaming accessibility, the Guidelines present web accessibility as an integral part of the overall development process.

g. Enforcement of accessibility legislation

The Planning and Building Act specifies sanctions for transgressions of the requirements for construction works, including accessibility in new and altered buildings, as a fixed sum and/or prohibition on the use of the building or a part thereof, until the faults have been rectified.

In the event of transgressions, the municipal building committee decides whether the consequences are to be financial fines and/or demands to rectify the deficient accessibility solutions. Financial fines are not earmarked for accessibility-improving measures.

h. Non-compliance and litigation

The Equality Ombudsman supervises compliance with the law and is entitled to bring a case in the courts on behalf of an individual who considers himself or herself to have been discriminated against. Certain non-profit organisations are also entitled to take legal action. The Equality Ombudsman must also work to ensure that discrimination that is linked to disability does not occur in any area of social life, and work to achieve equal rights and opportunities regardless of disability. The Ombudsman must, through advice and in other ways, contribute to the person who has been subjected to discrimination being able to utilise his or her rights. Furthermore, the authority is tasked for example with providing information and training, suggesting constitutional amendments to counteract discrimination, as well as implementing other suitable measures.

United Kingdom

a. Accessibility legislation: its place in the legal and regulatory framework

Accessibility legislation is in force in the UK, with this issue generally being treated as an aspect of discrimination law. In England, Scotland and Wales, section 20 of the Equality Act 2010 builds on all previous discrimination legislation. It formally recognises the rights of disabled people to access everyday services, whether they are paid for or not. It consolidates and expands the previous duty on public authorities to think about the implications of their programmes and policies from the perspective of race, gender and disability. It imposes a duty to make reasonable adjustments for disabled people in specified circumstances. A tribunal or court can determine that non-compliance with this duty is unlawful discrimination.

The duty to make reasonable adjustments applies in the following areas:

- Services and public functions (Part 3 and Schedule 2)
- Premises (Part 4 and Schedule 4)
- Work (Part 5 and Schedule 8)
- Education (Part 6 and Schedule 13)
- Associations (Part 7 and Schedule 21)
- Each of the Parts mentioned above (Schedule 21)

The duty comprises three requirements:

1) changing the way things are done, such as changing a rule or policy;
2) making changes to a physical feature, such as providing a ramp to allow wheelchair users access to a building; and
3) providing auxiliary aids and services, such as providing special computer software or providing a different service.

In each case, the duty applies where a disabled person is put at a substantial disadvantage in comparison with a person who is not disabled. The duty holder then has to take reasonable steps to avoid the disadvantage.

Information on the Equality Act 2010 Act can be found at: at
http://www.legislation.gov.uk/ukpga/2010/15/contents/enacted

The Disability Discrimination Act 1995 provides similar protection in Northern Ireland.

The UK has guidelines and voluntary standards covering a wide range of areas, e.g. the "Lifetime Homes" standard which defines standards and guidelines to ensure homes are accessible to everyone. All social housing will be built to these standards from 2011, with the aim that all housing will be by 2013[93]. Building Regulations in England and Wales impose certain accessibility requirements on domestic and non-domestic buildings.[94]

---

[93] Information on the Lifetime Homes standard can be found at:
http://www.communities.gov.uk/publications/housing/lifetimehomesneighbourhoods

[94] Information can be found in Approved Document M at :
http://www.planningportal.gov.uk/england/professionals/en/4000000000988.html
Information on the Public Service Accessibility Regulations 2000 for public transports can be found at http://www.dft.gov.uk/topics/access/buses-and-coaches/legislation/ and at http://www.dft.gov.uk/topics/access/rail/rail-vehicles/

UK airports like others in the EU, must comply with EU Regulation 1107/2006, which require that they provide services to ensure that disabled passengers can move through the airport, board, disembark and transit between flights.

The Communications Act 2003 sets minimum targets for subtitling, signing and audio description on television channels. The Code of Television Access Services produced by the UK communications regulator Ofcom gives guidance on these targets and how access to television services can be improved for people with hearing or visual impairments[95].

Regulations similarly exist covering Scotland and Northern Ireland.

The "Five Principles for Improving Provision of Information for Disabled People" sets out guidelines on how disabled people's access to information on public services can be improved[96].

b. General law, technical regulations and standards

As above, all service providers are required to comply with the provisions of the Equality Act 2010 or the Disability Discrimination Act 1995 in Northern Ireland. There are, however, some areas such as transport and buildings where there are also specific technical regulations and standards in place. Meeting a specific technical regulation may not be sufficient to meet the wider provisions of the Equality Act 2010 and the Equality Act 2010 does not set specific technical regulations or standards.

c. Role of national, European and international standards

European accessibility standards have been developed and are used in the context of the following EU mandates:

- Mandate 283 - Mandate to the European Standards Bodies for a guidance document in the field of safety and usability of products by people with special needs (e.g. elderly and disabled).
- Mandate 273 - Mandate to the European Standards Bodies for standardization in the field of information and communications technologies (ICT) for disabled and elderly people.
- Mandate 292 - Mandate to the European Standards Bodies for a guidance document in the field of safety of consumers and children - Product information.
- Mandate 293 - Mandate to the European Standards Bodies for a guidance document in the field of safety of consumers and children - Child safety.
- M/376: Standardization Mandate to CEN, CENELEC and ETSI in support of European Accessibility Requirements for Public Procurement of Products and Services in the ICT Domain (PDF) (7 December 2005)
- M/420: Standardization Mandate to CEN, CENELEC and ETSI in support of European Accessibility Requirements for Public Procurement in the Built Environment (PDF) (21 December 2007).

BSI (the national standards body) refers to the following legislation when developing British Standards:

- Equality Act 2010
- UN Convention on the Human Rights of Disabled People
- EU Employment Equality Directive.

There are also the following relevant EU resolutions:

[95] http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/ctas.pdf
[96] Information on the five principles can be found at: http://odi.dwp.gov.uk/common/publications-index.php

- EU Policy (1) CoE Resolution ResAp (2001)1 “on the introduction of the principles of universal design into the curricula of all occupations working on the built environment” (“Tomar Resolution”) “Universal design” ResAP(2007)3 “Achieving full participation through Universal Design”
- Recommendation Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015 EU Disability Action Plan (DAP) 2008-2009

d. Changes in legislation/regulation linked to the implementation of the UN CRPD

The reasonable adjustments duty in the Equality Act 2010, and previously for England, Scotland and Wales the Disability Discrimination Act 1995, are in accordance with the provisions of Article 9 of the UN Convention on the Rights of Persons with Disabilities. The Equality Act 2010 continues to build on the good work already achieved – one example of a significant change to the reasonable adjustment duty is a single threshold for the ‘trigger point’ of when a disabled person is put at a ‘substantial disadvantage’.

e. Services regulated for accessibility

In the UK, all service providers in both the public and private sectors are under a duty to make reasonable adjustments in certain circumstances where a disabled person is put at a ‘substantial disadvantage compared to non-disabled people’. Reasonable steps must be taken to avoid the disadvantage or to adopt a reasonable alternative method of providing the service.

The duty for service providers is anticipatory. This means that a service provider cannot wait until a disabled person wants to use its services but must think in advance (and on an ongoing basis) about what disabled people with a range of impairments might reasonably need. This is because the relationship between, for example, a shop and its customers is transitory and, whilst a service provider can reasonably be expected to anticipate such things as ramps for mobility-impaired customers, it would not be expected to provide personalised adjustments in the same way as is expected of employers.

However, section 20 of the Act recognises the need to strike a balance between the rights of disabled people and the interests of service providers. Thus, the reasonable adjustment duty only requires service providers to make adjustments that are reasonable in all the circumstances, depending on a number of factors including the size and nature of the organisation, the financial resources available to it and the nature of the services provided.

Section 20 of the Act specifically provides that the duty to make reasonable adjustments does not require a service provider to take a step that would fundamentally alter the nature of the service they provide.

f. Goods regulated for accessibility as part of a service

The duty to make reasonable adjustments applies to the provision of both goods and services under Part 3 of the Equality Act 2010. To the extent that the provision of a service includes access to goods, that is covered by the duty.

g. Goods regulated for accessibility

In general, manufactured goods are not regulated for accessibility in the UK. However, the requirement for services to be accessible means that that goods used in providing a service must be accessible or the service provider must provide an alternative way of accessing their service. For example, a bank would need to ensure that its ATMs are accessible or provide ATM services in a reasonable alternative manner; a bath manufacturing company is not required to manufacture accessible baths but must ensure that their sales processes are accessible.

Public Transport Accessibility is covered by a number of regulations:

- The Public Service Accessibility Regulations 2000 and its amendments require improved accessibility of buses and coaches. All single-decker buses, double-decker buses, and coaches on scheduled services must comply by 2016, 2017 and 2020 respectively - http://www.dft.gov.uk/topics/access/buses-and-coaches/legislation/
- Since December 1998, all new and refurbished rail vehicles have had to meet Rail Vehicle Accessibility Regulations - All rail vehicles, both heavy and light rail, must be accessible by no later than 1 January 2020 - http://www.dft.gov.uk/topics/access/rail/rail-vehicles/
- UK airports like others in the EU, must comply with EU Regulation 1107/2006, which require that they provide services to ensure that disabled passengers can move through the airport, board, disembark and transit between flights - http://europa.eu/legislation_summaries/transport/mobility_and_passenger_rights/l24132_en.htm The Civil Aviation Authority promotes and enforces compliance of air regulations within the UK.
- Part M (Access to and use of buildings) of the Building Regulations 2010 sets out minimum requirements to ensure that a broad range of people are able to access and use facilities within buildings. http://www.planningportal.gov.uk/buildingregulations/approveddocuments/partm/
- The Communications Act 2003 sets minimum targets for subtitling, signing and audio description on television channels. The Code of Television Access Services produced by the UK communications regulator Ofcom gives guidance on these targets and how access to television services can be improved for people with hearing or visual impairments. http://stakeholders.ofcom.org.uk/binaries/broadcast/other-codes/ctas.pdf
- The BSI (British Standards Institution) Group is the UK's National Standards Body. It works with manufacturing and service industries, businesses, the UK and other national governments and consumers to facilitate the production of British, European and international standards including those relating to disability accessibility.
- BSI also runs a consumer network including a representative who focuses on ‘Design for All’. There is a Disabled Experts’ Reference Group (DERG), who provides advice and input to standards in development. http://www.bsigroup.com/en/Standards-and-Publications/How-to-get-involved/Disabled-Experts-Reference-Group/
- ISO Guide 71 (also known as CEN/CENELEC Guide 6) provides Guidelines for standards developers to address the needs of older persons and persons with disabilities. http://www.iso.org/iso/catalogue_detail?csnumber=33987
- The BS 8878 Web Accessibility Code of Practice published in November 2010 presents a fully up-to-date, detailed guide for businesses and organizations to make their web products more accessible to disabled and older users - http://shop.bsigroup.com/en/ProductDetail/?pid=000000000030180388BS 8878 Web accessibility. Code of Practice.

h. Enforcement of accessibility legislation, non-compliance and litigation

The Equality Act 2010 provides for enforcement where an individual disabled person considers that they have been discriminated against because of a failure to comply with the duty to make reasonable adjustments. Depending on the circumstances, the individual may bring a claim before a tribunal or court. Remedies can include damages, declarations, quashing orders, mandatory orders and injunctions. This means that the tribunal or court can

require that certain adjustments are made in order to make the service or goods accessible to the claimant.

In addition, the Equality and Human Rights Commission, an independent statutory body with a remit including the elimination of discrimination and the reduction of inequality, has enforcement powers in this regard under the Equality Act.

Accessibility legislation in the UK is enforced by the application of case law, brought by individuals or bodies on behalf of individuals when they believe there rights have been infringed or a law broken in regards to them accessing a product or service.

European Union

The European Commission is committed to removing the economic and social barriers that prevent people with disabilities from enjoying their rights and full and complete participation in all areas of life.

Equality of opportunity for people with disabilities is at the centre of the multiannual European Disability Strategy 2010-2020 which was adopted on 15 November 2010[97], and its predecessor the EU Disability Action Plan 2003-2010[98].

The overarching goal of the EU Strategy is the continuous and sustainable improvement in the situation of persons with disabilities in economic, social and participatory terms.

The European Disability Strategy 2010-2020[99] provides the key elements of accessibility policies in the EU. It defines 'accessibility' as meaning that people with disabilities have access, on an equal basis with others, to the physical environment, transportation, information and communications including technologies and systems (ICT), and other facilities and services in line with Art. 9 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), to which the EU is a party.

Accessibility concept

Accessibility is considered as a wide concept that includes the prevention and elimination of obstacles that pose problems for persons with disabilities in using products, services and infrastructures. General accessibility measures address in a anticipatory manner the most common problems that persons with disability face. Accessibility and Reasonable accommodation are two related concepts that have to be understood within the "social model of disability". They are both contributing to solutions to ensure equal access for person with disabilities when interacting with goods and services and performing a task.

Accessibility targets the general group of person with disabilities addressing their most common needs and needs to be complemented by measures of reasonable accommodation, namely appropriate measures to be taken, where needed in a particular case, to enable a person with a disability to have access to a product or a service that target a particular individual with a disability.

Achieving accessibility requires acting on the design and functioning of the product, service or infrastructure itself to be "more usable" by persons with disabilities in general while taking into account the diversity of requirements coming from various impairments. Accessibility is thus mostly preventive and proactive while reasonable accommodation is often reactive.

The implementation of accessibility is often supported by general guidelines or standards that describe how products or services should be built.

EU policy background

In the EU, persons with disabilities and older persons constitute a substantial and strongly growing part of the population that can benefit from accessibility measures. Older persons often have chronic illnesses that have associated impairments. Furthermore, even with good

[97] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0636:EN:NOT

[98] http://ec.europa.eu/social/main.jsp?catId=430&langId=en.

[99] COM (2010) 636

health, mobility and dexterity are reduced and the functional performance of the senses diminishes. This leads to activity limitations. Over 32 % of those between 55 and 65 years of age report a disability. That figure increases to over 40 %, 60 % and 70 % for each additional ten years.

While the ageing of the population can raise the visibility of the market potential of products with good accessibility features in the most commercial areas, particularly health care, there are other areas where the economic potential is often overlooked by industry. Industry's response is limited and disabled persons do not benefit from the opportunities created by the single market as much as other citizens do. But also the myriad of national, regional and local accessibility rules and regulations does not make things easier for industry. These can *de facto* act as obstacles to the free movement of goods, persons and services in the EU and to potential economies of scale.

Addressing accessibility at EU level

At EU level, accessibility has been addressed mainly in three thematic policy areas: ICT, transport and built environment. It has been a core element of the EU policy since the nineties. Accessibility was already addressed in the European Disability Action plan 2003 -2010.

At EU level there are various legislative acts that contain certain accessibility provisions regulating some goods and services. The detailed list of EU legal acts addressing accessibility is contained in the Declaration of Competences annexed to the Council Decision on the conclusion by the EU of the UN Convention on the Rights of Persons with Disabilities (UNCRPD)[100]. In general, accessibility is not the main purpose of these legal instruments, but one of the many issues addressed:

- There are some legal instruments that contain general accessibility provisions like the Structural Funds Regulation[101] or the Public Procurement Directives[102]. Some legal instruments, like the Copyright Directive, are of enabling nature and permit the Member States to develop exceptions in national legislation that aim to improve accessibility for persons with disabilities but do not impose obligations[103].
- There are some acts that require specific products to be accessible. This is the case of lifts[104] and vehicles with more than eight seats[105] or even for some specific groups of persons with disabilities, like the Braille requirement for packaging of medicines[106].
- There are some sector regulations that have some general provisions for persons with disabilities addressing accessibility to some extent or indirectly, like the eCommunication package in the area of Information and Communication Technologies[107] and the various Regulations on the rights of persons with reduced mobility[108] in the area of transport.

---

100 See Annex II in the document available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:023:0035:0061:EN:PDF

101 Regulation (EC) No 1083/2006 and COM(2011) 615 final

102 Directives 2004/17/EC and 2004/17/EC.

103 Directive 2001/29/EC.

104 Directive 95/16/EC.

105 Directive 2001/85/EC

106 Directive 2004/27/EC

107 http://ec.europa.eu/information_society/policy/ecomm/eu-rules/index_en.htm

108 http://europa.eu/legislation_summaries/transport/mobility_and_passenger_rights/l24132_en.htm

With regard to ICT, in addition to the eCommunication package, the EU has invested significantly in RTD work. There are a number of Directives that address disability issues and that provide for possibility to address accessibility matters either in the terminals, the networks, the services including broadcasting services.

Furthermore, the eAccessibility policy has focused on the web and the promotion of Design for All. Accessibility to ICT is also dealt with in the Digital Agenda[109].

In the transport sector significant attention at EU level has been given to provide assistance to passengers with reduced mobility, while less work has been done on the accessibility side (accessibility of vehicles and transport infrastructures such as stations, bus stops). However in the rail area specific accessibility legislation is developed to address the accessibility of rail vehicles and stations that are part of the Trans-European network. The recent White Paper on transport refers to accessibility of the transport infrastructures beyond the service provision to persons with reduced mobility.

In the area of the built environment, some RTD projects and studies have been undertaken and accessibility has emerged in the policy discussions in the context of the lead market initiative for sustainable construction. Information on accessibility is gathered as part of social sustainability that includes some regulatory and standardisation aspects. EU transnational projects on accessibility address for example the training of professionals in accessible design, the development of tools for carrying out a detailed accessibility audit of buildings or accessibility in tourism infrastructures and services.

EU standardisation on accessibility

Since a number of years the Commission has been investing in the development of common voluntary standards on accessibility in specific areas. Currently, European standardisation organisations are working on preparing standards under three mandates given by the European Commission.

The first two Mandates address accessibility in the sense of point 2 (a) of article 9 of the Convention:

- Mandate 376 focuses on accessibility standards for ICT goods and services, and the standards are intended to be used in public procurement proceedings.
- Mandate 420 aims at developing accessibility standards for the built environment also intended to be used in public procurement.

. The third Mandate addresses accessibility in the sense of article 4 (f) of the Convention:

- Mandate 473 aims at including accessibility following "Design for all" (or Universal Design) in relevant mainstream standards and to develop process standards for manufactures and services providers on how to include accessibility in their product development cycle and service provision.

Horizontal instruments fostering accessibility

Public procurement

The current Public Procurement Directive allows for the integration of social considerations and specifically states the use of "Design for All" and accessibility requirements whenever

[109] COM(2010) 245

possible in the technical specifications in the contract documentation for public bids. [110] The Commission has issued a legislative proposal in 2011 making accessibility compulsory in public procurement in the EU.

Structural Funds
The General Regulation [111] on the European Regional development Fund, the European Social Fund and the Cohesion Fund, one of the largest financial instruments of the EU, places emphasis on addressing the issue of accessibility in its Article 16: "*The Member States and the Commission shall take appropriate steps to prevent any discrimination on the basis of gender, race or ethnic origin, religion or belief, disability, age or sexual orientation during the various stages of implementing the Funds and, in particular, access to them. Accessibility for disabled persons shall be one of the criteria to be observed in defining operations co-financed by the Funds and to be taken into account during the various stages of implementation"*.
The Commission has made a toolkit for using EU Structural and Cohesion funds and Ensuring accessibility and non-discrimination of people with disabilities. It includes examples of the prevention of discrimination on the basis of disabilities and accessibility for disabled persons as a horizontal principle, and also refers to a number of specific areas for potential action, including in the fields of transport, ICT and access to finance.

Research
Research activities in the area of accessibility to the built environment, transport and ICT have been in place since the early 90s. Only in the area of eAccessibility (addressing both accessibility to mainstream products and services and assistive solutions) there has been a budget of over 200 Million Euros and with over 200 projects. The current 7th Frame work programme addresses the area of eAccessibility. . The budget for the 7th Frame work programme and for deployment activities under the Competitive and innovation Programme are over 100 Million Euros.

Antidiscrimination Legislation
The European Directive establishing a general framework for equal treatment in employment and occupation contains an article on the obligation of employers to provide reasonable accommodation for disabled persons.[112] No reference is made in this context to accessibility.

However the 2008 Commission proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of inter alia disability, states that in order to guarantee the compliance with the principle of equal treatment in relation to person with disabilities, the measures necessary to enable persons with disabilities to have effective non-discriminatory access (meaning accessibility) among other to goods and services which area available to the public shall be provided by anticipation including through appropriate modifications or adjustments. However such measures should not impose a disproportionate burden, nor require a fundamental alteration or require the provision of alternatives thereto.[113]

---

4 Directive 2004/18/EC of 31 March 2004 of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

111 Article 16 of the 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

112 Article 5 of Directive 2000/78

113 Art 4 COM (2008) 426

Notwithstanding this previous obligation, reasonable accommodation shall be provided unless it would impose a disproportionate burden.

On going EU developments on accessibility

In the European Disability Strategy 2010-2020, the Commission has proposed to use legislative and other instruments, such as standardisation, to foster accessibility to complement on going activities. The Commission is preparing the development by the end of 2012 of a 'European Accessibility Act', *which could include the development of specific standards for particular sectors to substantially improve the proper functioning of the internal market for accessible goods and services*.

To that end the European Commission has issued a contract for a study on the potential socio-economic impacts of possible new legal measures by the EU to improve accessibility of goods and services for people with disabilities. This study will serve as a basis for *exploring the merits of adopting EU regulatory measures to substantially improve the proper functioning of the internal market for accessible products and services, including measures to step up the* use of public procurement.

The Commission work programme for 2012 describes this initiative as Proposal for a Directive to improve the market of goods and services that are accessible for persons with disabilities and elderly persons, based on a "design for all" approach. This business friendly initiative will include binding measures to promote procurement and harmonisation of accessibility standards.

The objective of this initiative is the improvement of the functioning of the Internal Market in relation to accessible goods and services in creating economies of scale and remedying market failures improving the effectiveness of accessibility legislation to create an EU level playing field.

It is expected that this will stimulate innovation in the accessibility field through the development and use of European standards, increasing also the incentives in the markets by increasing public procurement of accessible goods and services;

Improving the availability in the market of accessible goods and services as well as increased competition among industry on accessibility will improve the inclusion and participation of persons with disabilities in the European society and economy.

ANNEX 1: STATE OF PLAY

Dates of signatures and ratification					
Country	**Signature**		**Ratification*/Formal confirmation**		**Reporting**
	UN Convention	**Optional Protocol**	**UN Convention**	**Optional Protocol**	**1st Report submitted to UN**
AT	30 March 2007	30 March 2007	25 September 2008	25 September 2008	October 2010
BE	30 March 2007	30 March 2007	2 July 2009	2 July 2009	**July 2011**
BG	27 September 2007	18 December 2008	**26 January 2012**		
CY	30 March 2007	30 March 2007	**27 June 2011**	**27 June 2011**	
CZ	30 March 2007	30 March 2007	28 September 2009		**October 2011**
DE	30 March 2007	30 March 2007	24 February 2009	24 February 2009	**September 2011**
DK	30 March 2007		23 July 2009		**August 2011**
EE	25 September 2007		**14 April 2012****		
EL	30 March 2007	27 September 2010	**11 April 2012****		
ES	30 March 2007	30 March 2007	3 December 2007	3 December 2007	May 2010
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	October 2010
IE	30 March 2007				
IT	30 March 2007	30 March 2007	3 March 2009	3 March 2009	
LT	30 March 2007	30 March 2007	18 August 2010	18 August 2010	
LU	30 March 2007	30 March 2007	**26 September 2011**	**26 September 2011**	
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	**31 January 2011**		
SE	30 March 2007	30 March 2007	15 December 2008	15 December 2008	**February 2011**
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	**November 2011**
EU	30 March 2007		23 December 2010		

§ Dates in **bold** show developments under 2011 and 2012

* Ratification means the deposit of the instrument of ratification with the Secretary-General of the United Nations

** The Internal procedure achieved, but the instruments of ratification not yet deposited with the Secretariat General of the UN.

ANNEX 2: RESPONSIBLE AUTHORITIES AND CONTACT PERSONS

This annex contains an overview of responsible authorities, focal points, coordination mechanisms and contact points. The data were provided by the Member States in reply to the following questions:

* Who is responsible for the implementation (putting into practice) of the UN Convention, *i.e.* the focal point foreseen in article 33(1) of the Convention?

* Have you established a coordination mechanism foreseen in article 33(1) of the Convention?

Austria

Focal Point at federal level: Federal Ministry of Labour, Social Affairs and Consumer Protection (mail to: behindertenrechtskonvention@bmask.gv.at)

Coordination mechanism: Federal Ministry of Labour, Social Affairs and Consumer Protection (Website: www.bmask.gv.at)

Independent mechanism: Independent Committee on monitoring the implementation of the CRPD in Austria (Chair: Marianne Schulze)

Office of the Austrian CRPD Monitoring Committee
c/o Federal Ministry of Labour, Social Affairs and Consumer Protection
A-1010 Vienna, Stubenring 1
Fax: +43 1 718 94 70 2706
e-Mail: buero@monitoringausschuss.at
Website: www.monitoringausschuss.at

Contact:

Max Rubisch
Federal Ministry of Labour, Social Affairs and Consumer Protection (CRPD Focal Point)
A-1010 Vienna, Stubenring 1
E-Mail: max.rubisch@bmask.gv.at, Tel. +43-1-711 00-6262

Andreas Reinalter
Federal Ministry of Labour, Social Affairs and Consumer Protection (CRPD Focal Point)
A-1010 Vienna, Stubenring 1
E-Mail: andreas.reinalter@bmask.gv.at, Tel. +43-1-711 00-2255

Belgium

Focal Points:

- Federal level : Federal Public Service Sociale Security – DG Strategy & Research
- Flanders: Gelijke Kansen in Vlaanderen (Equal Opportunities in Flanders)
- Walloon region: Agence Wallonne pour l'Intégration des Personnes handicapées (Agency for Integration of Persons with Disabilities)

- Brussels-Capital region: Cel Gelijke Kansen en Diversiteit (Equal Opportunities and Diversity Body)
- Commission of the French speaking Community COCOF : Service Personne Handicapée Autonomie Recherchée (PHARE)
- Joint Community Commission COCOM : Administration COCOM
- French-Speaking community : WBI Service multilatéral mondial (WBI Multilateral World Service)
- German-speaking community: Dienststelle für Personen mit Behinderung (Office for People with Disabilities)

Coordination mechanism: Federal Public Service Sociale Security – DG Strategy & Research

Independent mechanisms: Centre for Equal Opportunities and Opposition to Racism

Contacts:

- Federal level + interfederal coordination mechanism: Greet van Gool - Federal Public Service Social Security, DG Strategy, International Affairs & Research – Mail: greet.vangool@minsoc.fed.be; CoordinationmechanismUNCRPD@minsoc.fed.be
- Flanders : Marian Vandenbossche – Gelijke Kansen in Vlaanderen– Mail: marian.vandenbossche@dar.vlaanderen.be
- Walloon Region: Jean-Marc HURDEBISE – AWIPH - Agence wallonne pour l'intégration des Personnes handicapées - Mail : jm.hurdebise@awiph.be
- Brussels Capital Region : Melissa De Schuiteneer - Cel Gelijke Kansen en Diversiteit - Mail: mdeschuiteneer@mbhg.irisnet.be
- Commission of the French speaking Community COCOF : DEBACKER Philippe – Service PHARE –Mail : pdebacker@cocof.irisnet.be
- Joint Community Commission COCOM - Edith Poot - Administration COCOM – Mail: epoot@ggc.irisnet.be
- French-Speaking community : FAURE Marien – WBI Service multilatéral mondial – Mail : m.faure@wbi.be
- German-speaking community: Joel Arens - DPB - Dienststelle für Personen mit Behinderung – Mail : joel.arens@dpb.be
- Independant mechanism: Centre for Equal Opportunities and Opposition to Racism – Mail: epost@cntr.be

Bulgaria

Focal Point: Integration of People with Disabilities Department at Ministry of Labour and Social Policy

Coordination mechanism: None established

Independent mechanism: None established

Contact:
Joanna Germanova
Ministry of Labour and Social Policy
Directorate "Policy for people with disabilities, equal right and social benefits"

2 Triaditza street, 1051 Sofia, Bulgaria
Email: jpetrova@mlsp.government.bg, Tel.: + 359 2 8119 658

Nadezhda Harizanova
Integration of People with Disabilities' Department
Directorate "Policy for people with disabilities, equal right and social benefits"
Ministry of Labour and Social Policy
2 Triaditza street, 1051 Sofia, Bulgaria
Email: nharizanova@mlsp.government.bg, Tel.: + 359 2 8119 656

Ministry of Labour and Social Policy
National Council for Integration of People with Disabilities.
Council of Ministers, regional governors, regional government in cooperation with civil society.

Ministry of Youth, Education and Science, Ministry of Health, Ministry of Regional Development and Republic Works, Ministry of Justice, Ministry of Culture, Ministry of transport, ICT, Ministry of economy, energetic and tourism, State Agency for Child Protection, Agency for People with Disabilities, Social Assistance Agency, National Statistical Institute and regional government.

Cyprus

Focal Point: Department for Social Inclusion of Persons with Disabilities at Ministry of Labour and Social Insurance

Coordination mechanism: The Pancyprian Council for the Persons with Disabilities.

Independent mechanism: Ombudsman and Commissioner for the Protection of Human Rights.

Contact:
Christina Flourentzou-Kakouri
Department for Social Inclusion of Persons with Disabilities
1430 Nicosía, Cyprus
Tel: 00357 22 815120, Fax: 00357 22 482737
e-mail: cflourentzou@dsid.mlsi.gov.cy

Czech Republic

Focal Point: Ministry of Labour and Social Affairs

Coordinating mechanism: Ministry of Labour and Social Affairs
Ministry of Foreign Affairs
Government Board for People with Disabilities
Czech National Disability Council

Independent mechanism: none established

Contact:
Stefan Culik
Ministry of Labour and Social Affairs
Na Poricnim pravu 1
128 01 Prague 2
Czech Republic
Tel: +42 22192 2693
E-mail: Stefan.Culik@mpsv.cz

Denmark

Focal Point: The Ministry of Social Affairs and Integration

Coordination: The Inter-ministerial Committee of Civil Servants on Disability Matters

Independent mechanism: The Danish Institute for Human Rights

Contact:
Anne Bækgaard (aba@sm.dk) or Thomas Falslund Johansen (tfj@sm.dk)
Ministry of Social Affairs and Integration
Holmens Kanal 22, DK-1060 København K
+45 33 92 93 00

The Danish Disability Council
Civil society: involvement through representative organizations ("Danske Handicaporganisationer"/Danish Council of Organisations of Disabled People,
Each sector Ministry is responsible of implementing necessary changes etc. in their area (the principle of sector responsibility)

Estonia

Focal Point: Ministry of Social Affairs.

Coordination mechanism: Ministry of Social Affairs (network of all the ministries yet to be formed)

Independent mechanism: none established, to be formed by the Estonian Chamber of Disabled People

Contact:
Aile Rahel Ausna
Social Welfare Department, Ministry of Social Affairs, Gonsiori 29, 15027 Tallinn, Estonia.
E-mail: rahel.ausna@sm.ee; Tel: +372 626 9228

Ministry of Foreign Affairs
Ministries (Ministry of Education and Research, Ministry of Justice, Ministry of Culture, Ministry of Internal Affairs, Ministry of Economic Affairs and Communications, Ministry of Finance) and non-governmental organizations (Estonian Chamber of Disabled People,

Estonian Union of People with Visual Impairment, Estonian Association of Hard Hearing, Estonian Union of Persons with Mobility Impairment, Association of Estonian Cities, Association of Municipalities of Estonia
Estonian National Council of People with Disabilities

Finland

Focal Point: none established

Coordination mechanism: none established

Independent mechanism: none established

Contact:
Satu Sistonen, Legal Officer (until May 2012)
Ministry of Foreign Affairs
Unit for human right courts and conventions
Email: satu.sistonen@formin.fi

Eveliina Pöyhönen
Ministerial Adviser
Social Inclusion Team
Department for Promotion of Welfare and Health
Ministry of Social Affairs and Health
P.O. Box 33, FI-00023 Government, Finland
Email: eveliina.poyhonen@stm.fi
Tel. +358 9 160 74133, +358 50 570 2186

France

Focal point: All administrations, services and bureaus working on the implementation of disability policy (not formally appointed yet as focal points)

Coordination mechanism: Interministerial committee of disability, chaired by the Prime Minister

Independent mechanism: Not appointed yet (see Chapter 2)

Contact:
Pascal FROUDIERE
European and International Affairs Unit
DIRECTORATE GENERAL FOR SOCIAL COHESION
Ministry for Solidarity and Social Cohesion
Phone : +33 (0)1 40 56 80 14
E-Mail : pascal.froudiere@social.gouv.fr

Germany

Focal Point: Federal Ministry of Labour and Social Affairs

Coordination Mechanism: Federal Government Commissioner for Matters relating to Persons with Disabilities

Monitoring Mechanism: German Institute for Human Rights
CRPD National Monitoring Mechanism
Zimmerstrasse 26/27, 10969 Berlin, Germany
Tel.: 0049-30-259359-450
E-Mail: monitoring-stelle@institut-fuer-menschenrechte.de
Fax: 0049-30-259359-459
www.institut-fuer-menschenrechte.de/en/monitoring-mechanism.html

Contact:
André Necke
Desk officer, Federal Ministry of Labour and Social Affairs,
email: andre.necke@bmas.bund.de
Tel. +49-30-527-1780

Barbara Braun
Desk officer, Federal Ministry of Labour and Social Affairs,
email: barbara.braun@bmas.bund.de
Tel. +49-30-527-2433

Greece

Focal point: None established

Coordination mechanism: none established

Independent mechanism: none established

Contact:
1. Stelakatos Michael,
Ministère des Affaires Etrangeres
Zalokosta 3, Athènes
e-mail: m.stelak@mfa.gr
Tel. : +30 210 368 33 19

2**.** Nikolsky Dimitrios
Ministry of Health and Social Solidairty
Aristotelous 17, Athens
e-mail: d.nikolsky@yyka.gov.gr
Tel: +30 210 5227700

Hungary

Focal Point: Ministry of National Resources

Coordination mechanism: not established

Independent mechanism: National Council on Disability Issues

Contact:
Mr Roland KISGYŐRI
Deputy Head of Department
Email: roland.kisgyori@nefmi.gov.hu
Ministry of National Resources

Ireland

Focal Point: will be confirmed following ratification

Coordination mechanism: will be confirmed following ratification

Independent mechanism: will be confirmed following ratification

Contact:
Richard Godfrey
Disability Policy Division
Department of Justice and Equality
Email: rcgodfrey@justice.ie
Tel: +353 1 4790212

Italy

Focal Point: Ministry of Labour and Social Policies - Directorate general for inclusion and social policies,

Coordination mechanism: Ministry of Labour and Social Policies- Directorate general for inclusion and social policies

Independent mechanism: National Observatory for monitoring the condition of people with disabilities (Law 18/2009)

Contact:
Alfredo Ferrante, aferrante@lavoro.gov.it, disabili@lavoro.gov.it
Head of Unit for persons with disabilities
Directorate general for inclusion and social policies
Ministry of Labour and Social Policies
Via Fornovo, 8
00192 Roma - IT
Tel +39 06.4683.4659-4457

Latvia

Focal Point: The Ministry of Welfare

Coordination mechanism: The National Council of Disability Affairs (NCDA)
Independent mechanism: The Ombudsman office (also the NCDA and working groups)

Contact:
Liene Kaulina-Bandere, Tel:+37167021608, Liene.Bandere@lm.gov.lv
Elina Celmina, Tel: +371 67021612, Elina.Celmina@lm.gov.lv

Equal Opportunities Policy Division
Ministry of Welfare
28 Skolas Str.Riga, LV-1331
Latvia

fax +371 67021607

Lithuania

Focal Point: Ministry of Social Security and Labour

Sub-Focal points: The Ministry of Education and Science, the Ministry of Transport and Communications, the Ministry of Health, the Ministry of Environment, the Ministry of Economics, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Culture, the Department of Physical Education and Sports under the Government of the Republic of Lithuania, the Department of Statistics, Information Society Development Committee under the Ministry of Transport and Communications.

Coordinating mechanism: Ministry of Social Security and Labour

Independent mechanism: The Council for the Affairs of Disabled at the Ministry of Social Security and Labour and the Office of Equal Opportunities Ombudsperson.

Contact:
Egle Caplikiene, Egle.Caplikiene@socmin.lt
Head of Equal Opportunities Division,
Tel: +370 5 266 42 61,

Rūta Jakubauskienė, ruta.jakubauskiene@socmin.lt
Chief Specialist of Equal Opportunities Division
Tel: +370 5 266 42 74

Luxembourg

Focal point: Ministry of Family Affairs and Integration

Coordination mechanism: Ministry of Family Affairs and Integration

Independent mechanism:

Task of promoting and monitoring: Consultative Commission of Human Rights (of the Grand Duchy of Luxembourg) jointly with the Centre for Equal Treatment
Task of protecting: National Ombudsman

Contact:
Pierre Biver
Conseiller de Direction
Ministry of Family Affairs & Integration
12-14 avenue Emile Reuter
L-2919 Luxembourg
pierre.biver@fm.etat.lu

Malta

Focal Point: Ministry for Justice, Dialogue and the Family

Coordination mechanism: Ministry for Justice, Dialogue and the Family

Independent mechanism: National Commission Persons with Disability (KNPD)

Contact:
For implementation: Anne-Marie Callus, Kummissjoni Nazzjonali Persuni b'Diżabilità, Bugeia Institute, Braille Street, St Venera

The National Commission Persons with Disability (KNPD) established by the Equal Opportunities (Persons with Disability) Act (includes representatives of the main Government Ministries and also the voluntary sector working in the field).

The Netherlands

Focal Point: The Ministry of Health, Welfare and Sport (VWS)

Coordination mechanism: Proposed network of representatives from all layers of government.

Independent mechanism: National Human Rights Institute

Contact:
Nicolette Damen
Ministry of Health, Welfare and Sport
PO Box 20350
NL 2500 EJ The Hague
Tel: + 31 70 340 7284
E: nicolette.damen@minvws.nl

Léon Poffé
Ministry of Health, Welfare and Sport

PO Box 20350
NL 2500 EJ The Hague
Tel: + 31 70 340 6016E: lr.poffe@minvws.nl

Poland

Focal Point: Ministry of Labour and Social Policy

Coordination mechanism: none established

Independent mechanism: none established

Contact:
Joanna Maciejewska, joanna.maciejewska@mpips.gov.pl
Ministry of Labour and Social Policy,
Department of Economic Analyses and Forecasts,
Nowogrodzka 1/3/5, 00-513 Warsaw, Poland
Tel: (48 22) 66 11 704, fax. (48 22) 66 11 243

Małgorzata Kiełducka, malgorzata.kielducka@mpips.gov.pl
Ministry of Labour and Social Policy, Office of the Government Plenipotentiary for Disabled Persons,
Nowogrodzka 1/3/5, 00-513 Warsaw, Poland
Tel: +48 22 529 06 12, fax. +48 22 529 06 02

Portugal

Focal point: to be designated

Coordination mechanism: National Institute for the Rehabilitation (waiting for Governmental designation)

Independent mechanism: to be designated

Contact:
José Madeira Serôdio (PhD)
National Institute for the Rehabilitation
Av. Conde de Valbom 63
1069-178 Lisbon
Portugal
Tel: 00351 21 792 95 00
Fax: 00351 21 792 95 95
E-mail: José.M.Serodio@inr.mtss.pt

Romania

Focal Point: Ministry of Labor, Family and Social Protection / General Directorate for the Protection of Persons with Handicap

Coordination mechanism: Ministry of Labor, Family and Social Protection / General Directorate for the Protection of Persons with Handicap

Independent mechanism: none established

Contact:
Gabriela Dobre
General Directorate for the Protection of Persons with Handicap
Ministry of Labor, Family and Social Protection
194, Calea Victoriei, 1st District, Bucharest, Romania
Tel: +4 021 212 54 38
Fax: +4 021 212 54 43
gabriela.dobre@anph.ro

Slovak Republic

Focal Point: none established

Coordination mechanism: none established

Independent mechanism: none established

With regard to the fact that the SR Government through a vote of no confidence by the legislative body has lost the mandate to carry out its function, the contact point together with the coordination mechanism in the framework of central government will be established only after the early parliamentary elections in June 2012.

Contact: (will be confirmed after the establishment of coordination mechanism)
Ministry of Labour, Social Affairs and Family of the Slovak Republic
Spitalska 4-6
816 43 Bratislava
Slovakia
Tel.: +421 2 2046 1055
Fax.: +421 2 2046 1075
dana.podobna@employment.gov.sk

Slovenia

Focal Point: Ministry of Labour, Family and Social Affairs, Directorate for persons with disability

Coordination mechanism: None established

Independent mechanisms: Government Council for Persons with Disabilities;

National Council of Disabled People's Organisation of Slovenia (NSIOS)

Contact:
Cveto Uršič,
Ministry of Labour and Social Affairs, general director, Directorate for disabled
Kotnikova 28, 1000 Ljubljana, SLOVENIA, tel: + 386 1 369 75 38, fax: +386 1 369 75 64
cveto.ursic@gov.si

Governmental Council for Persons with Disabilities
Relevant ministries
Slovenian National Council of disabled people's organizations

Spain

Focal Point : Ministry of Foreign Affairs and Cooperation as well as the Ministry of Health, Social Services and Equality[114], through Directorate-General for Disability Support Policies, which is responsible for the coordination of both.

Coordination: National Disability Council (General State Administration, Associations of common public interest, experts advisors).

Independent Mechanism: CERMI (Spanish Committee of Representatives of Persons with Disabilities) created by the National Disability Council

Contact:
Ignacio Tremiño
dgdiscapacidad@msssi.es
General Director of Disability Support Policies. Ministry of Health, Social Policy and Equality
Paseo de la Castellana 67-6ª planta
tel: + 34 918226502/03

Eva Mendoza
eva.mendoza@maec.es
Humans Rights Office - Ministry of Foreign Affairs and Cooperation (MAEC)

Sweden

Focal Point: Ministry of Health and Social Affairs

Coordinating mechanisms: Social Services Division of the Ministry of Health and Social Affairs; Swedish Agency for Disability Policy Coordination

Independent mechanism: none established

[114] The recent ministerial reorganization undertaken by the Spanish government, under which social policies, and therefore the UNCRPD, have been assigned to the new Ministry of Health, Social Services and Equality.

Contact:
Malin Ekman Aldén, malin.ekman-alden@social.ministry.se
Ministry of Health and Social Affairs Social Services Division
Tel: +46 8 405 11 15

UK

Focal Point: Office for Disability Issues (ODI)

Coordinating mechanism: Office for Disability Issues (ODI)

Independent mechanisms: UK's four equality and human rights Commissions i.e. the Equality and Human Rights Commission (EHRC), the Scottish Human Rights Commission (SHRC), the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission for Northern Ireland (ECNI)

Contact:
Stephen Thrower, Stephen.thrower@dwp.gsi.gov.uk
UN Convention and International Team,
Ground Floor, Caxton House
Tothill Street
London SW1H 9NA
Tel: +44 20 7449 5072,
Fax: +44 20 7449 5087

Department for Work and Pensions; Office for Disability Issues

European Union

Focal point: European Commission

Coordination mechanism: none established

Independent mechanism: none established

Contact:
Johan ten Geuzendam,
Head of Unit,
D3 Rights of Persons with Disabilities
European Commission
DG Justice
Rue Luxembourg 46 - 1049 Brussels

ANNEX 3: WEBSITES

Belgium
Federal Ministry of Social Security: www.socialsecurity.fgov.be/
Flemish administration for 'Equal Opportunities in Flanders' : www.gelijkekansen.be
Walloon Agency for Integration of Persons with Disabilities : www.awiph.be/
Brussels Joint Community Commission : www.bico.irisnet.be
Office of the German-speaking Community for Persons with Disabilities: www.dpb.be

Cyprus
Ministry of Labour and Social Insurance: www.mlsi.gov.cy
Department for Social Inclusion of Persons with Disabilities: www.mlsi.gov.cy/dsid

Czech Republic
Ministry of Labour and Social Affairs: www.mpsv.cz
Czech National Disability Council: www.nrzp.cz

Denmark
Ministry of Social Affairs and Integration: www.ism.dk

Estonia
Ministry of Social Affairs: www.sm.ee
The Estonian Chamber of Disabled People www.epikoda.ee

Finland
Electronic Treaty Data Base www.finlex.fi
Ministry of Foreign Affairs formin.finland.fi

France
Ministry for Solidarity and Social Cohesion: http://www.solidarite.gouv.fr/

Germany
Federal Ministry of Labour and Social Affairs:
www.bmas.de
Portal for persons with disabilities, their family, administrations and enterprises
www.einfach-teilhaben.de
Federal Commissioner:
www.behindertenbeauftragter.de
Monitoring Mechanism:
www.institut-fuer-menschenrechte.de/en/monitoring-mechanism.html

Greece
Ministry of Health and Social Security: www.mohaw.gr,
National Confederation of People with Disabilities: www.esaea.gr

Hungary
http://www.szmm.gov.hu

Ireland

http://www.justice.ie/en/JELR/Pages/Disability%20Policy

Italy
Ministry for Social Solidarity
www.solidarietasociale.gov.it

Latvia
Ministry of Welfare
www.lm.gov.lv

Lithuania
Ministry of Social Security and Labour and Department of Disabled People
http://www.ndt.lt/id-teises_aktai.html; http://www.socmin.lt/

Luxembourg
Ministry of Family Affairs and Integration
http://www.mfi.public.lu/

Malta
National Commission Persons with Disability (NCPD) website http://www.knpd.org.

The Netherlands
www.rijksoverheid.nl/onderwerpen/gehandicapten/gelijke-behandeling (Dutch)
www.rijksoverheid.nl

Poland
Ministry of Labour and Social Policy websites: www.mpips.gov.pl,
http://www.niepelnosprawni.gov.pl/dokumenty-organizacji-narodow-zj/konwencja-o-prawach/

Portugal
The Ministry of Solidarity and Social Security
The National Institute for Rehabilitation, I.P. www.inr.pt

Romania
National Authority for Persons with Handicap: www.anph.ro

Slovakia
Ministry of Labour, Social Affairs and Family of the Slovak Republic
www.employment.gov.sk

Slovenia
http://www.mddsz.gov.si/en/legislation/
http://www.mddsz.gov.si/en/publications/

Spain
Ministry of Health, Social Services and Equality: www.msssi.es
Ministry of Foreign Affairs and Cooperation: www.maec.es
Comité Español de Representantes de Personas con discapacidad (CERMI): www.cermi.es

Sweden
Government's home page: www.sweden.gov.se
Contains an Easy Read version of the Convention, Braille and sign language.

UK
www.officefordisability.gov.uk
Contains English language Easy Read version of the Convention.

European Union
Until April: http://ec.europa.eu/social/main.jsp?catId=429&langId=en
After May 2011 http://ec.europa.eu/justice/policies/intro/policies_intro_en.htm

Other relevant websites
http://www.un.org/disabilities/
www.easpd.eu
www.handicap.dk
www.nrozp.sk
www.cnditalia.it
www.superando.it
www.edf-feph.org/
www.epr.eu
www.enil.eu
www.coface-eu.org
http://www.un-convention.info/index.html
Independent (part funded by the UK Government) UK website dedicated to promoting disabled persons human rights.

ANNEX 4: NORWAY'S CONTRIBUTION TO THE 5TH HIGH LEVEL GROUP REPORT ON THE IMPLEMENTATION OF THE UNCRPD

Ratification of CRPD.

Norway signed the CRPD on 30. March 2007, the day of opening for signature. Norwegian legislation complies with the Convention, with the exception that a new act on legal capacity and guardianship has not yet been implemented. The new act was necessary to bring our legislation i compliance with article 12 of the CRPD. A new administration has to be set up to administer a more professionalized system of supportive guardians. Since legal capacity and guardianship concerns a civil right, the Government deems that the new legislation has to be implemented before ratification. The Government aims at ratifying the CRPD and will submit a proposition to the Parliament in the near future.

National implementation and monitoring

Each government ministry is responsible for disability matters within its field of competence. Norwegian policy has for many years had the same goals as the CRPD. The Ministry of Children, Equality and Social Inclusion coordinates the government's disability policy and functions as focal point for CRPD matters. That ministry chairs the government's committee of state secretaries on disability matters. 11 ministries are represented.
The Equality and Anti-discrimination Ombud is responsible for promoting, protecting and monitoring the important Anti-discrimination and Accessibility Act. The Ombud has these functions also as concerns CEDAW and CERD. In addition the Ombud has a special responsibility for monitoring living conditions for persons with disabilities.

There are a number of mechanisms for participation of persons with disabilities and their representative organizations in disability issues.

On national level:

- Regular meetings on political level between the Government and representatives of the organizations of persons with disabilities several times a year.
- Additional Meetings on political and administrative level between individual ministries and umbrella organizations or individual organizations from time to time and on specific issues.
- The National Disability Council is a forum for consultation between the government, disability organizations and experts on disability issues.

On County Council and Municipal level:

- Each County Council and Municipal Council is obliged by law the have an advisory Council on Disability matters to ensure participation of persons with disability on important matters, including accessibility, discrimination and services. In addition to representatives of persons with disabilities representative of the County or Municipal Council often take part in these advisory councils.

Norwegian disability organizations receive an annual government subsidy of more than NOK 100 million.

Formal decisions on the implementation on article 33 of CRPD will be taken in connection with its ratification.

Collecting statistics and /or developing indicators.

Statistic Norway (SSB) has the overall responsibility for meeting the need for statistics on Norwegian society and is also responsible for coordinating all official statistics in Norway. There is no established official definition on disability to be used in preparation of all statistics. Thus disability is defined according to the purpose of the statistics. Eurostat has developed a questionnaire, (European Disability and Social Integration Module) which partly has been integrated in the living condition survey on health.(Health Interview Survey)
However, SSB prepare several statistics which include markers on disability, some of them may also be disaggregated on gender and age. Some examples: The Labour Force Survey, the Population and Housing Census, and Living Conditions Survey on Health in Norway. Norway also conducts the EU-Silc, which might be disaggregated on disability.

Accessibility in national law.

In Norway accessibility legislation is found both in legislation concerning technical issues and as part of antidiscrimination legislation. Necessary links are made between the two when covering the same aspects of accessibility.

Accessibility requirements were first introduced in the building legislation in 1976. The requirements have been strengthened and expanded by later revisions. The latest revision was (made) in 2010 when universal design replaced accessibility as the defined objective in the building legislation, widening the scope of requirements and the required quality of accessibility to buildings and constructions.

Universal design is also required in legislation concerning city planning/outdoor environments, transport and public procurement. An Anti-Discrimination and Accessibility Act has been effective in Norway since 2009. It protects people with disabilities from discrimination and requires that public and private undertakings that offer goods or services to the general public are obliged to ensure the universal design of the undertaking's normal function provided this does not entail an undue burden for the undertaking. This covers the physical environment as well as the undertakings ICT services.
Requirements for further accessibility to services and goods and strengthened requirements for ICT services are under preparation for inclusion in the Anti-Discrimination and Accessibility Act.

Norway signed the UN convention on the Rights of Persons with Disabilities in 2003. The convention has been carefully examined to decide if more accessibility legislation should be introduced to comply with the convention. This has verified that the existing and pending Norwegian plans, policies and legislation in the field of accessibility are in line with the convention.

The premises of all public and private services directed towards the public in new buildings must be universally designed according to the building legislation. There are no exceptions to this requirement. In addition sectorial legislation has specific and more extensive requirements concerning universal design and accessibility, i.e. schools and universities, selected public offices and transport.

The Anti-Discrimination and Accessibility Act requires universal design of the undertaking's normal function provided this does not entail an undue burden for the undertaking. This requirement is also effective for services located in existing/old buildings, and covers all services directed towards the public.

The Public Procurement Act requires that all services and products purchased by providers of public services should be evaluated in accordance with universal design. There are no exceptions to this requirement except products and services where universal design is not relevant. All providers of services directed towards the public must comply with the Anti-Discrimination and Accessibility Act which requires that the physical means used in providing the service, including ICT, should be universally designed.

Concrete regulations concerning products are effective for some products, mainly those used in environments which should be accessible to the public. Examples of this are busses, ships and other means of transport affected by EU-regulations. In addition construction products such as elevators, electric switches, water-taps etc should be universally designed according to building regulations. A number of other products are covered by national standards and comparable guidelines. The scope of these standards is wide, covering ICT, out-door areas, infrastructure and more.

To support the implementation of national laws on universal design and accessibility and stimulate the work towards a universally designed society the Norwegian Government has launched action plans. The plan in operation is "Norway universally designed by 2025 The Norwegian government's action plan for universal design and increased accessibility 2009-2013.

Products for private use (with the exception of technical aids), are as a rule not covered by accessibility regulations. A national project conducted by the Norwegian Design Council is in operation to increase the use of universal design when designing products for the private sphere. Typical products dealt with in this project are toothbrushes, cutlery and kitchen equipment, packaging, internet design, cars etc.

Since it has been decided to use universal design when implementing accessibility in Norway, a number of new national standards have been developed. In addition existing standard have been reviewed and revised to cover the level of accessibility required by universal design. New standards has been developed amongst others for buildings, out-door areas, ICT and transport. A standard for goods and services is pending. International standards are used or included in national standards when relevant.

The various laws requiring universal design differs slightly when it comes to enforcement, but in general the enforcement is done administratively. A breach of the law can, if not corrected, result in fines or injunction to correct situation. If a case is not resolved the parties it may be brought to court.

The Anti-Discrimination and Accessibility Act is enforced by The Equality and Anti-Discrimination Ombud. Anyone affected can bring a claim to the Ombud.

The law enforcement role of the Ombud includes making statements in connection with complaints regarding violations of laws and regulations that are within the working scope of

the Ombud. The Equality and Anti-Discrimination Tribunal will try appeals based on the Ombuds statements. Parties may take the case to court if the Tribunal's conclusion is not accepted.

The Norwegian policies on universal design and accessibility take into account views expressed by NGOs and other parties. Representatives from interest organizations for people with disabilities participate in all relevant committees and panels.

Links: Norway universally designed by 2025 The Norwegian government's action plan for universal design and increased accessibility 2009-2013.

Focal Point: Ministry of Children, Equality and Social Inclusion.
Phone +47 22 249090
Email: Postmottak@bld.dep.no
Post address: Akersgt 59, Postboks 8036 , 0030 Oslo
Coordination mechanism: Ministry of Children, Equality and Social Inclusion

Independent mechanism: Equality and anti-discrimination ombud.
Phone + 47 23 157301,
Email: post@LDO.no

Contacts:
Petter Sørlien, Counsellor for Equality & Non-Discrimination
Mission of Norway to the European Union
Address: Rue Archimède 17 / B-1000 Brussels / Belgium
Office: +32 22387451
Mobile: +32 (0)499 05 79 82
Fax: +32 22387490
e-mail: kps@mfa.no

Ann-Marit Sæbønes, Special Adviser,
Ministry of Children, Equality and Inclusion,
Email: Ann-Marit.Sabones@bld.dep.no
Mobile: +47 904 02 110
Tel: +33 140728615

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 (Second Chamber)

6 December 2012 (*)

(Equal treatment in employment and occupation – Directive 2000/78/EC – Prohibition against any discrimination on grounds of age or disability – Compensation on termination of employment – Social plan providing for a reduction in the amount of redundancy compensation paid to disabled workers)

In Case C‑152/11,

REFERENCE for a preliminary ruling pursuant to Article 267 TFEU from the Arbeitsgericht München (Germany), made by decision of 17 February 2011, received at the Court on 28 March 2011, in the proceedings

Johann Odar

v

Baxter Deutschland GmbH,

THE COURT (Second Chamber),

composed of: A. Rosas, acting President of the Second Chamber, U. Lõhmus, A. Ó Caoimh, A. Arabadjiev (Rapporteur) and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 18 April 2012,

after considering the observations submitted on behalf of:

– Dr Odar, by S. Saller and B. Renkl, Rechtsanwälte,

– Baxter Deutschland GmbH, by C. Grundmann, Rechtsanwältin,

– the German Government, by T. Henze, J. Möller and N. Graf Vitzthum, acting as Agents,

– the European Commission, by J. Enegren and V. Kreuschitz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 July 2012,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 2 and paragraph (a) of the second subparagraph of Article 6(1) 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 That reference was made in the context of proceedings involving Dr Odar and his former employer, Baxter Deutschland GmbH ('Baxter'), concerning the amount of compensation on termination of employment received by him under the Contingency Social Plan ('CSP') concluded by Baxter and its works council.

Legal context

European Union law

3 Recitals 8, 11, 12 and 15 in the preamble to Directive 2000/78 are worded as follows:

'(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.

…

(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. …

…

(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.'

4 Article 1 states that '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'.

5 Article 2, entitled 'Concept of discrimination', 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.'

6 Article 3 of Directive 2000/78, entitled 'Scope', provides in paragraph 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;

…'

7 Article 6 of the same directive, entitled ‘Justification of differences of treatment on grounds of age’, provides in paragraph 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;

…’

8 Article 16 of that directive provides:

‘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 … are, or may be, declared null and void or are amended.’

German law

German legislation

9 Directive 2000/78 was transposed into German law by the General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006 (BGBl. 2006 I, p. 1897) (‘the AGG’). That law provides, in Paragraph 1, headed ‘Object of the law’:

‘The object of this law is to prevent or eliminate any discrimination on grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual orientation.’

10 Paragraph 10 of the AGG, headed ‘Permissible difference of treatment on grounds of age’, provides:

‘Paragraph 8 notwithstanding, a difference of treatment on grounds of age is also permissible if it is objective and reasonable and justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include in particular the following:

…

(6) differences in benefits in “social plans” within the meaning of the Law on the organisation of businesses [Betriebsverfassungsgesetz], if the parties have established a compensation scheme which is graduated according to age or length of service and under which the opportunities on the employment market, which depend essentially on age, have been clearly taken into account by a relatively strong emphasis on age, or if the parties have excluded from the benefits of the social plan workers who are financially secure because they are entitled to a pension, after receiving unemployment benefit where applicable.’

11 Paragraphs 111 to 113 of the Law on the organisation of businesses, in the version of 25 September 2001 (BGBl. 2001 I, p. 2518) require arrangements to be put in place in order to alleviate the adverse consequences on workers arising from an operation to restructure an undertaking. Thus, employers and works councils are obliged to conclude social plans to that effect.

12 Paragraph 112 of the Law on the organisation of businesses, entitled ‘Agreement on structural changes in the undertaking and social plan’, provides in paragraph 1:

‘If the management and the works council arrive at an agreement to balance the interests in connection with planned structural changes to the undertaking, the agreement shall be in writing and signed by both parties. The same shall apply in the event of an agreement providing for compensation or mitigation of the economic consequences for the workers resulting from the planned changes to the undertaking (social plan). The social plan shall have the same effects as a works agreement …’

13 Under Paragraph 127 of the Social Security Code (Sozialgesetzbuch), which is found in Book III of that code, regular unemployment benefits are paid for a limited period, determined according to the age of the worker and duration of contributions. A worker is entitled to unemployment benefit corresponding to 12 months’ salary before he turns 50, 15 months’ salary after turning 50, 18 months’ salary after turning 55 and 24 months’ salary upon turning 58.

The Contingency Social Plan and the Supplementary Social Plan

14 On 30 April 2004 Baxter concluded a CSP with the company’s works council, paragraph 6(1)(1.1) to (1.5) of which reads as follows:

‘1. Compensation on termination of employment (except in cases of “early retirement”)

1.1 Employees to whom, in spite of every endeavour, no acceptable job can be offered by Baxter in Germany and for whom there is no question of early termination of employment under paragraph 5 and who leave the company (as a result of redundancy for operational reasons or by mutual agreement), shall receive taxable gross compensation in euros in accordance with the following formula:

Compensation = (age factor x length of service x gross monthly pay) (“standard formula compensation”)

1.2 Age factor table

Age

Age factors

Age

Age factors

Age

Age factors

Age

Age factors

Age

Age factors

18

0.35

28

0.60

38

1.05

48

1.30

58

1.70

19

0.35

29

0.60

39

1.05

49

1.35

59

1.50

20

0.35

30

0.70

40

1.10

50

1.40

60

1.30

21

0.35

31

0.70

41

1.10

51

1.45

61

1.10

22

0.40

32

0.80

42

1.15

52

1.50

62

0.90

23

0.40

33

0.80

43

1.15

53

1.55

63

0.60

24

0.40

34

0.90

44

1.20

54

1.60

64

0.30

25

0.40

35

0.90

45

1.20

55

1.65

26

0.50

36

1.00

46

1.25

56

1.70

27

0.50

37

1.00

47

1.25

57

1.70

…

1.5 In the case of workers who are more than 54 years old and are made redundant on operational grounds or by mutual agreement, the compensation calculated under paragraph 6(1)(1.1) will be compared with that generated by the following formula:

Months until earliest possible beginning of pension x 0.85 x gross monthly pay ("special formula compensation")

Should [the standard formula compensation] be greater than [the special formula compensation] the smaller amount will be payable. However, the

smaller amount must not be less than one half of [the standard formula compensation].

If the figure given by [the special formula compensation] is nil, one half of [the standard formula compensation] will be payable.'

15 On 13 March 2008, Baxter concluded a supplementary social plan ('SSP') with the competent central works council. Paragraph 7 of that plan, relating to compensation, reads as follows:

'Employees covered by this [CSP] and whose employment relationship ends as a result of the operational change will receive the following benefits:

7.1 Compensation: Employees will receive a single payment under paragraph 6(1) [CSP].

7.2 Clarification: With regard to paragraph 6(1.5) of the [CSP], the parties agree on the following clarification: "earliest possible beginning of pension" means the date on which the employee can claim for the first time one of the statutory retirement pensions, including a pension with reductions on the ground that it is drawn early.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 The applicant in the main proceedings, Dr Odar, is an Austrian national who was born in 1950. He is married with two dependent children. He is recognised as being severely disabled, with his degree of disability being 50%. Dr Odar was employed by Baxter or its legal predecessors from 17 April 1979, most recently holding the post of marketing director.

17 Baxter terminated its employment relationship with Dr Odar by letter of 25 April 2008 and offered him further employment at its premises in Munich-Unterschleißheim (Germany). Dr Odar accepted that offer but subsequently decided to resign on 31 December 2009 after the parties agreed that his resignation would not reduce his entitlement to compensation.

18 The order for reference indicates that, under the German retirement pension scheme, Dr Odar may claim an ordinary old-age pension as of age 65, that is, as from 1 August 2015, as well as a retirement pension for severely disabled persons at age 60, in his case from 1 August 2010.

19 Baxter paid Dr Odar compensation under the CSP of EUR 308 253.31 (gross). Application of the standard formula would have generated a compensation figure of EUR 616 506.63 (gross). In using the special formula and

basing itself on an assumption of earliest possible beginning of pension, namely 1 August 2010, Baxter calculated compensation totalling EUR 197 199.09 (gross). It accordingly paid him the minimum guaranteed amount, that is to say, 50% of EUR 616 506.63.

20 By letter of 30 June 2010, Dr Odar brought an action before the Arbeitsgericht München (Employment Court, Munich), asking that Baxter be ordered to pay him further compensation of EUR 271 988.22 (gross), which corresponds to the difference between the compensation actually paid to him and the amount that he would have received if he had been 54 years old (the period of service being the same) on the date of termination of his employment. Dr Odar submits that the calculation of the compensation due to him under the CSP discriminates against him because of his age and his disability.

21 The referring court seeks clarification as to whether the third sentence of Paragraph 10(6) of the AGG and Paragraph 6(1)(1.5) of the CSP are compatible with Directive 2000/78. It observes that, if the former provision of national law is incompatible with European Union law and, consequently, does not apply, Dr Odar's action before it must be upheld. The rule laid down in the latter provision cannot be based on a rule which is incompatible with that directive.

22 In those circumstances, the Arbeitsgericht München decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is a national rule which provides that different treatment on the ground of age may be lawful if, in the framework of an occupational social security scheme, the management and the works council have excluded from social plan benefits workers who are financially secure because they are entitled to a pension, after drawing unemployment benefit where applicable, contrary to the prohibition of discrimination on the ground of age, laid down by Articles 1 and 16 of [Directive 2000/78] or is that unequal treatment justified under [the second subparagraph of] Article 6[(1)(a)] of [the directive]?

2. Is a national rule which provides that different treatment on the ground of age may be lawful if, in the framework of an occupational social security scheme, the management and the works council have excluded from social plan benefits workers who are financially secure because they are entitled to a pension, after drawing unemployment benefit where applicable, contrary to the prohibition of discrimination on the ground of disability laid down by Articles 1 and 16 of [Directive 2000/78]?

3. Is a rule of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, an alternative calculation will be made of the compensation on the basis of the earliest possible date on which their pension will begin – by comparison with the more normal method of calculation, which takes account

in particular of the length of service – and the smaller amount of compensation, though still at least one half of the normal sum in compensation, will be paid, contrary to the prohibition of discrimination on the ground of age laid down by Articles 1 and 16 of [Directive 2000/78], or is that unequal treatment justified under [the second subparagraph of] Article 6[(1)(a)] of [Directive 2000/78]?

4. Is a rule of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, an alternative calculation will be made of the compensation on the basis of the earliest possible date on which their pension will begin – by comparison with the more normal method of calculation, which takes account in particular of the length of service – and the smaller amount of compensation, though still at least one half of the normal sum in compensation, will be paid, the alternative method of calculation taking into account a retirement pension on the ground of disability, contrary to the prohibition of discrimination on the ground of disability laid down by Articles 1 and 16 of [Directive 2000/78]?'

The questions referred for a preliminary ruling

The first two questions

23 By its first two questions, which it is appropriate to consider together, the referring court asks, in essence, whether Articles 2(2) and 6(1) of Directive 2000/78 must be interpreted as precluding national legislation providing that different treatment on the ground of age may be lawful if, in the framework of an occupational social security scheme, the management and the works council have excluded from social plan benefits workers who are financially secure because they are entitled to a pension, after drawing unemployment benefit where applicable.

24 In that regard, it should be remembered at the outset that, according to the Court's settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU 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, Joined Cases C-188/10 and C-189/10 Melki and Abdeli [2010] ECR I-5667, paragraph 27; Case C-599/10 SAG ELV Slovensko and Others [2012] ECR I-0000, paragraph 15; and Case C-378/10 VALE Építési [2012] ECR I-0000, paragraph 18).

25 It is clear that that is precisely the case here.

26 The first two questions relate to a situation, envisaged by the third sentence of Paragraph 10(6) of the AGG, in which the management and the works council have excluded from social plan benefits workers who are financially secure because they are entitled to a pension, after drawing unemployment benefit where applicable.

27 Yet there is nothing in the order for reference indicating that the main proceedings concern such a situation. On the contrary, the referring court has observed that, unlike the possibility provided for in that provision of the AGG, the CSP does not allow for workers approaching retirement to be excluded from compensation on termination of employment; nor does it allow for unemployment benefits received by the worker to be taken into account. As is apparent from the case-file, Dr Odar received compensation on termination of employment, but that compensation was reduced pursuant Paragraph 6(1)(1.5) of the CSP, read in conjunction with Paragraph 7(7.2) of the SSP, which he has challenged with his action before the referring court.

28 It is thus quite clear that the question of the compatibility of the third sentence of Paragraph 10(6) of the AGG with Directive 2000/78 is abstract and purely hypothetical in relation to the dispute in the main proceedings.

29 In those circumstances, it is not necessary to give an answer to the first and second questions put by the referring court.

The third question

30 By its third question, the referring court asks, in essence, whether Articles 2(2) and 6(1) of Directive 2000/78 must be interpreted as precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, a calculation is to be made of the compensation on the basis of the earliest possible date on which their pension will begin – unlike the standard method of calculation, which takes account in particular of the length of service – with the result that the compensation paid to those workers is lower than the compensation resulting from the application of that standard method, though still at least one half of the standard amount.

31 Regarding, first, the question whether the national legislation at issue comes within the scope of Directive 2000/78, it must be pointed out that it is apparent both from its title and the preamble and from its content and purpose that Directive 2000/78 seeks to lay down a general framework in order to guarantee equal treatment 'in employment and occupation' to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1 of that directive, which include age.

32 More specifically, it follows from Article 3(1)(c) that Directive 2000/78 is to apply within the limits of the areas of competence conferred on the European Union 'to all persons, as regards both the public and private sectors, including

public bodies', in relation to inter alia 'employment and working conditions, including dismissals and pay'.

33 In providing for a reduction in the amount of compensation on termination of employment for workers older than 54 years of age, Paragraph 6(1)(1.5) of the CSP affects the conditions of termination of employment of those workers within the meaning of Article 3(1)(c) of Directive 2000/78. Such a provision therefore comes within the scope of that directive.

34 According to the Court's settled case-law, where they adopt measures which fall within the scope of Directive 2000/78, which gives specific expression, in the domain of employment and occupation, to the principle of non-discrimination on grounds of age, the social partners must respect the directive (Case C-447/09 Prigge and Others [2011] ECR I-0000, paragraph 48, and Case C-132/11 Tyrolean Airways Tiroler Luftfahrt [2012] ECR I-0000, paragraph 22).

35 Regarding the question whether the rules in question provide for a difference in treatment based on age within the meaning of Article 2(1) of Directive 2000/78, it should be observed that Paragraph 6(1)(1.5) of the CSP has the effect, in respect of workers over 54 years of age who have been made redundant on operational grounds or whose employment relationship has been terminated by mutual agreement between the undertaking and the worker, that the compensation calculated using the standard formula is compared to the compensation calculated using the special formula, with the lower amount being granted to the worker in question, that worker being nevertheless guaranteed to receive at least half of the amount resulting from the application of the standard formula.

36 Pursuant to those provisions, Dr Odar was paid the amount of EUR 308 357.10, corresponding to half of the standard formula compensation. All other things being equal, had he been 54 years old at the time his employment was terminated, he would have been entitled to compensation of EUR 580 357.10. The fact that he was older than 54 thus led to the application of the comparative method and the payment of an amount lower than that to which he would have been entitled if he had not been older than 54. It thus appears that the calculation method provided for in the CSP in the event of termination of employment on operational grounds does give rise to a difference in treatment on the basis of age.

37 Next, it is necessary to examine whether that difference in treatment may be justified under the first subparagraph of Article 6(1) of Directive 2000/78. That provision states that a difference in treatment on grounds of age does not constitute discrimination if, within the context of national law, it is 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.

38 The referring court observes, in relation to the aim of the national measures at issue in the main proceedings, that the wording of Paragraph 6(1)(1.5) of the CSP does not shed any light on which objectives are being pursued. It is apparent from the case-file submitted to the Court, however, that they are identical to the rule in the third sentence of Paragraph 10(6) of the AGG. As observed by the referring court, the detailed rules decided upon for the application of the social plan by management and workers must be such as effectively to promote achievement of the objective referred to in the that provision of the AGG, and not undermine disproportionately the interests of disadvantaged age groups.

39 According to Article 112 of the Law on the organisation of businesses, in the version in force on 25 September 2001, the meaning and purpose of a social plan are to offset or alleviate the adverse consequences on workers arising from an operation to restructure the undertaking concerned. In its written observations, the German Government stated in that regard that compensation paid under a contingency social plan is not aimed specifically at facilitating reintegration into employment.

40 A difference in the compensation paid under a contingency social plan on grounds of age pursues an objective based on the view that, since the economic disadvantages will manifest themselves in the future, certain workers who will not be faced with such disadvantages resulting from loss of their employment, or only to a limited extent compared with others, may, as a rule, be excluded from entitlement to compensation.

41 The German Government observes that a social plan must provide for a distribution of limited resources, so that it may fulfil its 'transitional function' in respect of all workers, not just older workers. Such a plan cannot, in principle, jeopardise the survival of the undertaking or the remaining posts. The third sentence of Paragraph 10(6) of the AGG also makes it possible to limit the scope for abuse by preventing workers who intend to retire from claiming a severance allowance which is intended to support them while seeking new employment.

42 That national provision is thus aimed at granting compensation for the future, protecting younger workers and facilitating their reintegration into employment, whilst taking account of the need to achieve a fair distribution of limited financial resources in a social plan.

43 Such objectives are capable of justifying, by way of derogation from the general rule prohibiting discrimination on grounds of age, differences in treatment relating, inter alia, to 'the setting of special conditions on … employment and occupation, including dismissal and remuneration conditions, for young people [and] older workers … in order to promote their vocational integration or ensure their protection' within the meaning of the second subparagraph of Article 6(1) of Directive 2000/78.

44 Moreover, the aim of preventing compensation on termination from being claimed by persons who are not seeking new employment but will receive a replacement income in the form of an occupational old-age pension must be considered to be legitimate (see, to that effect, Case C‑499/08 Ingeniørforeningen i Danmark [2010] ECR I‑9343, paragraph 44).

45 In those circumstances, objectives such as those pursued by Paragraph 6(1)(1.5) of the CSP must, in principle, be held to be capable of justifying differences in treatment on grounds of age, 'objectively and reasonably' and 'within the context of national law', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78.

46 It is still necessary to ascertain whether the means employed are appropriate and necessary and do not go beyond what is required to achieve the objective pursued.

47 It should be borne in mind that the Member States and, as necessary, the social partners at national level have broad discretion in choosing not only to pursue a particular aim in the field of social and employment policy, but also in defining measures to implement it (see, to that effect, Case C-141/11 Hörnfeldt [2012] ECR I-0000, paragraph 32).

48 As to whether the provisions of the CSP and the SSP at issue are appropriate, it should be observed that the reduction in compensation granted to workers who, on the date of termination of their employment, are financially secure, does not seem unreasonable in the light of the purpose of such social plans, which is to enhance protection for workers for whom the transition to new employment is challenging due to their limited financial means.

49 Therefore, it must be considered that a provision such as Paragraph 6(1)(1.5) of the CSP does not appear to be manifestly inappropriate for attaining the legitimate employment policy objective pursued by the German legislature.

50 As to whether those provisions are necessary, it is true that Paragraph 7(7.2) of the SSP provides that the earliest possible beginning of pension for the purposes of Paragraph 6(1)(1.5) of the CSP means the date on which the worker can claim for the first time one of the statutory retirement pensions, including a pension with reductions on the ground that it is drawn early.

51 However, as observed in paragraph 27 above, the CSP provides only for a reduction in the amount of compensation on termination granted to those workers.

52 It should be observed, firstly, that Paragraph 6(1)(1.5) of the CSP provides that the compensation granted to the worker concerned corresponds to whichever amount is lowest of the amounts calculated using the standard formula or the special formula, with the recipient having nevertheless the

guarantee that the amount actually paid to him will be at least equal to half of the amount calculated using the standard formula. Moreover, as emerges from the table reproduced in paragraph 14 above, the age factor, which is one of the coefficients in the standard formula and the special formula, increases progressively from the age of 18 (0.35) until 57 (1.70). It is only as of age 59 that that factor starts to decrease (1.50), reaching its lowest level at age 64 (0.30). Secondly, the fourth subparagraph of that provision provides that, even if the use of the special formula gives a result of nil, the worker concerned will be entitled to one half of the standard formula compensation.

53 In the light of the assessment made by the referring court, it must be observed that Paragraph 6(1)(1.5) of the CSP is the result of an agreement negotiated between employees' and employers' representatives exercising their right to bargain collectively which is recognised as a fundamental right. The fact that the task of striking a balance between their respective interests is entrusted to the social partners offers considerable flexibility, as each of the parties may, where appropriate, opt not to adopt the agreement (see, to that effect, Case C-45/09 Rosenbladt [2010] ECR I-9391, paragraph 67).

54 In the light of the foregoing, the answer to the third question is that Articles 2(2) and 6(1) of Directive 2000/78 must be interpreted as not precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, a calculation is to be made of the compensation on the basis of the earliest possible date on which their pension will begin – unlike the standard method of calculation, which takes account in particular of the length of service – with the result that the compensation paid to those workers is lower than the compensation resulting from the application of that standard method, though still at least one half of the standard amount.

The fourth question

55 By its fourth question, the referring court asks, in essence, whether Article 2(2) of Directive 2000/78 must be interpreted as precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, the compensation to which they are entitled is calculated on the basis of the earliest possible date on which their pension will begin – unlike the standard formula, under which account is taken inter alia of the length of service – with the result that the compensation paid is lower than the standard formula compensation, although still at least one half thereof, and that alternative calculation method takes account of the possibility of receiving an early retirement pension on the ground of disability.

56 Regarding, firstly, the question whether Paragraph 6(1)(1.5) of the CSP, read in conjunction with Paragraph 7(7.2) of the SSP, provides for a difference in treatment for the purposes of Article 2(1) of Directive 2000/78, it should be observed that the amount of compensation on termination paid to the worker

is reduced pursuant to Paragraph 7(7.2), taking account of the earliest possible beginning of pension. Moreover, eligibility to receive a retirement pension is subject to a minimum age requirement and that age is different for severely disabled persons.

57 As observed by the Advocate General in point 50 of her Opinion, the first component in the special formula calculation will always be lower for a severely disabled worker than for a non-disabled worker of the same age. In the present case, the fact that the calculation is based, in an ostensibly neutral manner, on the pensionable age, leads to a situation where severely disabled workers, who are eligible for a pension at 60 rather than 63 in the case of non-disabled workers, receive less compensation on termination of employment because of their serious disability.

58 As evidenced by Dr Odar's observations and acknowledged by Baxter at the hearing, had Dr Odar not been severely disabled, he would have received EUR 570 839.47 in compensation on termination.

59 It follows that Paragraph 6(1)(1.5) of the CSP, read in conjunction with Paragraph 7(7.2) of the SSP, the application of which has the effect of the compensation on termination paid to severely disabled workers being lower than that paid to non-disabled workers, gives rise to a difference in treatment based indirectly on disability for the purposes of the combined provisions of Articles 1 and 2(2)(a) of Directive 2000/78.

60 It is appropriate, secondly, to consider whether, in a context such as that governed by the provision at issue in the main proceedings, severely disabled workers in an age bracket approaching retirement are in a comparable situation, within the meaning of Article 2(2)(a) of Directive 2000/78, to that of non-disabled workers in the same age bracket. The German Government submits that the respective starting points for those two categories of workers are objectively different in terms of their entitlement to receive a pension.

61 It must be noted that workers in age brackets approaching retirement are in a situation comparable to that of other workers concerned by the social plan, since their employment relationship with their employer ends for the same reason and in the same circumstances.

62 The advantage granted to severely disabled workers consisting in entitlement to claim a retirement pension as from three years earlier than non-disabled workers does not place them in a different situation in relation to those workers.

63 It is accordingly necessary to examine, in the light of Article 2(2)(b) of Directive 2000/78, whether the difference in treatment between those two categories of workers is objectively and reasonably justified by a legitimate aim and whether the means employed are appropriate and do not go beyond what is necessary to achieve that aim, as pursued by the German legislature.

64 It has been held above in paragraphs 43 to 45 that objectives such as those pursued by Paragraph 6(1)(1.5) of the CSP must, in principle, be held to be capable of justifying differences in treatment on grounds of age, 'objectively and reasonably' and 'within the context of national law', as provided for by the first subparagraph of Article 6(1) of Directive 2000/78. Furthermore, as is apparent from paragraph 49 above, such a national provision does not appear to be manifestly inappropriate for attaining the legitimate employment policy objective pursued by the German legislature.

65 In order to examine whether Paragraph 6(1)(1.5) of the CSP, read in conjunction with Paragraph 7(7.2) of the SSP, goes beyond what is necessary to achieve the aims pursued, it is necessary to place the provision in the context of which it forms a part and to consider the adverse effects it is liable to cause for the workers concerned.

66 Baxter and the German Government state, in essence, that the lower amount of compensation on termination received by Dr Odar is justified in the case of severely disabled workers by the advantage they have consisting in entitlement to claim a retirement pension as from three years earlier than non-disabled workers.

67 That line of reasoning cannot be upheld, however. Firstly, there is discrimination based on disability when the disputed measure is not justified by objective factors unrelated to such discrimination (see, by analogy, Case C-226/98 Jørgensen [2000] ECR I-2447, paragraph 29; Joined Cases C-4/02 and C-5/02 Schönheit and Becker [2003] ECR I-12575, paragraph 67; and Case C-313/02 Wippel [2004] ECR I-9483, paragraph 43). Moreover, such a line of reasoning, if accepted, would undermine the effectiveness of the national provisions providing for that advantage, the rationale for which is generally to take account of the specific difficulties and risks faced by severely disabled workers.

68 It thus appears that management and the workers, in pursuing the legitimate objective of a fair distribution of limited financial resources allocated to a social plan which is proportionate to the needs of the workers concerned, omitted to take account of relevant factors affecting, in particular, severely disabled workers.

69 They disregarded the risks faced by severely disabled people, who generally face greater difficulties in finding new employment, as well as the fact that those risks tend to become exacerbated as they approach retirement age. Severely disabled people have specific needs stemming both from the protection their condition requires and from the need to anticipate possible worsening of their condition. As observed by the Advocate General in point 68 of her Opinion, regard must be had to the risk that disabled workers may throughout their lives have financial requirements arising from their disability

which cannot be adjusted and/or that, with advancing age, those financial requirements may increase.

70 It follows that, in ultimately paying a severely disabled worker compensation on termination on operational grounds which is lower than the amount paid to a non-disabled worker, the measure at issue in the main proceedings has an excessive adverse effect on the legitimate interests of severely disabled workers and therefore goes beyond what is necessary to achieve the social policy objectives pursued by the German legislature.

71 Therefore, the difference in treatment resulting from Paragraph 6(1)(1.5) of the CSP cannot be justified under Article 2(2)(b)(i) of Directive 2000/78.

72 In the light of the aforegoing considerations, the answer to the fourth question is that Article 2(2) of Directive 2000/78 must be interpreted as precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, the compensation to which they are entitled is calculated on the basis of the earliest possible date on which their pension will begin – unlike the standard formula, under which account is taken inter alia of the length of service – with the result that the compensation paid is lower than the standard formula compensation, although still at least one half thereof, and that alternative calculation method takes account of the possibility of receiving an early retirement pension on the ground of disability.

Costs

73 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 (Second Chamber) hereby rules:

1. Articles 2(2) and 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as not precluding rules of an occupational social security scheme under which, in the case of workers older than 54 years of age who are made redundant on operational grounds, a calculation is to be made of the compensation on the basis of the earliest possible date on which their pension will begin – unlike the standard method of calculation, which takes account in particular of the length of service – with the result that the compensation paid to those workers is lower than the compensation resulting from the application of that standard method, though still at least one half of the standard amount.

2. Article 2(2) of Directive 2000/78 must be interpreted as precluding rules of an occupational social security scheme under which, in the case of workers older

than 54 years of age who are made redundant on operational grounds, the compensation to which they are entitled is calculated on the basis of the earliest possible date on which their pension will begin – unlike the standard formula, under which account is taken inter alia of the length of service – with the result that the compensation paid is lower than the standard formula compensation, although still at least one half thereof, and that alternative calculation method takes account of the possibility of receiving an early retirement pension on the ground of disability.

[Signatures]

* Language of the case: German.

ARRÊT DE LA COUR (quatrième chambre)

4 juillet 2013 (*)

«Manquement d'État – Directive 2000/78/CE – Article 5 – Création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail – Personnes handicapées – Mesures de transposition insuffisantes»

Dans l'affaire C-312/11,

ayant pour objet un recours en manquement au titre de l'article 258 TFUE, introduit le 20 juin 2011,

Commission européenne, représentée par M. J. Enegren et M^me^ C. Cattabriga, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République italienne, représentée par M^me^ G. Palmieri, en qualité d'agent, assistée de M^me^ C. Gerardis, avvocato dello Stato, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (quatrième chambre),

composée de M. L. Bay Larsen, faisant fonction de président de la quatrième chambre, M. J.-C. Bonichot, M^mes^ C. Toader, A. Prechal et M. E. Jarašiūnas (rapporteur), juges,

avocat général: M. Y. Bot,

greffier: M. A. Calot Escobar,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission européenne demande à la Cour de constater que, en ne contraignant pas tous les employeurs à prévoir des aménagements raisonnables pour toutes les personnes handicapées, la République italienne a manqué à son obligation de transposer correctement et pleinement l'article 5 de la directive 2000/78/CE du Conseil, du 27 novembre 2000, portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail (JO L 303, p. 16).

Le cadre juridique

Le droit international

2 La convention des Nations unies relative aux droits des personnes handicapées, qui a été approuvée au nom de la Communauté européenne par la décision 2010/48/CE du Conseil,

du 26 novembre 2009 (JO 2010, L 23, p. 35, ci-après la «convention de l'ONU»), énonce, à son considérant e):

«Reconnaissant que la notion de handicap évolue et que le handicap résulte de l'interaction entre des personnes présentant des incapacités et les barrières comportementales et environnementales qui font obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres».

3 Aux termes de l'article 1er de cette convention:

«La présente Convention a pour objet de promouvoir, protéger et assurer la pleine et égale jouissance de tous les droits de l'homme et de toutes les libertés fondamentales par les personnes handicapées et de promouvoir le respect de leur dignité intrinsèque.

Par personnes handicapées, on entend des personnes qui présentent des incapacités physiques, mentales, intellectuelles ou sensorielles durables dont l'interaction avec diverses barrières peut faire obstacle à leur pleine et effective participation à la société sur la base de l'égalité avec les autres.»

4 Selon l'article 2, quatrième alinéa, de ladite convention, «[o]n entend par 'aménagement raisonnable' les modifications et ajustements nécessaires et appropriés n'imposant pas de charge disproportionnée ou indue apportés, en fonction des besoins dans une situation donnée, pour assurer aux personnes handicapées la jouissance ou l'exercice, sur la base de l'égalité avec les autres, de tous les droits de l'homme et de toutes les libertés fondamentales».

Le droit de l'Union

5 Les considérants 11, 16, 17, 20 et 21 de la directive 2000/78 énoncent:

«(11) La discrimination fondée sur la religion ou les convictions, un handicap, l'âge ou l'orientation sexuelle peut compromettre la réalisation des objectifs du traité CE, notamment un niveau d'emploi et de protection sociale élevé, le relèvement du niveau et de la qualité de la vie, la cohésion économique et sociale, la solidarité et la libre circulation des personnes.

[...]

(16) La mise en place de mesures destinées à tenir compte des besoins des personnes handicapées au travail remplit un rôle majeur dans la lutte contre la discrimination fondée sur un handicap.

(17) La présente directive n'exige pas qu'une personne qui n'est pas compétente, ni capable ni disponible pour remplir les fonctions essentielles du poste concerné ou pour suivre une formation donnée soit recrutée, promue ou reste employée ou qu'une formation lui soit dispensée, sans préjudice de l'obligation de prévoir des aménagements raisonnables pour les personnes handicapées.

[...]

(20) Il convient de prévoir des mesures appropriées, c'est-à-dire des mesures efficaces et pratiques destinées à aménager le poste de travail en fonction du handicap, par exemple en procédant à un aménagement des locaux ou à une adaptation des équipements, des rythmes de travail, de la répartition des tâches ou de l'offre de moyens de formation ou d'encadrement.

(21) Afin de déterminer si les mesures en question donnent lieu à une charge disproportionnée, il convient de tenir compte notamment des coûts financiers et autres qu'elles impliquent, de la taille et des ressources financières de l'organisation ou de l'entreprise et de la possibilité d'obtenir des fonds publics ou toute autre aide.»

6 L'article 1er de la directive 2000/78 dispose:

«La présente directive a pour objet d'établir un cadre général pour lutter contre la discrimination fondée sur la religion ou les convictions, [le] handicap, l'âge ou l'orientation sexuelle, en ce qui concerne l'emploi et le travail, en vue de mettre en œuvre, dans les États membres, le principe de l'égalité de traitement.»

7 Aux termes de l'article 2 de cette directive, intitulé «Concept de discrimination»:

«1. Aux fins de la présente directive, on entend par 'principe de l'égalité de traitement' l'absence de toute discrimination directe ou indirecte, fondée sur un des motifs visés à l'article 1er.

2. Aux fins du paragraphe 1:

a) une discrimination directe se produit lorsqu'une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable, sur la base de l'un des motifs visés à l'article 1er;

b) une discrimination indirecte se produit lorsqu'une disposition, un critère ou une pratique apparemment neutre est susceptible d'entraîner un désavantage particulier pour des personnes d'une religion ou de convictions, d'un handicap, d'un âge ou d'une orientation sexuelle donnés, par rapport à d'autres personnes, à moins que:

i) cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un objectif légitime et que les moyens de réaliser cet objectif ne soient appropriés et nécessaires, ou que

ii) dans le cas des personnes d'un handicap donné, l'employeur ou toute personne ou organisation auquel s'applique la présente directive ne soit obligé, en vertu de la législation nationale, de prendre des mesures appropriées conformément aux principes prévus à l'article 5 afin d'éliminer les désavantages qu'entraîne cette disposition, ce critère ou cette pratique.

[...]»

8 L'article 3 de la directive 2000/78 définit le champ d'application de celle-ci de la manière suivante:

«1. Dans les limites des compétences conférées à la Communauté, la présente directive s'applique à toutes les personnes, tant pour le secteur public que pour le secteur privé, y compris les organismes publics, en ce qui concerne:

[...]

c) les conditions d'emploi et de travail, y compris les conditions de licenciement et de rémunération;

[...]»

9 L'article 5 de cette directive prévoit:

«Afin de garantir le respect du principe de l'égalité de traitement à l'égard des personnes handicapées, des aménagements raisonnables sont prévus. Cela signifie que l'employeur prend les mesures appropriées, en fonction des besoins dans une situation concrète, pour permettre à une personne handicapée d'accéder à un emploi, de l'exercer ou d'y progresser, ou pour qu'une formation lui soit dispensée, sauf si ces mesures imposent à l'employeur une charge disproportionnée. Cette charge n'est pas disproportionnée lorsqu'elle est compensée de façon suffisante par des mesures existant dans le cadre de la politique menée dans l'État membre concerné en faveur des personnes handicapées.»

Le droit italien

10 La loi n° 104 – loi-cadre pour l'assistance, l'intégration sociale et les droits des personnes handicapées (legge n.° 104 – Legge-quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate), du 5 février 1992 (supplément ordinaire à la GURI nº 39, du 17 février 1992, ci-après la «loi n° 104/1992»), dispose à son article 3:

«1. Par personne handicapée, on entend toute personne présentant une déficience physique, psychique ou sensorielle, stable ou progressive, constituant la cause de difficultés dans l'apprentissage, les relations avec autrui ou l'intégration professionnelle, et de nature à engendrer un processus défavorable sur le plan social ou de marginalisation.

2. Les personnes handicapées ont droit aux prestations établies en leur faveur en fonction de la nature et de la consistance de la déficience, de la capacité individuelle globale résiduelle et de l'efficacité des soins de réadaptation fonctionnelle.

[...]»

11 L'article 8 de ladite loi prévoit, en tant que méthodes d'insertion et d'intégration sociales des personnes handicapées, «des mesures permettant de favoriser leur pleine intégration dans le monde du travail, sous une forme individuelle ou associée, ainsi que la protection de leur emploi, y compris au moyen d'incitations diverses».

12 Aux termes de l'article 17, paragraphes 1 et 5, de la même loi:

«1. Les régions [...] se chargent de l'insertion des personnes handicapées dans les cours ordinaires de formation professionnelle des centres publics et privés et garantissent aux élèves handicapés qui ne seraient pas en mesure d'utiliser les méthodes d'apprentissage ordinaires, l'acquisition d'une qualification [...] À cette fin, les régions fournissent aux centres [de formation professionnelle] les subsides et équipements nécessaires.

[...]

5. [...] [U]ne partie du fonds commun [...] est destinée à des initiatives de formation et de placement sous forme expérimentale, telles que les stages, les contrats de formation, les actions territoriales de travail guidé et les cours de préemploi [...]»

13 L'article 18 de la loi n° 104/1992 énonce:

«1. Les régions fixent, dans le délai de six mois à compter de la date d'entrée en vigueur de la présente loi, la réglementation concernant l'institution et la tenue du registre régional des entités, institutions, coopératives sociales, de travail, de services, et des centres de travail guidé, associations et organisations de volontariat qui réalisent des activités visant à favoriser l'insertion et l'intégration professionnelles des personnes handicapées.

[...]

4. Les rapports des communes, des groupements de communes et groupements entre communes et provinces, des groupements intercommunaux des régions de montagne et des unités sanitaires locales, avec les organismes visés au paragraphe 1 sont régis par des conventions répondant au projet type [...]

[...]

6. Les régions peuvent, par l'adoption de lois propres:

a) réglementer les aménagements consentis individuellement aux personnes handicapées en matière d'accès au poste de travail et pour la mise en route et la réalisation d'activités professionnelles indépendantes;

b) réglementer les incitations, les aménagements et les aides accordés aux employeurs, y compris aux fins d'adapter le poste de travail pour le recrutement d'une personne handicapée.»

14 L'article 20, paragraphe 1, de la loi n° 104/1992 dispose:

«La personne handicapée passe les épreuves d'examen des concours publics et pour l'habilitation aux professions, avec les aides nécessaires et les délais supplémentaires éventuellement nécessaires au regard du handicap particulier.»

15 La loi n° 381 sur la réglementation des coopératives sociales (legge n.°381 – Disciplina delle cooperative sociali), du 8 novembre 1991 (GURI n° 283, du 3 décembre 1991, p. 3, ci-après la «loi n° 381/1991»), prévoit à son article 4, paragraphes 1 et 2:

«1. Dans les coopératives [...] sont considérées personnes défavorisées les personnes handicapées physiques, psychiques et sensorielles [...]

2. Les personnes défavorisées [...] doivent représenter au moins 30 % des travailleurs de la coopérative et, d'une façon compatible avec leur état subjectif, être membres de la coopérative [...]»

16 La loi n° 68 portant normes relatives au droit au travail des personnes handicapées (legge n° 68 – Norme per il diritto al lavoro dei disabili), du 12 mars 1999 (supplément ordinaire à la GURI n° 68, du 23 mars 1999, ci-après la «loi n° 68/1999»), concerne le traitement des personnes handicapées en matière d'emploi. L'article 1er, paragraphes 1 et 7, de cette loi dispose:

«1. La présente loi vise à promouvoir l'insertion et l'intégration professionnelles des personnes handicapées dans le monde du travail grâce à des services de suivi et de placement ciblé. Elle est applicable:

a) aux personnes en âge de travailler qui présentent des déficiences physiques, psychiques, sensorielles ou un handicap mental, dont la réduction de la capacité à travailler est supérieure à 45 %, attestée par les commissions compétentes en matière de reconnaissance de l'invalidité civile, conformément au barème d'invalidité pour handicaps et maladies invalidantes [...], sur la base de la classification internationale des déficiences, élaborée par l'Organisation mondiale de la santé;

b) aux personnes atteintes d'une invalidité professionnelle dont le taux d'invalidité est supérieur à 33 % [...]

c) aux personnes non voyantes ou sourdes-muettes [...]

d) aux personnes invalides de guerre, invalides civiles de guerre et invalides de service [...]

[...]

7. Les employeurs, qu'ils soient publics ou privés, sont tenus de garantir le maintien de l'emploi des personnes qui, n'étant pas handicapées au moment de leur recrutement, se verraient affectées par un éventuel handicap du fait d'un accident de travail ou d'une maladie professionnelle.»

17 Aux termes de l'article 2 de ladite loi, on entend par «placement ciblé des personnes handicapées»:

«[...] la série d'instruments techniques et de support qui permettent d'évaluer de manière adéquate les personnes handicapées et leurs capacités de travail et d'insertion dans la fonction adaptée, par des analyses des postes de travail, des formes de suivi, des actions positives et des solutions aux problèmes liés à l'environnement de travail, aux outils et aux relations interpersonnelles sur le lieu quotidien de travail et de relation.»

18 L'article 3 de cette même loi, concernant les recrutements obligatoires et les quotas d'emplois réservés, dispose:

«1. Les employeurs publics et privés sont tenus d'employer des travailleurs appartenant aux catégories prévues à l'article 1er, à raison de:

a) 7 % des travailleurs engagés, si la structure compte plus de 50 employés;

b) deux travailleurs, si elle compte entre 36 et 50 employés;

c) un travailleur, si elle compte entre 15 et 35 employés.

2. Les employeurs du secteur privé qui comptent entre 15 et 35 employés sont soumis aux conditions fixées au paragraphe 1 uniquement pour les nouveaux recrutements.

3. Concernant les partis politiques, les organisations syndicales et les organisations qui, sans but lucratif, sont actives dans le domaine de la solidarité sociale, de l'assistance et de la réhabilitation, le quota d'emplois réservés prend en compte exclusivement le personnel technique, administratif et d'exécution et les conditions fixées au paragraphe 1 s'appliquent uniquement lors d'un nouveau recrutement.

4. Dans les services de police, de la protection civile et de la défense nationale, le placement ciblé des personnes handicapées est prévu uniquement dans les services administratifs.

[...]

6. Les organismes économiques publics sont soumis aux mêmes conditions que les employeurs du secteur privé.

[...]»

19 L'article 7, paragraphe 1, de la loi n° 68/1999 énonce:

«Afin de respecter l'obligation prévue à l'article 3, les employeurs recrutent les travailleurs en adressant la demande d'embauche aux bureaux compétents ou par la conclusion de conventions au sens de l'article 11 [...]»

20 L'article 10, paragraphes 2 et 3, de ladite loi prévoit:

«2. L'employeur ne peut pas demander à la personne handicapée une prestation qui n'est pas compatible avec ses déficiences.

3. En cas d'aggravation de son état de santé ou de changements significatifs dans l'organisation du travail, la personne handicapée peut demander de vérifier si les tâches qui lui ont été confiées sont compatibles avec son état de santé. De la même façon, l'employeur peut demander une évaluation de l'état de santé de la personne handicapée afin de vérifier si, en raison de ses déficiences, elle peut continuer d'être employée par l'entreprise. En cas de circonstance aggravante [...] incompatible avec la poursuite de l'activité professionnelle, ou s'il y a incompatibilité avec les changements dans l'organisation du travail, la personne handicapée a droit à la suspension non rémunérée de la relation de travail tant que l'incompatibilité persiste. Pendant cette période, le travailleur peut être amené à suivre une formation. [...]»

21 L'article 11, paragraphe 1, de la même loi dispose:

«Afin de favoriser l'insertion professionnelle des personnes handicapées, les bureaux compétents [...] peuvent conclure avec l'employeur des conventions ayant pour objet de définir un programme visant à atteindre les objectifs en matière d'emploi prévus dans la présente loi.»

22 Les articles 13 et 14 de la loi n° 68/1999 prévoient, respectivement, le versement d'une aide aux employeurs qui recrutent certaines catégories de personnes handicapées dans le cadre des conventions décrites à l'article 11 de cette loi et la création d'un fonds régional pour l'emploi des personnes handicapées destiné au financement de programmes régionaux d'insertion professionnelle et des services connexes.

23 Le décret législatif n° 81, sur la mise en œuvre de l'article 1er de la loi n° 123 du 3 août 2007 relative à la protection de la santé et de la sécurité sur le lieu de travail (decreto legislativo n.° 81 – Attuazione dell'articolo 1 della legge 3 agosto 2007, n. 123, in materia di tutela della salute e della sicurezza nei luoghi di lavoro), du 9 avril 2008 (supplément ordinaire à la GURI n° 101, du 30 avril 2008, ci-après le «décret législatif n° 81/2008»), dispose à son article 42, concernant l'adaptation des tâches à la condition de la personne concernée:

«1. L'employeur [...] met en œuvre les mesures indiquées par le médecin compétent et, si celles-ci concluent à l'inaptitude à la tâche spécifique, assigne au travailleur, lorsque cela est possible, des tâches équivalentes ou, à défaut, des tâches inférieures en lui garantissant le même traitement que celui correspondant à la tâche originaire.

[…]»

La procédure précontentieuse

24 Le 15 décembre 2006, la Commission a adressé à la République italienne une lettre de mise en demeure dans laquelle elle a informé cet État membre des lacunes constatées dans la transposition de la directive 2000/78 et lui a fixé un délai de deux mois pour présenter des observations.

25 Dans ses lettres en réponse des 16 février 2007 ainsi que 16 et 18 juin 2008, la République italienne a reconnu certaines lacunes constatées dans la lettre de mise en demeure et a annoncé l'adoption de mesures pour y remédier. Toutefois, elle a contesté les griefs concernant la transposition de l'article 5 de la directive 2000/78 en faisant valoir que la Commission n'avait pas suffisamment tenu compte des aménagements prévus en faveur des personnes handicapées dans la loi n° 68/1999.

26 N'étant pas pleinement satisfaite de ces réponses, la Commission a, le 29 octobre 2009, émis un avis motivé en réitérant ses griefs portant sur la mise en œuvre du principe de l'égalité de traitement en faveur des personnes handicapées en matière d'emploi prévu à l'article 5 de la directive 2000/78.

27 La République italienne a répondu à l'avis motivé par une note du 13 janvier 2010, en maintenant sa position.

28 C'est dans ces conditions que la Commission a introduit le présent recours.

Sur le recours

Argumentation des parties

29 Dans sa requête, la Commission expose que la directive 2000/78 a été transposée par la République italienne, en des termes généraux, par le décret législatif n° 216, sur la mise en œuvre de la directive 2000/78/CE en faveur de l'égalité de traitement en matière d'emploi et de travail (decreto legislativo n.° 216 – Attuazione della direttiva 2000/78/CE per la parità di trattamento in materia di occupazione e di condizioni di lavoro), du 9 juillet 2003 (GURI nº 187, du 13 août 2003, p. 4, ci-après le «décret législatif n° 216/2003»). Toutefois, ce décret législatif ne contiendrait pas toutes les mesures de mise en œuvre de la directive 2000/78 et, notamment, celles relatives à l'article 5 de celle-ci. Les dispositions concernant le traitement des personnes handicapées en matière d'emploi figureraient en effet dans la loi n° 68/1999.

30 Selon la Commission, il n'existe aucune disposition dans la législation italienne qui transpose l'obligation générale prévue à l'article 5 de la directive 2000/78.

31 Tout en reconnaissant que les dispositions de la loi n° 68/1999, sous certains aspects, offrent des garanties et des aménagements plus importants que ceux prévus à l'article 5 de la directive 2000/78, la Commission observe cependant que ces garanties et aménagements ne concernent pas toutes les personnes handicapées, ni tous les employeurs, ni même tous les différents aspects de la relation de travail.

32 La Commission constate, tout d'abord, que la loi n° 68/1999 ne s'applique qu'à certains types de personnes handicapées définis par cette loi.

33 Ensuite, la Commission soutient que de nombreuses dispositions de la loi n° 68/1999 ne concernent que certaines catégories d'entreprises et donc d'employeurs.

34 Enfin, la Commission considère que ladite loi ne prévoit pas d'aménagements raisonnables en faveur des personnes handicapées en ce qui concerne tous les différents aspects de la relation de travail.

35 Par ailleurs, l'application des aménagements prévus par la loi n° 68/1999 dépendrait de l'adoption de mesures ultérieures par les autorités locales ou de la conclusion de conventions spéciales entre ces dernières et les employeurs et ne conférerait donc pas aux personnes handicapées des droits qui pourraient être directement invoqués en justice.

36 La République italienne conclut au rejet du recours. Elle estime, dans son mémoire en défense, que la Commission n'a pas procédé à un examen complet de la législation tant nationale que régionale en vigueur en matière de protection des personnes handicapées, se limitant à affirmer de façon générale que les garanties de la loi n° 68/1999 ne concernent pas toutes les personnes handicapées et tous les employeurs, alors que la législation italienne en la matière est particulièrement fournie et n'est pas de la seule compétence de l'État.

37 À cet égard, elle cite, outre la loi n° 68/1999, les lois n^{os} 104/1992 et 381/1991, le décret législatif n° 81/2008 ainsi que le décret du président de la République n° 333 – règlement pour la mise en œuvre de la loi n° 68, du 12 mars 1999, portant normes relatives au droit au travail des personnes handicapées (decreto del presidente della Repubblica n.° 333 – Regolamento di esecuzione per l'attuazione della legge 12 marzo 1999, n. 68, recante norme per il diritto al lavoro dei disabili), du 10 octobre 2000 (GURI n° 270, du 18 novembre 2000, p. 2, ci-après le «décret n° 333/2000»). De plus, il existerait des lois régionales visant, en application de la loi n° 104/1992, à instituer et à tenir les registres régionaux des entités réalisant des activités destinées à favoriser l'insertion et l'intégration professionnelles des personnes handicapées.

38 S'agissant, en premier lieu, du grief de la Commission selon lequel la législation italienne ne s'appliquerait qu'à certaines personnes handicapées, la République italienne fait observer que la Commission ne donne aucune explication sur la notion uniforme de «handicap» que l'ensemble des États membres devraient prendre en compte et que ni la directive 2000/78 ni la jurisprudence de la Cour ne fournissent de définition concrète et spécifique de l'invalidité ou du handicap.

39 Selon la République italienne, l'arrêt du 11 juillet 2006, Chacón Navas (C-13/05, Rec. p. I-6467), cité par la Commission dans sa requête, contient une définition du handicap suffisamment générale pour en permettre une adaptation selon les principes d'adéquation et de proportionnalité visés à l'article 5 de la directive 2000/78. Cet article préciserait que les formes de protection doivent être établies en fonction des exigences propres aux situations concrètes, à savoir en fonction du degré de gravité du handicap. Dès lors, il serait demandé aux États membres de prévoir, dans leur législation nationale, des formes de protection des personnes handicapées en se référant au niveau de limitation résultant des déficiences physiques, mentales ou psychiques affectant la participation de la personne concernée à la vie professionnelle.

40 La République italienne estime que la loi n° 104/1992 fournit une conception du handicap pleinement conforme à la réglementation de l'Union ainsi qu'une conception de l'adéquation et de la proportionnalité des mesures à adopter selon la gravité du handicap conforme au texte de l'article 5 de la directive 2000/78.

41 En ce qui concerne la loi n° 68/1999, dont l'application serait limitée à certaines catégories de personnes handicapées, elle fait valoir que ces catégories sont définies non pas sur la base d'un critère propre à la législation italienne, mais par renvoi à la classification internationale des handicaps élaborée par l'Organisation mondiale de la santé.

42 À cet égard, elle observe que la notion de «handicap» n'est pas une notion uniquement juridique et du droit de l'Union, mais constitue une notion de nature scientifique et sociale de portée mondiale, considérée comme le seul critère de la législation italienne pour l'élaboration des barèmes de handicap figurant dans la loi n° 68/1999. Ces barèmes de handicap, utilisés pour qualifier les handicaps par rapport à l'activité professionnelle exercée, constitueraient un élément de référence objectif, conforme au principe de proportionnalité visé à l'article 5 de la directive 2000/78, permettant l'adoption de diverses mesures favorables plus ou moins fortes en fonction du degré et de la gravité du handicap, allant jusqu'à un droit au recrutement obligatoire pour les personnes dont le taux de handicap dépasse un certain pourcentage.

43 La loi n° 104/1992 réglementerait, quant à elle, par des dispositions d'application immédiate de nature détaillée et concrète, l'intégration sociale de toute personne handicapée et les modalités de mise en œuvre de cette intégration, la formation professionnelle ainsi que l'intégration professionnelle. Cette loi concernerait toutes les personnes handicapées et tous les employeurs.

44 S'agissant, en deuxième lieu, du grief selon lequel les dispositions de la loi n° 68/1999 ne concerneraient que certains employeurs, la République italienne reconnaît que cette loi ne s'applique qu'aux entreprises d'au moins quinze employés, en leur imposant le recrutement obligatoire de personnes ayant un certain taux de handicap. Elle considère que l'existence de cette limitation à l'application de ladite loi est cependant justifiée dans la mesure où, afin d'engager une personne handicapée, il est nécessaire que l'employeur ait certaines capacités dimensionnelles et organisationnelles. Ladite limitation respecterait le principe de proportionnalité.

45 Toutefois, cela ne signifierait pas que les entreprises comptant moins de quinze employés ne soient pas soumises à des règles particulières destinées à éliminer les inégalités de traitement liées au handicap.

46 En troisième lieu, quant au grief de la Commission relatif à l'absence d'aménagements raisonnables en faveur des personnes handicapées concernant tous les aspects de la relation de travail, la République italienne indique que la loi n° 68/1999 prévoit des conventions d'insertion professionnelle. Celles-ci seraient conclues entre l'employeur et le service provincial pour les personnes handicapées territorialement compétent et devraient prévoir la durée et les modalités d'embauche. Des conventions pourraient être également conclues avec les employeurs non soumis aux obligations prévues par la loi n° 68/1999.

47 De plus, la République italienne souligne que les services compétents peuvent accorder aux employeurs privés des mesures d'incitation, à savoir une aide d'un certain pourcentage du coût salarial du travailleur handicapé et le remboursement forfaitaire partiel des dépenses nécessaires à l'adaptation du poste de travail. Ces incitations pourraient également être étendues aux employeurs privés qui, même s'ils ne sont pas soumis aux obligations prévues par la loi n° 68/1999, procèdent au recrutement de personnes handicapées pour une durée indéterminée.

48 Elle ajoute que les régions mènent une politique active pour l'emploi et la formation professionnelle des personnes défavorisées.

49 Concernant les aménagements en faveur des personnes handicapées, la République italienne indique que le décret législatif n° 81/2008, applicable à toutes les personnes

handicapées, prévoit l'adaptation des tâches à la condition de la personne concernée. Elle invoque également, sur ce point, la loi n° 381/1991, qui régit le fonctionnement des coopératives sociales destinées à l'insertion professionnelle des personnes handicapées au sein de ces coopératives.

50 Par ailleurs, l'affirmation de la Commission selon laquelle les personnes handicapées ne pourraient pas invoquer directement en justice les droits que la législation italienne leur attribue est, selon la République italienne, dénuée de fondement. Le décret législatif n° 216/2003 aurait en effet prévu une protection juridictionnelle, sur le plan civil, du principe d'égalité de traitement, sans distinguer en fonction de la gravité du handicap. Sur le plan du droit public, le décret n° 333/2000 prévoirait un système de sanctions à plusieurs niveaux en cas de violation des obligations prévues par la loi n° 68/1999.

51 La Commission affirme, dans son mémoire en réplique, que, à aucun moment, au cours de la procédure précontentieuse, la République italienne n'a mentionné l'existence, dans son ordre juridique national, d'autres dispositions que celles contenues dans la loi n° 68/1999, qui seraient de nature à compléter les mesures prévues par cette dernière. Dans sa correspondance, la défenderesse aurait toujours prétendu que les dispositions de la loi n° 68/1999 suffisaient amplement à garantir la pleine transposition de l'article 5 de la directive 2000/78.

52 La Commission considère, au demeurant, que les dispositions citées par la République italienne ne sauraient être considérées, même examinées globalement, comme des mesures suffisantes pour transposer l'article 5 de la directive 2000/78 et que, partant, elles ne remettent pas en cause le bien-fondé des griefs avancés dans la présente procédure.

53 En définitive, la Commission estime que le système italien de promotion de l'insertion professionnelle des personnes handicapées est essentiellement fondé sur un ensemble de mesures d'incitation, de facilités et d'initiatives à la charge des autorités publiques et repose, pour une infime partie seulement, sur des obligations imposées aux employeurs. Or, l'article 5 de la directive 2000/78, lu à la lumière des considérants 20 et 21 de celle-ci, établirait un système d'obligations à la charge de ces derniers, qui ne sauraient être remplacées par les mesures d'incitation et les aides fournies par les autorités publiques.

54 La République italienne, dans son mémoire en duplique, reproche à la Commission de faire une interprétation trop littérale de l'article 5 de la directive 2000/78, qui est substantiellement différente de celle figurant dans la requête de cette institution et qui est plus radicale et plus extensive que celle qui pourrait résulter d'une simple lecture des termes employés audit article ainsi que d'une approche raisonnable et proportionnée.

55 Par ailleurs, la République italienne considère que rien dans le texte de la directive 2000/78 ne justifie la position de la Commission selon laquelle la seule modalité acceptable et propre à transposer l'article 5 de cette directive serait celle d'imposer des obligations aux employeurs à l'égard de tous les travailleurs handicapés, et non celle consistant à organiser un système public et privé de nature à soutenir l'employeur et la personne handicapée.

Appréciation de la Cour

56 S'agissant du grief de la Commission selon lequel la législation italienne ne s'appliquerait qu'à certaines personnes handicapées, il convient de rappeler que, si, certes, la notion de «handicap» n'est pas définie dans la directive 2000/78 elle-même, la Cour a cependant déjà jugé, aux points 38 et 39 de l'arrêt du 11 avril 2013, HK Danmark (C-335/11 et C-337/11, non encore publié au Recueil), que, au regard de la convention de l'ONU, cette notion doit être entendue comme visant une limitation, résultant notamment d'atteintes physiques, mentales ou psychiques durables, dont l'interaction avec diverses barrières peut faire obstacle à la pleine et effective participation de la personne concernée à la vie professionnelle sur la base de l'égalité avec les autres travailleurs.

57 Par suite, l'expression «personnes handicapées» employée à l'article 5 de la directive 2000/78 doit être interprétée comme englobant toutes les personnes atteintes d'un handicap correspondant à la définition énoncée au point précédent.

58 Ensuite, s'agissant du grief de la Commission selon lequel la législation italienne ne respecterait pas l'obligation de prévoir des «aménagements raisonnables» au sens dudit article 5, il y a lieu de rappeler que, conformément à l'article 2, quatrième alinéa, de la convention de l'ONU, les «aménagements raisonnables» sont «les modifications et ajustements nécessaires et appropriés n'imposant pas de charge disproportionnée ou indue apportés, en fonction des besoins dans une situation donnée, pour assurer aux personnes handicapées la jouissance ou l'exercice, sur la base de l'égalité avec les autres, de tous les droits de l'homme et de toutes les libertés fondamentales». Il s'ensuit que ladite disposition préconise une définition large de la notion d'«aménagements raisonnables» (arrêt HK Danmark, précité, point 53).

59 Ainsi, s'agissant de la directive 2000/78, la Cour a jugé, au point 54 de l'arrêt HK Danmark, précité, que ladite notion devait être entendue comme visant l'élimination des diverses barrières qui entravent la pleine et effective participation des personnes handicapées à la vie professionnelle sur la base de l'égalité avec les autres travailleurs.

60 Il ressort du libellé de l'article 5 de la directive 2000/78, lu à la lumière des considérants 20 et 21 de celle-ci, que les États membres doivent établir, dans leur législation, une obligation pour les employeurs de prendre les mesures appropriées, c'est-à-dire des mesures efficaces et pratiques, telles que, notamment, un aménagement des locaux, une adaptation des équipements, des rythmes de travail ou de la répartition des tâches, en prenant en compte chaque situation individuelle, pour permettre à toute personne handicapée d'accéder à un emploi, de l'exercer ou d'y progresser, ou pour qu'une formation lui soit dispensée sans imposer à l'employeur une charge disproportionnée. De telles mesures, ainsi que la Cour l'a jugé au point 64 de l'arrêt HK Danmark, précité, peuvent aussi consister en une réduction du temps de travail.

61 Il y a lieu de souligner que l'obligation imposée par l'article 5 de la directive 2000/78 de prendre, le cas échéant, les mesures appropriées vise l'ensemble des employeurs. Ces mesures ne doivent pas, toutefois, leur imposer une charge disproportionnée.

62 Il s'ensuit que, contrairement aux arguments de la République italienne exposés au point 55 du présent arrêt, il ne suffit pas, pour transposer correctement et pleinement l'article 5 de la directive 2000/78, d'édicter des mesures publiques d'incitation et d'aide, mais il incombe aux États membres d'imposer à tous les employeurs l'obligation de prendre des mesures efficaces et pratiques, en fonction des besoins dans des situations concrètes, en faveur de toutes les personnes handicapées, portant sur les différents aspects de l'emploi et du travail et permettant à ces personnes d'accéder à un emploi, de l'exercer ou d'y progresser, ou pour qu'une formation leur soit dispensée.

63 Or, en l'occurrence, il convient d'observer que la loi n° 104/1992 prévoit que l'insertion et l'intégration sociales des personnes handicapées sont réalisées par des mesures permettant de favoriser leur pleine insertion dans le monde du travail, sous une forme individuelle ou associée, ainsi que la protection de leur emploi. Elle comporte des dispositions relatives à l'intégration scolaire et à la formation professionnelle et prévoit en particulier des aides à la charge des régions. Par ailleurs, la loi n° 104/1992 donne compétence aux régions pour réglementer les aménagements d'accès au poste de travail et l'installation d'activités professionnelles indépendantes pour les personnes handicapées, ainsi que les incitations, les aménagements et les aides accordés aux employeurs, y compris aux fins d'adapter le poste de travail. Il ne ressort pas de cette loi-cadre qu'elle garantit que tous les employeurs sont tenus de prendre des mesures efficaces et pratiques, en fonction des besoins dans des situations concrètes, en faveur des personnes handicapées, ainsi que l'exige l'article 5 de la directive 2000/78.

64 La loi n° 381/1991, quant à elle, contient des règles relatives aux coopératives sociales dont au moins 30 % des employés doivent être des personnes défavorisées au sens de ladite loi. Destinée à l'insertion professionnelle des personnes handicapées au moyen de telles structures, elle ne contient pas non plus de disposition imposant à tous les employeurs l'obligation de prendre des mesures appropriées, en fonction des besoins dans des situations concrètes, au sens de l'article 5 de la directive 2000/78.

65 En ce qui concerne la loi n° 68/1999, celle-ci a pour seul objet de favoriser l'accès à l'emploi de certaines personnes handicapées et n'a pas vocation à réglementer ce qu'exige l'article 5 de la directive 2000/78.

66 S'agissant du décret législatif n° 81/2008, il y a lieu de relever que celui-ci ne régit qu'un aspect des mesures appropriées prescrites à l'article 5 de la directive 2000/78, à savoir l'adaptation des tâches au handicap de la personne concernée.

67 Au vu de ce qui précède, il apparaît que la législation italienne, même appréciée dans son ensemble, n'impose pas à l'ensemble des employeurs l'obligation de prendre, le cas échéant, des mesures efficaces et pratiques, en fonction des besoins dans des situations concrètes, en faveur de toutes les personnes handicapées portant sur les différents aspects de l'emploi et du travail et permettant à ces personnes d'accéder à un emploi, de l'exercer ou d'y progresser, ou pour qu'une formation leur soit dispensée. Partant, elle n'assure pas une transposition correcte et complète de l'article 5 de la directive 2000/78.

68 Par conséquent, il convient de constater que, en n'instituant pas d'obligation pour tous les employeurs de mettre en place, en fonction des besoins dans des situations concrètes, des aménagements raisonnables pour toutes les personnes handicapées, la République italienne a manqué à son obligation de transposer correctement et pleinement l'article 5 de la directive 2000/78.

Sur les dépens

69 En vertu de l'article 138, paragraphe 1, du règlement de procédure de la Cour, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la République italienne et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (quatrième chambre) déclare et arrête:

1) En n'instituant pas d'obligation pour tous les employeurs de mettre en place, en fonction des besoins dans des situations concrètes, des aménagements raisonnables pour toutes les personnes handicapées, la République italienne a manqué à son obligation de transposer correctement et pleinement l'article 5 de la directive 2000/78/CE du Conseil, du 27 novembre 2000, portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail.

2) La République italienne est condamnée aux dépens.

Signatures

---

* Langue de procédure: l'italien.

JUDGMENT OF THE COURT (Second Chamber)

11 April 2013 (*)

(Social policy – United Nations Convention on the Rights of Persons with Disabilities – Directive 2000/78/CE – Equal treatment in employment and occupation – Articles 1, 2 and 5 – Difference of treatment on grounds of disability – Dismissal – Existence of a disability – Employee absent because of disability – Obligation to provide accommodation – Part-time work – Length of the period of notice)

In Joined Cases C-335/11 and C-337/11,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Sø- og Handelsret (Denmark), made by decisions of 29 June 2011, received at the Court on 1 July 2011, in the proceedings

HK Danmark, acting on behalf of Jette Ring,

v

Dansk almennyttigt Boligselskab (C-335/11),

and

HK Danmark, acting on behalf of Lone Skouboe Werge,

v

Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation (C-337/11),

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as a Judge of the Second Chamber, G. Arestis, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 18 October 2012,

after considering the observations submitted on behalf of:

– HK Danmark, acting on behalf of Ms Ring, by J. Goldschmidt, advokat,

– HK Danmark, acting on behalf of Ms Skouboe Werge, by M. Østergård, advokat,

– Dansk almennyttigt Boligselskab, by C. Emmeluth and L. Greisen, advokaten,

– Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, by T. Skyum and L. Greisen, advokaten,

– the Danish Government, originally by C. Vang, and subsequently by V. Pasternak Jørgensen, acting as Agents,

– the Belgian Government, by L. Van den Broeck, acting as Agent,

– Ireland, by D. O'Hagan, acting as Agent, and C. Power BL,

– the Greek Government, by D. Tsagkaraki, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and C. Gerardis, avvocato dello Stato,

– the Polish Government, by M. Szpunar, J. Faldyga and M. Załęka, acting as Agents,

– the United Kingdom Government, by K. Smith, Barrister,

– the European Commission, by M. Simonsen and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 December 2012,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 1, 2 and 5 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 requests have been made in proceedings, first, between HK Danmark ('HK'), acting on behalf of Ms Ring, and Dansk almennyttigt Boligselskab ('DAB') and, secondly, between HK, acting on behalf of Ms Skouboe Werge, and Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, in liquidation ('Pro Display'), concerning the lawfulness of the dismissals of Ms Ring and Ms Skouboe Werge.

Legal context

International law

3 The United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35) ('the UN Convention'), states in recital (e) in its preamble:

'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.'

4 Under Article 1 of the UN Convention:

'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.'

5 Under the fourth indent of Article 2 of the Convention, '"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.'

European Union law

6 Recitals 6 and 8 in the preamble to Directive 2000/78 state:

'(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.

…

(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.'

7 According to recitals 16 and 17 in the preamble to the directive:

'(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.'

8 Recitals 20 and 21 in the preamble to the directive read as follows:

'(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.'

9 In accordance with Article 1 of Directive 2000/78, the purpose of the 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'.

10 Article 2 of the directive, 'Concept of discrimination', 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.

…'

11 Article 5 of the directive, 'Reasonable accommodation for disabled persons', reads as follows:

'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to 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.'

Danish law

12 Paragraph 2 of the Law on the legal relationship between employers and salaried employees (Lov om retsforholdet mellem arbejdsgivere og funktionærer, 'the FL') provides:

'1. The employment contract between the employer and the employee may be terminated only after prior notice has been given in accordance with the rules stated below. This shall also apply to the termination of a fixed-term employment contract before expiry of the employment contract.

2. Termination of the employment contract on the part of the employer must take place with at least

(1) one month's notice, expiring at the end of a month, during the first six months' employment,

(2) three months' notice, expiring at the end of a month, after six months' employment.

3. The period of notice in subparagraph 2(2) shall be increased by one month for every three years of service, subject to a maximum of six months.'

13 Paragraph 5 of the FL, which provides inter alia that a salaried worker is entitled to receive his salary when absent because of illness, states:

'1. If the salaried employee becomes unable to carry out his work because of illness, the resulting absence from work shall be regarded as lawful absence on his part unless he has contracted the disease intentionally or by gross negligence during the employment relationship or he has fraudulently failed to disclose at the time when he took on the job that he was suffering from the disease in question.

2. However, it may be stipulated by written agreement in the individual employment relationship that the employee may be dismissed with one month's notice to expire at the end of a month, if the employee has received his salary during periods of illness for a total period of 120 days during any period of 12 consecutive months. The validity of the notice shall be dependent on it being given immediately on the expiry of the 120 days of illness and while the employee is still ill, but its validity shall not be affected by the employee's return to work after the notice of dismissal has been given.'

14 Directive 2000/78 was transposed into national law by Law No 1417 amending the law on the prohibition of discrimination on the labour market (Lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.) of 22 December 2004 ('the Anti-Discrimination Law'). Paragraph 2a of the Anti-Discrimination Law provides:

'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 enable a person with a disability to undergo training. This does not however apply if such measures would impose a disproportionate burden on the employer. This burden shall not be regarded as disproportionate if it is sufficiently remedied by public measures.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

15 From 1996 Ms Ring was employed in Lyngby (Denmark) by the housing association Boligorganisationen Samvirke, and then from 17 July 2000 by DAB, which took over Boligorganisationen Samvirke. Ms Ring was absent on several occasions from 6 June 2005 to 24 November 2005. The medical certificates stated inter alia that she was suffering from constant lumbar pain which could not be treated. No prognosis could be made as regards the prospect of returning to full-time employment.

16 By letter from DAB of 24 November 2005, Ms Ring was dismissed, in accordance with Paragraph 5(2) of the FL.

17 According to the documents before the Court, the working area was altered after her dismissal. DAB submitted an estimate dated 3 September 2008, at a total cost of 'approx. DKK 305 000 (+ a little)', for 'a reception desk with a number of workstations behind it', 'removing and replacing old carpet' and installing 'adjustable-height desks'.

18 On 1 February 2006 Ms Ring started a new job as a receptionist for ADRA Danmark, working for 20 hours a week. The parties to the main proceedings in Case C-335/11 agree that her workstation is a normal workstation which includes an adjustable-height desk.

19 Ms Skouboe Werge started work for Pro Display in 1998 as an office assistant/management secretary. On 19 December 2003 she was the victim of a road accident and suffered whiplash injuries. She was then on sick leave for about three weeks. She was subsequently absent because of illness for a few days only. On 4 November 2004 the director of accounts of Pro Display sent the staff an email informing them that, by agreement, Ms Skouboe Werge would be on part-time sick leave for four weeks, during which she would work for about four hours a day. Pro Display was reimbursed the part of Ms Skouboe Werge's pay which corresponded to the daily sickness allowances.

20 On Monday 10 January 2005 Ms Skouboe Werge went on full-time sick leave. By email of 14 January 2006 she informed Pro Display's managing director that she was still very poorly and was to consult a specialist that day. According to a medical report of 17 January 2005, she had seen the doctor that day and had said that she had been unfit for work from 10 January 2005. The doctor considered that that unfitness for work would last for a further month. In a medical report of 23 February 2005, the same doctor said that he could not give an opinion on the duration of the unfitness for work.

21 By letter of 21 April 2005 Ms Skouboe Werge was dismissed with one month's notice expiring on 31 May 2005.

22 Ms Skouboe Werge underwent an assessment procedure at Jobcenter Randers, which concluded that she was capable of working for about eight hours a week at a slow pace. In June 2006 she was granted early retirement on the ground of her incapacity for work. In 2007 the Arbejdsskadestyrelsen (National office for accidents at work and occupational diseases) assessed Ms Skouboe Werge's degree of invalidity at 10% and her loss of working capacity at 50%, subsequently revised to 65%.

23 The trade union HK, acting on behalf of the two applicants in the main proceedings, brought proceedings against their employers in the Sø- og Handelsret (Maritime and Commercial Court), seeking compensation on the basis of the Anti-Discrimination Law. HK submits that both employees were suffering from a disability and that their employers were required to offer them reduced working hours, by virtue of the obligation to provide accommodation pursuant to Article 5 of Directive 2000/78. HK also argues that Paragraph 5(2) of the FL cannot apply to those two employees, because their absences because of illness were the result of their disability.

24 In both main proceedings the employers dispute that the applicants' state of health is covered by the concept of 'disability' within the meaning of Directive 2000/78, since the only incapacity that affects them is that they are not able to work full-time. They also dispute that reduced working hours are among the measures contemplated by Article 5 of that directive. They submit, finally, that, in cases of absence on grounds of illness caused by a disability, the dismissal of a worker with a disability pursuant to Paragraph 5(2) of the FL does not constitute discrimination, and is not therefore contrary to that directive.

25 The referring court observes that in paragraph 45 of its judgment in Case C-13/05 *Chacón Navas* [2006] ECR I-6467 the Court stated that, for a limitation of the capacity to participate in professional life to fall within the concept of 'disability', it must be probable that it will last for a long time.

26 In those circumstances, the Sø- og Handelsret decided to stay the proceedings and to refer the following questions, which are formulated in the same terms in Cases C-335/11 and C-337/11, to the Court for a preliminary ruling:

'1. (a) Is any person who, because of physical, mental or psychological impairments, 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 [in *Chacón Navas*] covered by the concept of disability within the meaning of [Directive 2000/78]?

(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 solely or essentially that the person concerned is not able to work full-time be regarded as a disability in the sense in which that term is used in [Directive 2000/78]?

3. Is a reduction in working hours among the measures covered by Article 5 of [Directive 2000/78]?

4. Does [Directive 2000/78] 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 within 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 is caused by the disability,

or

(b) the absence is due to the fact that the employer has not implemented the measures appropriate in the specific situation to enable a person with a disability to perform his work?'

27 By order of the President of the Court of 4 August 2011, Cases C-335/11 and C-337/11 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

Preliminary observations

28 It should be noted, as a preliminary point, that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding on its institutions, and consequently they prevail over acts of the European Union (Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-0000, paragraph 50 and the case-law cited).

29 It should also be recalled that the primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements (Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet and Others* [2012] ECR I-0000, paragraph 39 and the case-law cited).

30 It follows from Decision 2010/48 that the European Union has approved the UN Convention. The provisions of that convention are thus, from the time of its entry into force, an integral part of the European Union legal order (see, to that effect, Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5).

31 Moreover, according to the appendix to the Annex II to that decision, in the field of independent living and social inclusion, work and employment, Directive 2000/78 is one of the European Union acts which refer to matters governed by the UN Convention.

32 It follows that Directive 2000/78 must, as far as possible, be interpreted in a manner consistent with that convention.

33 It is in the light of those considerations that the questions put to the Court by the referring court must be answered.

Questions 1 and 2

34 By its first and second questions, which should be considered together, the referring court asks essentially whether the concept of 'disability' in Directive 2000/78 must be interpreted as including the state of health of a person who, because of physical, mental or psychological impairments, cannot or can only to a limited extent carry out his work, for a period that will probably last for a long time, or permanently. It further asks whether that concept must be interpreted as meaning that a condition caused by a medically diagnosed incurable illness may be covered by that concept, that a condition caused by a medically diagnosed curable illness may also be covered by that concept, and that the nature of the measures to be taken by the employer is decisive for considering that a person's state of health is covered by that concept.

35 It must be recalled that the purpose of Directive 2000/78, as stated in Article 1, is to lay down a general framework for combating discrimination, as regards employment and occupation, on any of the grounds referred to in that article, which include disability (see *Chacón Navas*, paragraph 41). In accordance with Article 3(1)(c) of the directive, it applies, within the limits of the areas of competence conferred on the European Union, to all persons, in relation inter alia to conditions of dismissal.

36 The concept of 'disability' is not defined by Directive 2000/78 itself. The Court therefore held, in paragraph 43 of its judgment in *Chacón Navas*, that the concept 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.

37 The UN Convention, which was ratified by the European Union by decision of 26 November 2009, in other words after the judgment in *Chacón Navas* had been delivered, acknowledges in recital (e) 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'. Thus the second paragraph of Article 1 of the convention states that persons with disabilities include 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

38 Having regard to the considerations set out in paragraphs 28 to 32 above, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.

39 In addition, it follows from the second paragraph of Article 1 of the UN Convention that the physical, mental or psychological impairments must be 'long-term'.

40 It may be added that, as the Advocate General observes in point 32 of her Opinion, it does not appear that Directive 2000/78 is intended to cover only disabilities that are congenital or result from accidents, to the exclusion of those caused by illness. It would run counter to the very aim of the directive, which is to implement equal treatment, to define its scope by reference to the origin of the disability.

41 It must therefore be concluded that if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78.

42 On the other hand, an illness not entailing such a limitation is not covered by the concept of 'discrimination' within the meaning of Directive 2000/78. Illness as such cannot be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination (see *Chacón Navas*, paragraph 57).

43 The circumstance that the person concerned can work only to a limited extent is not an obstacle to that person's state of health being covered by the concept of 'disability'. Contrary to the submissions of DAB and Pro Display, a disability does not necessarily imply complete exclusion from work or professional life.

44 The concept of 'disability' as defined in paragraph 38 above must be understood as referring to a hindrance to the exercise of a professional activity, not, as DAB and Pro Display submit, to the impossibility of exercising such an activity. The state of health of a person with a disability who is fit to work, albeit only part-time, is thus capable of being covered by the concept of 'disability'. An interpretation such as that suggested by DAB and Pro Display would, moreover, be incompatible with the objective of Directive 2000/78, which aims in particular to enable a person with a disability to have access to or participate in employment.

45 In addition, a finding that there is a disability does not depend on the nature of the accommodation measures such as the use of special equipment. It should be noted here that the definition of the concept of 'disability' within the meaning of Article 1 of Directive

2000/78 comes before the determination and assessment of the appropriate accommodation measures referred to in Article 5 of the directive.

46 According to recital 16 in the preamble to Directive 2000/78, such measures are intended to accommodate the needs of disabled persons. They are therefore the consequence, not the constituent element, of the concept of disability. Similarly, the measures or adaptations referred to in recital 20 in the preamble make it possible to comply with the obligation under Article 5 of the directive, but do not apply unless there is a disability.

47 It follows from the above considerations that the answer to Questions 1 and 2 is that the concept of 'disability' in Directive 2000/78 must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept.

Question 3

48 By its third question the referring court asks essentially whether Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article.

49 As that article states, the employer is required to take appropriate measures in particular to enable a person with a disability to have access to, participate in, or advance in employment. Recital 20 in the preamble to the directive gives a non-exhaustive list of such measures, which may be physical, organisational and/or educational.

50 Neither Article 5 of Directive 2000/78 nor recital 20 in its preamble mentions reduced working hours. However, the concept of 'patterns of working time' mentioned in that recital must be interpreted in order to determine whether an adaptation of working hours may be covered by that concept.

51 DAB and Pro Display submit that that concept refers to such matters as the organisation of the patterns and rhythms of work, for example in connection with a production process, and of breaks, so as to relieve as much as possible the burden on workers with disabilities.

52 However, it does not appear from recital 20 in the preamble or from any other provision of Directive 2000/78 that the European Union legislature intended to limit the concept of 'patterns of working time' to such elements and to exclude the adaptation of working hours, in particular the possibility for persons with a disability who are not capable, or no longer capable, of working full-time to work part-time.

53 In accordance with the second paragraph of Article 2 of the UN Convention, 'reasonable accommodation' is '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'. It follows that that provision prescribes a broad definition of the concept of 'reasonable accommodation'.

54 Thus, with respect to Directive 2000/78, that concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers.

55 As recital 20 in the preamble to Directive 2000/78 and the second paragraph of Article 2 of the UN Convention envisage not only material but also organisational measures, and the term 'pattern' of working time must be understood as the rhythm or speed at which the work is done, it cannot be ruled out that a reduction in working hours may constitute one of the accommodation measures referred to in Article 5 of that directive.

56 It should be observed, moreover, that the list of appropriate measures to adapt the workplace to the disability in recital 20 in the preamble to Directive 2000/78 is not exhaustive and, consequently, even if it were not covered by the concept of 'pattern of working time', a reduction in working hours could be regarded as an accommodation measure referred to in Article 5 of the directive, in a case in which reduced working hours make it possible for the worker to continue employment, in accordance with the objective of that article.

57 It must be recalled, however, that, as stated in recital 17 in the preamble, Directive 2000/78 does not require the recruitment, promotion or maintenance in employment of a person 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, which includes a possible reduction in their hours of work.

58 Moreover, in accordance with Article 5 of that directive, the accommodation persons with disabilities are entitled to must be reasonable, in that it must not constitute a disproportionate burden on the employer.

59 In the disputes in the main proceedings, it is therefore for the national court to assess whether a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employers.

60 As follows from recital 21 in the preamble to Directive 2000/78, account must be taken in particular of the financial and other costs entailed by such a measure, the scale and financial resources of the undertaking, and the possibility of obtaining public funding or any other assistance.

61 It should be recalled that, in proceedings under Article 267 TFEU, which is 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. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary (Case C-433/05 *Sandström* [2010] ECR I-2885, paragraph 35 and the case-law cited).

62 It may be of relevance for the purposes of that assessment that, as noted by the referring court, immediately after the dismissal of Ms Ring, DAB advertised a position for an office worker to work part-time, 22 hours a week, in its regional office in Lyngby. There is nothing in the documents before the Court to show that Ms Ring was not capable of occupying that part-time post or to explain why it was not offered to her. Moreover, the referring court stated that soon after her dismissal Ms Ring started a new job as a receptionist with another company and her actual working time was 20 hours a week.

63 In addition, as the Danish Government pointed out at the hearing, Danish law makes it possible to grant public assistance to undertakings for accommodation measures whose purpose is to facilitate the access to the labour market of persons with disabilities, including initiatives aimed at encouraging employers to recruit and maintain in employment persons with disabilities.

64 In the light of the foregoing, the answer to Question 3 is that Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.

Question 4(b)

65 By part (b) of its fourth question, the referring court asks essentially whether Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the

employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.

66 The circumstance that an employer has failed to take those measures may have the consequence, having regard to the obligation under Article 5 of Directive 2000/78, that the absences of a worker with a disability are attributable to the employer's failure to act, not to the worker's disability.

67 Should the national court find that the absences of the workers are attributable, in the present cases, to the employer's failure to adopt appropriate accommodation measures, Directive 2000/78 would preclude the application of a provision of national law such as that at issue in the main proceedings.

68 Having regard to the foregoing, the answer to Question 4(b) is that Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.

Question 4(a)

69 By part (a) of its fourth question, the referring court asks essentially whether Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his disability.

70 By this question the referring court is raising the case of Paragraph 5(2) of the FL being applied to a disabled person following absence on grounds of illness attributable wholly or partly to his disability, not to the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of Directive 2000/78.

71 As the Court held in paragraph 48 of *Chacón Navas*, 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. A disabled worker covered by that directive must be protected against all discrimination in comparison to a worker not so covered. The question thus arises whether the national legislation at issue in the main proceedings is liable to produce discrimination against persons with disabilities.

72 On the question whether the provision at issue in the main proceedings contains a difference of treatment on grounds of disability, it must be noted that Paragraph 5(2) of the FL, which relates to absences on grounds of illness, applies in the same way to disabled and non-disabled persons who have been absent for more than 120 days on those grounds. In those circumstances, that provision cannot be regarded as establishing a difference of treatment based directly on disability, within the meaning of Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78.

73 It should be observed that a person whose employer terminates his employment contract with a shortened notice period solely on grounds of illness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78 (see, by analogy, *Chacón Navas*, paragraph 47).

74 It must therefore be concluded that Paragraph 5(2) of the FL does not contain direct discrimination on grounds of disability, in so far as it uses a criterion that is not inseparably linked to disability.

75 On the question whether that provision is liable to produce a difference of treatment indirectly based on disability, it must be observed that taking account of days of absence on grounds of illness linked to disability in the calculation of days of absence on grounds of illness amounts to assimilating illness linked with disability to the general concept of illness. However, as the Court said in paragraph 44 of *Chacón Navas*, the concepts of 'disability' and 'sickness' cannot simply be treated as being the same.

76 A worker with a disability is more exposed to the risk of application of the shortened notice period laid down in Paragraph 5(2) of the FL than a worker without a disability. As the Advocate General observes in point 67 of her Opinion, compared with such a worker, a worker with a disability has the additional risk of an illness connected with his disability. He thus runs a greater risk of accumulating days of absence on grounds of illness, and consequently of reaching the 120-day limit provided for in Paragraph 5(2) of the FL. It is thus apparent that the 120-day rule in that provision is liable to place disabled workers at a disadvantage and so to bring about a difference of treatment indirectly based on disability within the meaning of Article 2(2)(b) of Directive 2000/78.

77 In accordance with point (i) of that provision, it must be examined whether that difference of treatment is objectively justified by a legitimate aim and whether the means used to achieve that aim are appropriate and do not go beyond what is necessary to achieve the aim pursued by the Danish legislature.

78 As regards the aim of Paragraph 5(2) of the FL, the Danish Government states that this is to encourage employers to recruit and maintain in their employment workers who are particularly likely to have repeated absences because of illness, by allowing them subsequently to dismiss them with a shortened period of notice, if the absences tend to be for very long periods. As a counterpart, those workers can retain their employment during the period of illness.

79 The Danish Government observes that the provision thus has regard to the interests both of employers and employees and is in line with the general regulation of the Danish labour market, which is based on a combination of flexibility and freedom of contract, on the one hand, and the protection of workers, on the other.

80 DAB and Pro Display state that the 120-day rule laid down in Paragraph 5(2) of the FL is regarded as protection for workers who are ill, since an employer who has agreed to apply it will generally be inclined to wait longer before dismissing such a worker.

81 It should be recalled that the Member States have a broad discretion not only in choosing to pursue a particular aim in the field of social and employment policy but also in defining measures to implement it (see, to that effect, Case C-141/11 *Hörnfeldt* [2012] ECR I-0000, paragraph 32, and Case C-152/11 *Odar* [2012] ECR I-0000, paragraph 47).

82 The Court has previously held that encouragement of recruitment undoubtedly constitutes a legitimate aim of the social or employment policy of the Member States and that that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers (see Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 65). Similarly, a measure taken to promote the flexibility of the labour market may be regarded as a measure of employment policy.

83 Consequently, aims such as those referred to by the Danish Government may in principle be regarded as objectively justifying, in national law, as provided for by Article 2(2)(b)(i) of Directive 2000/78, a difference of treatment based on disability such as that deriving from Paragraph 5(2) of the FL.

84 It remains to ascertain whether the means used to achieve those aims are appropriate and necessary and do not go beyond what is needed to achieve them.

85 The Danish Government argues that Paragraph 5(2) of the FL enables, first, the objective of enabling the recruitment and maintenance in employment of persons who have, at least

potentially, a reduced work capacity and, secondly, the superior objective of a flexible, contractual and secure labour market to be achieved most appropriately.

86 DAB and Pro Display submit that, under the Danish legislation on sickness benefits, an employer who pays wages to a worker on sick leave is entitled to have the sickness benefits reimbursed by the local authorities of the worker's place of residence. However, the entitlement to those benefits is limited to 52 weeks, and their amount is lower than the pay actually paid. In those circumstances, the provisions of Paragraph 5(2) of the FL ensure a reasonable balance between the opposing interests of the employee and the employer with respect to absences on grounds of illness.

87 Having regard to the broad discretion enjoyed by the Member States not only in choosing to pursue a particular aim in the field of social and employment policy but also in defining measures to implement it, it does not appear unreasonable for them to consider that a measure such as the 120-day rule laid down in Paragraph 5(2) of the FL might be appropriate for achieving the aims mentioned above.

88 It may be accepted that, by providing for the right to make use of a shortened period of notice for the dismissal of workers who have been absent because of illness for over 120 days, that rule has the effect, for employers, of encouraging recruitment and maintenance in employment.

89 In order to examine whether the 120-day rule laid down in Paragraph 5(2) of the FL goes beyond what is necessary to achieve the aims pursued, that provision must be placed in its context and the adverse effects it is liable to cause for the persons concerned must be considered (see, to that effect, *Odar*, paragraph 65).

90 In this respect, it is for the referring court to examine whether the Danish legislature, in pursuing the legitimate aims of, first, promoting the recruitment of persons with illnesses and, secondly, striking a reasonable balance between the opposing interests of employees and employers with respect to absences because of illness, omitted to take account of relevant factors relating in particular to workers with disabilities.

91 In this respect, the risks run by disabled persons, who generally face greater difficulties than non-disabled persons in re-entering the labour market, and have specific needs in connection with the protection their condition requires, should not be overlooked (see, to that effect, *Odar*, paragraphs 68 and 69).

92 In the light of the above considerations, the answer to Question 4(a) is that Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his disability, unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the referring court to assess.

Costs

93 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 (Second Chamber) hereby rules:

1. **The concept of 'disability' in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as including a condition caused by an**

illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. The nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept.

2. **Article 5 of Directive 2000/78 must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article. It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.**

3. **Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of that directive.**

4. **Directive 2000/78 must be interpreted as precluding national legislation under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his disability, unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim, that being for the referring court to assess.**

[Signatures]

---

* Language of the case: Danish.

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 6 December 2012 (1)

Joined Cases C-335/11 and C-337/11

HK Danmark, acting on behalf of Jette Ring
v
Dansk Almennyttigt Boligselskab DAB

and

HK Danmark, acting on behalf of Lone Skouboe Werge
v
Pro Display A/S in liquidation

(Reference for a preliminary ruling from the Sø- og Handelsret (Denmark))

(Equal treatment in employment and occupation – Directive 2000/78/EC – Prohibition of discrimination on grounds of disability – Concept of disability – Distinction between sickness and disability – Reasonable accommodation for disabled persons – Indirect discrimination – Justification)

I – Introduction

1. When is there a disability within the meaning of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (2) and how is the concept of disability to be distinguished from that of sickness? This is the question that lies at the heart of the present preliminary ruling proceedings. The Court of Justice is therefore called upon to clarify the definition of the concept of disability which it formulated in *Chacón Navas*. (3)

2. These proceedings are also concerned with the meaning to be ascribed to the reasonable accommodation for disabled persons which the employer must provide under Article 5 of Directive 2000/78. Finally, the referring court asks whether a period of notice which is shortened on account of periods of absence due to sickness may constitute discrimination on grounds of disability.

II – Legal context

A – *International law*

3. Paragraph (e) in the preamble to the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities (4) reads: '[r]ecogni[s]ing 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'.

4. The second paragraph of Article 1 of the Convention contains the following definitions:

'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'.

B – *European Union law*

5. Recital 20 in the preamble to Directive 2000/78 provides:

'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'.

6. In accordance with Article 2(2)(b) of Directive 2000/78, indirect discrimination is to 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

…'

7. Article 5 of Directive 2000/78 provides, under the heading 'Reasonable accommodation for disabled persons', as follows:

'In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to 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.'

C – *National law*

8. Directive 2000/78 was transposed into Danish law by the Forskelsbehandlingslov. (5) Under Paragraph 7 of that law, a claim for compensation can be brought for breach of the prohibition of discrimination or failure to take appropriate measures by the employer.

9. The Funktionærlov (6) governs the legal relationship between employers and employees.

10. Paragraph 5(2) of the FL contains a special provision on the termination of an employment relationship on account of the employee's sickness and provides:

'However, it may be stipulated by written agreement in the individual employment relationship that the employee may be dismissed with one month's notice to expire at the end of a month, if the employee has been in receipt of salary during periods of sickness amounting in total to 120 days in any period of 12 consecutive months. The validity of the notice shall be dependent on it being given immediately on the expiry of the 120 days of sickness and while the employee is still ill, but its validity shall not be affected by the employee's return to work after the notice of dismissal has been given. …'

III – Facts and main proceedings

11. The present references for a preliminary ruling have their origin in two actions brought in 2006 by the Handels- og Kontorfunktionærernes Forbund Danmark (HK) (7) on behalf of the employees Jette Ring and Lone Skouboe Werge with a view to obtaining compensation under the Danish law on equal treatment for discrimination on grounds of disability. It had been agreed that Paragraph 5(2) of the FL was applicable to both employment relationships.

A – *Case C-335/11*

12. In *Ring*, the national proceedings are based on the following facts:

13. Ms Ring had been employed as a customer service centre operator with the firm Dansk Almennyttigt Boligselskab (DAB) since 2000. Between June 2005 and her dismissal in November 2005, she was off sick for several periods, her absences amounting in total to more than 120 days. The medical certificates submitted in respect of those periods of absence referred primarily to chronic back complaints attributable *inter alia* to osteoarthritis between the lumbar vertebrae, the symptoms of which were constant pain in the lumbar region. Once the doctors treating her had established that her lumbar vertebrae were stiffening as a result of spontaneous fusion, no further treatment options were available. Measures which might have alleviated those complaints while Ms Ring was at work, such as the acquisition of an adjustable-height desk for her workstation or the offer of part-time working, were not taken. Part-time posts were in principle available at DAB, however.

14. On the basis of her accumulated periods of absence, Ms Ring was dismissed with a shortened period of notice in accordance with Paragraph 5(2) of the FL. Immediately after Ms Ring's dismissal, DAB placed an advertisement for a part-time position with a comparable job description in a regional office located nearby. Ms Ring took up a new position as a receptionist with another firm, which provided her with an adjustable-height desk and fixed her actual working time at 20 hours per week. She was appointed on a full-time basis under the Danish flexijob scheme and the position qualified for a 50% rebate. (8)

B – *Case C-337/11*

15. In *Skouboe Werge*, the Sø- og Handelsret set out the following facts:

16. Ms Skouboe Werge had been employed as an administrative assistant with the firm Pro Display since 1998. After suffering whiplash following a road traffic accident in December 2003 and having been certified sick for three weeks, she initially resumed her full-time employment with Pro Display. When, in late 2004, it became clear that Ms Skouboe Werge was still suffering from the after-effects of whiplash, she was given a sickness certificate, issued provisionally for four weeks, on the basis of which she worked only approximately four hours per day. In January 2005 Ms Skouboe Werge certified herself sick, on account of ongoing complaints, in respect of the entirety of her working hours. In accordance with the 120-day rule laid down in Paragraph 5(2) of the FL, she was then dismissed with a shortened period of notice of one month expiring on 31 May 2005.

17. Ms Skouboe Werge's complaints manifested themselves in various symptoms, in particular neck pains spreading to her shoulders, jaw problems, fatigue, disturbances in concentration and memory, difficulties in expressing herself, hypersensitivity to noise, a low stress threshold and dizziness. In June 2006 approval was therefore given for Ms Skouboe Werge to receive an early retirement pension based on an assessment of her capacity for work as being approximately eight hours a week at a slow pace. Moreover, by decision of the Arbejdsskadestyrelsen (Office for Accidents at Work and Occupational Diseases), Ms Skouboe Wege's degree of disability was assessed as 10% and the reduction in her capacity for work as 65%.

18. In the main proceedings, HK took the view that dismissing the employees in question with a shortened period of notice in accordance with Paragraph 5(2) of the FL was precluded by the fact that this infringes the prohibition of discrimination on grounds of disability laid

down in Directive 2000/78. The referring court therefore wishes to ascertain what definition is to be given to 'disability' within the meaning of Directive 2000/78.

IV – Reference for a preliminary ruling and the procedure before the Court

19. By orders of 29 June 2011, received at the Court Registry on 1 July 2011, the Sø- og Handelsret stayed the proceedings in each case and referred the following questions to the Court for a preliminary ruling:

1. (a) Is any person who, because of physical, mental or psychological impairments, 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 *Chacón Navas* 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 solely or essentially that the person concerned is not able to work full-time be regarded as a disability in the sense in which that term is used in Council Directive 2000/78?

3. Is a reduction in working hours among the measures covered by Article 5 of Directive 2000/78?

4. Does Directive 2000/78 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 sickness 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 is caused by the disability

   or

   (b) the absence is due to the fact that the employer has not implemented the measures appropriate in the specific situation to enable a person with a disability to perform his work?

20. By order of 4 August 2011, the President of the Court joined Cases C-335/11 and C-337/11 for the purposes of the written procedure, the oral procedure and the judgment.

21. As well as the parties to the dispute in the main proceedings, the Danish, Irish, Polish and United Kingdom Governments and the European Commission took part in the written and oral procedures before the Court. In addition, the Belgian and Greek Governments submitted written observations.

V – Assessment

22. The first and second questions referred by the Sø- og Handelsret must be answered together, as they both concern the definition of the concept of disability (see A below). The third question has to do with the substance and extent of the measures which the employer must take in accordance with Article 5 of Directive 2000/78 (see B below). It is necessary, finally, to examine the fourth question, that is to say whether the shortening of a period of notice on account of absence due to sickness is discriminatory (see C below).

A – *Questions 1 and 2*

1. Definition of the concept of disability

23. Directive 2000/78 itself does not contain any definition of the concept of disability.

24. The Court had already been called upon to define that concept independently for the purposes of European Union law in *Chacón Navas*. According to that definition, the concept of disability refers 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'. (9) It must also be probable that it will last for a long time. (10)

25. In 2010 – and, therefore, some years after the judgment in *Chacón Navas* – the European Union ratified the United Nations Convention on the Rights of Persons with Disabilities. The UN Convention refers first of all, in its preamble, to the fact that the concept of disability must be understood dynamically and that the understanding of disability is constantly evolving. (11) Article 1 of the Convention then contains a definition of the concept. According to that definition, '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'.

26. It follows from Article 216(2) TFEU that international agreements concluded by the European Union are binding upon the institutions of the European Union and on its Member States. Once they enter into force, international agreements concluded by the European Union form an essential ('integral') part of the European Union legal order. (12) Consequently, provisions of secondary European Union legislation must, so far as is possible, be interpreted in a manner consistent with the European Union's obligations under international law. (13)

27. Accordingly, the concept of disability within the meaning of Directive 2000/78 should not fall short of the scope of the protection afforded by the UN Convention. In accordance with the definition contained in the UN Convention, the hindrance to participation in society arises from 'interaction with various barriers'. To that extent, there might be certain circumstances in which the definition given in *Chacón Navas* falls short of the definition contained in the UN convention and would have to be interpreted in a manner consistent with international law.

28. In the present cases, however, the heart of the problem does not lie in the 'barriers' element of the definition. The referring court wishes to ascertain whether a condition caused by a medically diagnosed incurable or temporary, curable sickness is capable of being covered by the concept of disability. Neither the definition given in *Chacón Navas* nor that contained in the UN Convention provides, in itself, an answer to the referring court's questions. After all, leaving aside the requirement that the limitation must last for a long time, neither definition contains any explicit criteria for distinguishing between disability and sickness.

29. Consequently, in order to answer the referring court's questions, we must now look at the distinction between sickness and disability.

2. Distinction between disability and sickness

30. In *Chacón Navas,* the Court held that workers do not fall within the scope of the protection afforded by Directive 2000/78 as soon as they develop any type of sickness. (14) The Court thus distinguishes between sickness and disability. After all, 'sickness' is not referred to in the directive as a separate prohibited ground of discrimination.

31. However, the Court excluded only 'sickness as such' from the scope of the directive. (15) It cannot be inferred from the judgment in *Chacón Navaz* that sickness as a cause of disability rules out classification as a disability. Finally, the Court also made it clear

in its second judgment concerning discrimination based on disability that it cannot be inferred from the judgment in *Chacón Navaz* that the scope *ratione materiae* of that directive must be interpreted strictly. (16)

32. In particular, there is nothing to indicate that Directive 2000/78 is intended only to cover disabilities which are congenital or result from accidents. To define the scope of the directive by reference to the cause of the disability would be arbitrary and would thus be contrary to the very aim of the directive of giving effect to the principle of equal treatment.

33. A distinction must therefore be drawn between sickness as the possible cause of the impairment and the impairment resulting from sickness. A permanent limitation resulting from sickness which hinders participation in professional life is also covered by the protection of the directive.

34. The present cases concern physical impairments that manifest themselves inter alia in pain and lack of mobility. The distinction between sickness and disability is therefore easier to draw in these cases than in the case on which the Supreme Court of the United States of America had to rule, where it held that even an *asymptomatic* HIV infection may constitute a disability within the meaning of the ADA 1990. (17) Whether a person's complaints constitute a limitation in a particular set of circumstances is a matter for assessment by the court of the Member State.

35. There is nothing in the wording of Directive 2000/78 to indicate that its scope of application is limited to a certain degree of severity of disability. (18) Since, however, this issue has been neither raised by the referring court nor discussed by the parties to the proceedings, it does not need to be definitively resolved here.

36. Furthermore, for the purposes of the existence of a disability, it is decisive that the limitation will probably last for a 'long time'. (19) In this regard, the UN Convention states that the impairment must be 'long-term'. (20) I do not see any substantive difference between these two forms of words.

37. A limitation resulting from an incurable illness will usually be regarded as lasting for a long time. However, even an illness which is in principle curable may take so long to be completely cured that the limitation lasts for a long time. Moreover, even an illness which is basically curable may leave behind a long-term limitation. Precisely in the case of chronic illnesses, the transition from a (treatable) illness to what is likely to be a permanent limitation, which only then has the character of a disability, may actually be an evolving process. Not until there is a prognosis of permanent limitation can there be any question of a disability.

38. Consequently, the mere finding than an illness is in itself curable or incurable, permanent or temporary is not such as to support a definitive conclusion as to whether there will subsequently be a permanent limitation.

3. Need for special aids

39. The referring court also asks whether the assumption of a disability presupposes a need for special aids or whether it is sufficient that the person concerned is no longer able to work full-time.

40. The concept of disability within the meaning of the directive does not presuppose a need for special aids.

41. Article 5 of Directive 2000/78 makes it clear that it is necessary first of all to establish the existence of a disability in order then to take the appropriate measures necessary. Recital 20 gives some indication of what appropriate measures might mean and refers in particular to 'adapt[ing] the workplace to the disability'. The need for special adaptations and aids is therefore a *consequence* of the establishment of the disability and does not form part of the definition of the concept of disability.

42. The need for special aids as a part of the definition of disability is also unconvincing from the point of view of the meaning and purpose of the directive. Disabilities within the meaning of the directive may be the result of physical, mental or psychological impairments. However, the requirement of a need for special aids seems to be based only on the scenario of a person with physical impairments. If aids were required as a compulsory element of the concept of disability, the mental or psychological impairments explicitly referred to in the directive would not be covered, as they do not normally call for aids. What is more, such a requirement would actually operate to the disadvantage of disabled persons whose disability cannot be offset or alleviated by an aid and who, for that reason alone, are usually more severely affected than other disabled persons.

43. In conclusion, therefore, the only decisive criterion is whether there is a hindrance to participation in professional life.

44. DAB and Pro Display have submitted that a person may be regarded as disabled only if he is completely excluded from professional life, so that a reduced capacity to work is not sufficient for the purposes of classification as a disability. That argument is unconvincing. Even on a general linguistic understanding, the phrase 'hindered from participating in professional life' also covers barriers which are only partial and is not confined to a comprehensive 'exclusion' from professional life.

45. The proposition that that phrase includes people who are hindered from participating in professional life by not being able to work full-time is also supported by recital 17 in the preamble to the directive. This provides that the protection afforded by the directive covers workers who are in principle 'competent, capable and available to perform the essential functions of the post'. The directive is therefore specifically intended to protect persons who are in principle capable of participating in professional life, albeit in some circumstances to a limited extent or if special accommodation is provided. Consequently, the applicability of the directive does not presuppose that the person concerned is excluded from professional life.

46. The interim conclusion must therefore be that the concept of disability covers a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life. It is immaterial to the definition of disability that the impairment was caused by an illness; the only decisive factor is whether the limitation lasts for a long time. Even a permanent reduction in functional capacity which does not entail a need for special aids but means only or essentially that the person concerned is not capable of working full-time is to be regarded as a disability within the meaning of Directive 2000/78.

B – *Question 3*

47. By its third question, the Sø- og Handelsret wishes to ascertain whether reasonable accommodation for disabled persons also includes a reduction in working hours.

48. The first sentence of Article 5 of Directive 2000/78 provides that reasonable accommodation is to be provided in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities. 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. Employers are exempt from that obligation where such measures would impose a disproportionate burden on them.

49. The purpose of that provision is to enforce not only the equal *treatment* but also the equal *status* of a disabled person and thus to enable him to participate in employment.

50. Article 5 of Directive 2000/78 itself provides simply that the measures must be 'appropriate' and 'needed in a particular case' in order to enable a person with a disability to have access and so on to employment.

51. However, recital 20 in the preamble to the directive brings greater clarity to that provision. According to that recital, 'effective and practical measures' are to be provided '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'.

52. A reduction in working hours might be covered by the explicit example given in that recital of 'adapting patterns of working time'. However, DAB and Pro Display take the view that the phrase 'patterns of working time' does *not* relate to working hours but only to the performance and pace of work or the distribution of tasks between employees.

53. Even if the view is taken that a reduction in working hours does not fall within the scope of the phrase 'adapting patterns of working time', I am of the opinion that the reduction in working hours is covered by Article 5 of the directive.

54. It is clear not least from the wording of recital 20 that the list it contains is given purely by way of example and is not meant to be exhaustive. It cannot be concluded from the mere fact that a reduction in working hours is not expressly mentioned in that recital that it is not covered by Article 5 of the directive.

55. DAB and Pro Display also point out that the concept of working hours is not mentioned in the directive and was not discussed in the preparatory work for the directive either. Furthermore, they submit, the concept of a reduction in working hours is so closely associated with the Part-Time Working Directive (21) that any corresponding heads of claim must be assessed under that directive alone.

56. However, the European Union legislature framed the wording of Article 5 broadly. It speaks in general terms of measures enabling people with disabilities to have access to employment. A reduction in working hours is undoubtedly capable of enabling a person with a disability to participate in employment.

57. In this regard, recital 20, too, supports a broad understanding of Article 5. It is after all clear from that recital that, contrary to the view taken by DAB and Pro Display, not only physical but also organisational measures are covered. 'Adapting premises or equipment' refers to the removal of physical barriers, whereas 'adapting patterns of working time, the distribution of tasks or the provision of training or integration resources' refers to measures of an organisational nature. This is consistent in particular with the understanding of disability under the UN Convention, which, in the context of limitations, attaches relevance not only to physical but also in particular to social barriers.

58. The meaning and purpose of Directive 2000/78 also indicate that part-time working is covered. That directive calls for individually agreed measures on equal treatment and thus improved participation of people with disabilities in professional life. (22) The decisive factor must therefore be whether a particular measure is capable of enabling a person with a disability to take up a profession or to continue to exercise his profession. From that point of view, a measure to ensure that disabled employees who are able to work at least part-time are not entirely excluded from the labour market but are afforded the possibility of adequately participating in professional life by being offered part-time work is eminently consistent with the meaning and purpose of the directive. There is nothing to indicate that the directive requires only measures such as the installation of a lift or wheelchair-friendly sanitary facilities – which can also be time-consuming and expensive – but cannot cover a reduction in working hours.

59. Admittedly, the objection raised by DAB and Pro Display, to the effect that part-time working may constitute a considerable interference with the legal relationship between employer and employee and impose a burden on the employer, cannot be dismissed out of hand. However, the same may also be true of the example of adapting premises. That is why the second sentence of Article 5 imposes the obligation on the employer but does so on condition that the measures must not impose a disproportionate burden on the employer. To this extent, the directive requires an appropriate balance to be struck between the interest of the disabled employee in benefiting from measures to support him and that of the employer in not being compelled to accept interferences with the organisation of his business and economic losses without further consideration.

60. The interim conclusion must therefore be that a reduction in working hours may be a measure covered by Article 5 of Directive 2000/78. It is for the national court to determine in each individual case whether such a measure imposes a disproportionate burden on the employer.

C – *Question 4*

1. First part of Question 4

61. By the first part of the fourth question, the Sø- og Handelsret wishes to ascertain to what extent a provision of national law which permits dismissal with a shortened period of notice in cases involving absence due to sickness is contrary to Directive 2000/78 in so far as it is also applied in situations where the absence is caused by the disability.

62. Article 1 in conjunction with Article 2(2) of Directive 2000/78 prohibits direct or indirect discrimination on the grounds of disability as regards employment and occupation. Direct discrimination is taken to occur where one person is treated less favourably than another in a comparable situation on grounds of disability. Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put disabled persons at a particular disadvantage compared with other persons, unless this is justifiable. In accordance with Article 3(1)(c), the scope *ratione materiae* of the directive explicitly covers conditions governing dismissal. Consequently, it must now be examined, first, whether the shortened period of notice is to be regarded as a direct or indirect disadvantage and, if so, whether it is justifiable.

a) Disadvantage

63. First of all, however, I should like to clarify the subject-matter of the examination. The referring court asks only whether the provision allowing the period of notice to be shortened on account of absences due to sickness is in conformity with European Union law.

64. Another obvious question in the circumstances would be to what extent absences connected with a disability or with an illness resulting from a disability may constitute a permissible ground for dismissal at all. The Court has already held that the directive precludes dismissal which, in the light of the employer's obligation to provide reasonable accommodation, is not justified by the fact that the person concerned is not available to perform the essential functions of his post. (23) By converse inference, it might be concluded from this that dismissal is permissible where the accommodation necessary to adapt the workplace would impose a disproportionate burden on the employer or the employee is not available to perform the essential functions of his post because of his absence. I would argue, however, that that finding by the Court does not in itself conclusively dispose of the question as to whether a dismissal on account of absences due to sickness resulting from disability is permissible. Nevertheless, in answer to the question referred, I shall now concern myself exclusively with the shortening of the period of notice.

65. Where an employee with a disability is absent because of a 'general' illness, the fact that absences due to sickness are taken into account for the purposes of shortening the period of notice does not put that employee at a disadvantage compared with a non-disabled employee. After all, the likelihood of contracting an illness such as flu bears no relation to the disability and affects employees in the same way whether they are disabled or not.

66. The present case, however, is concerned with absences which are due to a disability. At first sight, Paragraph 5(2) of the FL appears to be neutral, since it applies to all employees who have been absent on account of sickness for more than 120 days. It does not therefore give rise to direct discrimination against disabled persons, as it does not directly apply the prohibited differentiating criterion of disability and does not prescribe unequal treatment by reference to a criterion which is inseparably linked to disability. After all, a disability does not always necessarily lead to illness and absences due to sickness, so that there cannot be said to be an inseparable link.

67. There is, however, an indirect disadvantage here. In so far as the sickness is connected with a disability, unequal situations are treated equally. Generally speaking, employees with a disability have a much higher risk of contracting an illness connected with their disability than employees without a disability. The latter can contract only 'general' illnesses. Employees with a disability, on the other hand, can additionally contract a 'general' illness. The provision on the shortened period of notice is therefore one which indirectly puts employees with a disability at a disadvantage compared with non-disabled employees.

68. The objection raised by some of the parties to the proceedings, to the effect that, taking into account the right of employees not to have to disclose the nature of their illness, it is not practicable to differentiate between 'general' illnesses and those which are the result of a disability, is unconvincing. There are, after all, ways of resolving this issue, for example by recourse to a medical examiner.

b) Justification

69. In accordance with Article 2(2)(b)(i), a provision such as Paragraph 5(2) of the FL is justified where it pursues a legitimate aim and the means of achieving that aim are appropriate and necessary. That wording contains the general requirements recognised in European Union law for the justification of unequal treatment. (24)

70. Thus, the provision must be appropriate for the purposes of achieving a legitimate aim. It must also be necessary, which is to say that the legitimate aim pursued must not be capable of being achieved by more moderate but equally appropriate means. Finally, the provision must also be proportionate within the narrower meaning of that term, which is to say that it must not give rise to disadvantages disproportionate to the aims pursued. (25)

71. It must be borne in mind when examining these criteria that it is recognised in case-law that the Member States enjoy broad discretion in their choice of measures capable of achieving their aims in the field of social and employment policy. (26)

72. The order for reference contains no information on the aims pursued by Paragraph 5(2) of the FL. This makes an assessment difficult. It will therefore be for the referring court to make a definitive assessment of whether the provision at issue is justified.

73. The Danish Government has submitted that Paragraph 5(2) of the FL attempts to strike a fair balance between the interests of employers and those of employees in cases involving long absences due to sickness. Ultimately, however, that provision serves the interests of employees. In its view, the shortened period of notice applicable in the case of a long absence due to sickness gives the employer an incentive not to dismiss a sick employee at the earliest opportunity but, initially, to continue to employ him because the employer knows that, if the employee is absent for a long period of time, the period of notice will, by way of compensation, be shortened.

74. The aims pursued are legitimate and, moreover, in the light of the discretion available to the Member States, the provision is not manifestly inappropriate for the purposes of achieving those aims. (27) An alternative, less drastic, measure would have to be capable of being incorporated into the remaining scheme of employment law provisions. Whether such a measure is conceivable is therefore difficult to assess without further information.

75. The decisive factor is whether the disadvantages sustained by disabled employees as a result of the shortened period of notice in its present form are proportionate to the aims pursued, in other words, whether they have undue adverse effects on the persons concerned. This requires that the right balance be found between the various conflicting interests involved. (28) A question here is whether an appropriate provision should not also take into account the severity of the disability and the chances of reemployment of the employee concerned. The more severe the employee's disability is and the more difficult it is for him to find new employment, the more important the length of his period of notice becomes. It is for the referring court to assess this issue in detail.

76. In conclusion, the answer to the first part of the fourth question must therefore be that Directive 2000/78 must be interpreted as precluding a national provision under which an employer is entitled to dismiss an employee with a shortened period of notice on account of absences due to sickness where such sickness is the result of a disability. This does not apply where the disadvantage is objectively justified by a legitimate aim in accordance with Article 2(2)(b)(i) of Directive 2000/78 and the measures taken are appropriate and necessary for achieving that aim.

2. Second part of Question 4

77. By the second part of the fourth question, the referring court wishes to ascertain, finally, whether Directive 2000/78 precludes the shortening of the period of notice where the employee's absence is due to the fact that the employer did not take the measures appropriate to enable a person with a disability to perform his work, in accordance with Article 5 of the Directive.

78. An examination of proportionality is already implicit in the question as to what measures are appropriate within the meaning of Article 5 of the Directive. Whether the measures to be taken can be expected of the employer is clarified in this connection, with a balance being struck between the interests of the disabled employee and those of his employer. If the employer fails to take these appropriate measures which he can be expected to take, in other words if he fails to comply with his obligation under Article 5 of the directive, he must not gain any legal advantage thereby. The obligation under Article 5 of Directive 2000/78 would become meaningless if the failure to take proportionate measures could justify placing a disabled worker at a disadvantage. Therefore, in the light of the spirit and purpose of the provision, any absences on the part of the employee which are due to the failure to take a measure cannot justify a shortening of the period of notice.

79. Consequently, the application of a shortened period of notice on account of absences on the part of the employee which were due to the fact that the employer did not take any appropriate measures in accordance with Article 5 of Directive 2000/78 constitutes an unjustifiable disadvantage.

VI – Conclusion

80. In the light of all of the foregoing, I propose that the Court should answer the questions referred for a preliminary ruling as follows:

1. (a) The concept of disability within the meaning of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation covers a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.

   (b) It is immaterial to the definition of disability that the impairment was caused by an illness; the only decisive factor is whether the limitation is likely to last for a long time.

   (c) Even a permanent reduction in functional capacity which does not entail a need for special aids but means only or essentially that the person concerned is not capable of working full-time is to be regarded as a disability within the meaning of Directive 2000/78.

2. A reduction in working hours may be a measure covered by Article 5 of Directive 2000/78. It is for the national court to determine in each individual case whether such a measure imposes a disproportionate burden on the employer.

3. Directive 2000/78 must be interpreted as precluding a national provision under which an employer is entitled to dismiss an employee with a shortened period of notice on account of absences due to sickness where such sickness is the result of a disability. This does not apply where the disadvantage is objectively justified by a legitimate

aim in accordance with Article 2(2)(b)(i) of Directive 2000/78 and the measures are appropriate and necessary for the purposes of achieving that aim. However, the application of a shortened period of notice on account of absences on the part of the employee which were due to the fact that the employer did not take any appropriate measures in accordance with Article 5 of Directive 2000/78 constitutes an unjustifiable disadvantage.

---

1 – Original language: German.

---

2 – 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) ('Directive 2000/78').

---

3 – Case C-13/05 *Chacón Navas* [2006] ECR I-6467.

---

4 – Ratified by the European Union on 23 December 2010 ('the UN Convention'). See Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion of the Convention (OJ 2010 L 23, p. 35).

---

5 – Lov om forbud mod forskelsbehandling på arbejdsmarkedet (Law on the prohibition of discrimination in the labour market).

---

6 – Lov om retsforholdet mellem arbejdsgivere og funktionærer Funktionærlov (Law on the legal relationship between employers and salaried employees) ('the FL').

---

7 – Association of Danish commercial and office employees.

---

8 – The flexijob scheme is a Danish scheme under which the State provides wage subsidies for the employment of persons with a permanently reduced capacity for work.

---

9 – *Chacón Navas* (cited in footnote 3, paragraph 43).

---

10 – Ibid, paragraph 45.

---

11 – See also to this effect the Opinion of Advocate General Geelhoed in *Chacón Navas* (cited in footnote 3, point 66).

---

12 – See to this effect Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52; Case C-311/04 *Allgemene Scheeps Agentuur Dordrecht* [2006] ECR I-609, paragraph 25; Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 42; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission* [2008] ECR I-6351, paragraph 307; and Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-0000, paragraph 50.

---

13 – See *Commission* v *Germany*, cited in footnote 12, paragraph 52; Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 20; Case C-76/00 P *Petrotub and Republica*[2003] ECR I-79, paragraph 57; and Case C-161/08 *Internationaal Verhuis- en Transportbedrijf Jan de Lely* [2009] ECR I-4075, paragraph 38.

---

14 – *Chacón Navas* (cited in footnote 3, paragraph 46).

---

15 – Ibid, paragraph 57.

---

16 – Case C-303/06 *Coleman* [2008] ECR I-5603, paragraph 46.

---

17 – US Supreme Court, Bragdon v. Abbott, 524 US 624 [1998]. Section 12102(2)(A) of the ADA 1990 states that there is a disability where 'a physical … impairment […] substantially limits one or more of [an individual's] major life activities'.

---

18 – The European Court of Human Rights, too, has recognised sickness from diabetes mellitus type 1, which the national authorities considered to be minor, as a disability for the purposes of protection against discrimination: *Glor v. Switzerland*, no 13444/04, ECHR 2009.

19– *Chacón Navas* (cited in footnote 3, paragraph 45).

---

20 – In the English language version, 'long-term … impairments', in the French language version, 'incapacités … durables'.

---

21 – Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1998 L 14, p. 9.

---

22 – See recitals 8, 9, 11 and 16 in the preamble to Directive 2000/78.

23– *Chacón Navas* (cited in footnote 3, paragraph 51).

---

24 – See my Opinion in Case C-499/08 *Andersen* [2010] ECR I-9343, point 42.

---

25 – Case C-189/01 *Juppes and Others* [2001] ECR I-5689, paragraph 81; Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5873, paragraph 41; and Case C-343/09 *Afton Chemical* [2010] ECR I-7023, paragraph 45 and the case-law cited.

---

26 – Compare, in the context of discrimination on grounds of age, Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 68, and Case C-45/09 *Rosenbladt*[2010] ECR I-9391, paragraph 41.

---

27 – See in this regard *Palacios de la Villa* (cited in footnote 26, paragraph 72) and Case C-341/08 *Petersen* [2010] ECR I-47, paragraph 70.

---

28 – See in this regard my Opinion in *Andersen* (cited in footnote 24, point 68) and my Opinion in Case C-286/12 *Commission* v *Hungary* [2012] ECR I-0000, point 78.

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.

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. Puissochet, 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. Martinez del Peral Cagigal and D. Martin, 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 Eurest 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 Eurest'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.**

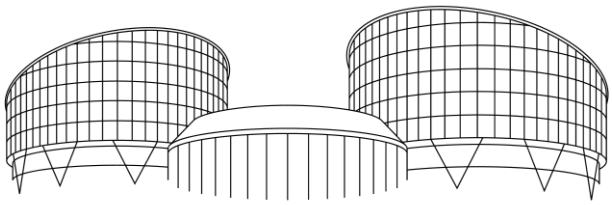
2. **The prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not 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.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF LASHIN v. RUSSIA

(Application no. 33117/02)

JUDGMENT

STRASBOURG

22 January 2013

FINAL

22/04/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Lashin v. Russia,

The European Court of Human Rights (Chamber), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 18 December 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 33117/02) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Aleksandr Petrovich Lashin ("the applicant"), on 29 July 2002.

2. The applicant, who had been granted legal aid, was represented by Mr D. Bartenev, a lawyer practising in St Petersburg. The Russian Government ("the Government") were represented by Mr G. Matyushkin, the Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant complained, in particular, about his status as a legally incapacitated person, his non-voluntary commitment to a psychiatric hospital and his inability to marry.

4. By a decision of 6 January 2011, the Court declared the application partly admissible.

5. The applicant and the Government each filed further written observations on the merits (Rule 59 § 1 of the Rules of Court). The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1960 and lives in Omsk.

A. Deprivation of legal capacity

7. The applicant suffers from schizophrenia, which was first diagnosed in 1987. In the 1980s and early 1990s he was employed as a bus driver, but in 1995 he stopped working. The applicant kept writing nonsensical letters to state officials and lodged numerous administrative complaints and lawsuits. At some point he started giving money and clothes to strangers and invited them to his house, explaining it by religious considerations. Such behaviour led to recurrent conflicts with his wife. The applicant became irritable, aggressive and once in 1996 tried to strangulate her. As a result, they divorced. In 1998 the applicant was officially given the "2nd degree disability" status due to his mental disorder.

8. Between 1989 and 17 July 2000 the applicant was hospitalised nine times in the Omsk Regional Psychiatric Hospital. As follows from the opinion of the Serbskiy Institute of 19 August 1999 (a leading State psychiatric research centre based in Moscow) during that period the applicant considered himself as a "defender of justice", believed that he knew important State secrets, and claimed that there was a conspiracy against him. Amongst other things, he challenged his diagnosis, complained of his confinement to the hospital, threatened the doctors who had been treating him in the Omsk Regional Psychiatric Hospital, and tried to institute criminal proceedings against them. The report did not mention any incidence of violence or self-destructive behaviour after 1996, and it was not alleged that during that period the applicant was unable to take care of himself in everyday life. However, it is clear that his mental condition had a persistent character, and that he kept harassing doctors from the Omsk Regional Psychiatric Hospital with complaints and litigations.

9. On 5 April 2000 the applicant underwent an examination in the Omsk Regional Psychiatric Hospital by a panel of doctors, who confirmed the previous diagnosis and the opinion by the Serbskiy Institute and concluded that the applicant was "incapable of understanding the meaning of his actions and was unable to control them".

10. On 16 June 2000, following an application by the public prosecutor, the Kuybyshevskiy District Court of Omsk declared the applicant legally incapacitated because of his illness. The hearing took place in the absence of the applicant. On 30 August 2000 the Omsk Regional Court upheld the decision of the District Court.

11. On an unspecified date the Omsk Municipal Public Health Department appointed the applicant's father as his guardian.

B. Attempts to restore legal capacity

1. First request

12. On 2 October 2000 the applicant's daughter brought court proceedings seeking to restore his legal capacity. Her request was supported by the applicant's father as guardian. The plaintiffs claimed that the applicant's mental state had significantly improved and requested that the court conduct a new psychiatric examination of his health. As the plaintiffs did not trust doctors from the Omsk Regional Psychiatric Hospital, they insisted that the process of the psychiatric examination of the applicant be recorded on a videotape.

13. On 27 October 2000 the court commissioned a psychiatric examination of the applicant, but refused to order a video recording of it. The expert examination was entrusted to the Omsk Regional Psychiatric Hospital. However, the applicant failed to submit himself for an examination at the hospital, so the examination was not conducted.

14. On 19 March 2001 the Sovetskiy District Court of Omsk decided to confirm the status of legal incapacity and maintain the applicant's guardianship. It is unclear whether the applicant was present at the hearing. The court noted that because the new expert examination could not be conducted due to the applicant's failure to cooperate, the results of the examination of 5 April 2000 were still applicable. It appears that the decision of 19 March 2001 was not appealed against.

2. Second request

15. On 9 July 2001 the applicant's father (as guardian) instituted court proceedings challenging the medical report of 5 April 2000 by the Omsk Regional Psychiatric Hospital which had served as grounds for declaring the applicant legally incapacitated. He also sought restoration of the applicant's legal capacity. Since the plaintiffs did not trust doctors from the Omsk Regional Psychiatric Hospital they requested that the court commission a panel of experts from the Independent Psychiatric Association of Russia, a non-State professional association of psychiatrists, based in Moscow, to assess the applicant's mental capacity.

16. On 26 February 2002 the Kuybyshevskiy District Court held a hearing in the applicant's absence, having decided in particular that:

> "... [the applicant's] mental condition prevented him from taking part in the hearing, and, moreover, [his] presence would be prejudicial to his health".

The court further refused to commission a new expert examination by a non-State psychiatric association, on the ground that only State-run

institutions were allowed by law to conduct such examinations and issue reports. The relevant part of the District Court judgment reads as follows:

> "... under section 1 of the Psychiatric Care Act ... State forensic examination activity in judicial proceedings is carried out by State forensic examination institutions, and consists of organising and implementing the forensic examination".

In conclusion the court found that the expert report of 5 April 2000 was still valid, that the applicant continued to suffer from a mental disorder and that, therefore, his status as a legally incapacitated person should be maintained.

17. The applicant's father (as his guardian) appealed to the Omsk Regional Court, which on 15 May 2002 upheld the judgment of 26 February 2002.

C. Confinement of the applicant in the psychiatric hospital

18. Some time later the applicant's father solicited an opinion from Dr S., a psychiatrist not affiliated with the Omsk Regional Psychiatric Hospital, concerning the applicant's mental condition. Dr S. examined the applicant and on 1 July 2002 he submitted a report according to which the applicant's mental illness was not as serious as claimed by the doctors at the Omsk Regional Psychiatric Hospital.

19. On an unspecified date in 2002 the applicant's father, as his guardian, delivered a power of attorney to a third person, mandating that person to act in the applicant's name. However, a notary public refused to certify the power of attorney, on the basis that under the law a guardian should represent his ward personally and could not confer his duties on a third person. The applicant's father brought proceedings against the notary public in court, but to no avail: on 10 October 2002 the Sovetskiy District Court of Omsk confirmed the lawfulness of the refusal.

20. On 2 December 2002 the applicant and his fiancée, Ms D., requested that the municipality register their marriage. According to the applicant, they received no reply from the municipality.

21. On 4 December 2002 a district psychiatrist (*uchastkovyi psikhiatr*) examined the applicant and concluded that the latter suffered from "paranoid schizophrenia with paraphrenic delusion of reformism". The psychiatrist delivered a hospitalisation order, which relied strongly on the "nonsensical complaints" lodged by the applicant's representatives.

22. On 6 December 2002 the Guardianship Council of the Omsk Region decided to strip the applicant's father of his status as the applicant's guardian. The decision was taken by the Guardianship Council without the applicant or his father being heard.

23. By virtue of the hospitalisation order the applicant was placed in the Omsk Regional Psychiatric Hospital on 9 December 2002. According to the

applicant, he and his father unambiguously opposed this provisional placement in the hospital.

24. On the same day a panel of three doctors from the Omsk Regional Psychiatric Hospital examined the applicant and concluded that he should stay in the hospital. They mostly based themselves on the medical history of the applicant that had led to the deprivation of legal capacity. The report stated that the worsening of the applicant's mental condition was demonstrated by the numerous complaints by which he had tried to recover his legal capacity and challenge the actions of the hospital.

25. On 10 December 2002 the Omsk Municipal Public Health Authority approved the decision taken by the Guardianship Council on 6 December 2002. From that moment on the applicant's father ceased to be his guardian and, according to the Government, the functions of the applicant's guardian were performed by the municipal authorities, namely the Omsk Public Health Authority.

26. On 11 December 2002 the Omsk Regional Psychiatric Hospital requested that the Kuybyshevskiy District Court authorise the applicant's further confinement. On the same day the judge, in accordance with section 33 of the Psychiatric Care Act, ordered that the applicant be held in the hospital for such time as was necessary for the examination of his case. The provisional order issued by the judge was a one-sentence annotation on the hospitalisation order of 4 December 2002: "I hereby authorise detention [in hospital] pending the examination [of the case] on the merits".

27. Having been informed of that ruling, the applicant asked the hospital staff to release him for home treatment. The hospital staff refused, however, and prohibited him from seeing his relatives or talking to them.

28. On 15 December 2002 the applicant lodged an application with the court for his release from the Omsk Regional Psychiatric Hospital. However, the judge informed the applicant by letter that such a provisional placement of a patient in a psychiatric hospital for a period necessary for the examination of the case on the merits was not subject to judicial review.

29. On 17 December 2002 the District Court held a hearing in the presence of the applicant, the applicant's father, the public prosecutor, and a representative of the hospital. From the case file it appears that the participants and the judge himself were not aware that the applicant's father was no longer the applicant's guardian.

30. At that hearing the applicant and his father claimed that the applicant's condition did not require hospitalisation. They insisted that the hospital had not proved the medical necessity of such a measure. The applicant and his father referred to the report by Dr. S. of 1 July 2002 (see paragraph 18 above). In order to clarify the matter, the applicant asked the court to commission a fresh medical examination of his mental health, in order to establish whether there had been any deterioration. The court rejected the request, while at the same time admitting the applicant's

medical record in evidence. At the end of the day the hearing was adjourned to 24 December 2002.

31. On 20 December 2002 the Guardianship Council appointed the administration of the Omsk Regional Psychiatric Hospital as the applicant's guardian and delivered an authorisation for his extended confinement in the hospital.

32. On 24 December 2002, without holding a hearing, the District Court closed the proceedings because the hospital, as the applicant's only legitimate guardian, had revoked its request for authorisation of his confinement. The applicant's confinement was thus considered to be "voluntary", and therefore did not require court approval.

33. On the same day, the applicant's father and fiancée asked the court to give them a copy of the decision, so that they could lodge an appeal. The judge refused because the applicant's father, who was no longer his guardian, could not act on behalf of the applicant. The court also denied a request to consider the applicant's fiancée to be his representative.

34. On 27 January 2003, the applicant's fiancée wrote a letter to the Guardianship Council where she requested that the council appoint her as the guardian of "her husband, Mr. Lashin". There is no information whether she received any reply.

35. On an unspecified date the applicant's father lodged an appeal against the decision of 24 December 2002. On 10 February 2003 the Regional Court refused to examine the appeal on the grounds that the applicant's father had no right to represent his son and that no decision on the merits of the case had been taken by the first-instance court.

36. On 2 February 2003 the applicant's fiancée lodged a supervisory review appeal, which was returned to her without examination on 13 February 2003 on the basis that she had no power to represent the applicant.

37. In the following months the applicant's father and fiancée lodged several criminal-law complaints against the hospital and its doctors. Their complaints were addressed to various state authorities and the courts. It appears that none of those complaints was successful.

38. On an unspecified date the applicant's father challenged the decision of the Guardianship Council of 6 December 2002, as approved by the municipal authorities on 10 December 2002, stripping him of his status as the applicant's guardian. On 16 July 2003 the Kuybyshevskiy District Court of Omsk upheld the decision of the Guardianship Council. The District Court found that the applicant's father had neglected his duties on many occasions and had tried to entrust the guardianship to a third party, referring in particular to the episode concerning the power of attorney (see paragraph 19 above). The court also noted that the applicant's father had failed to secure appropriate medical treatment for the applicant as prescribed by the doctors, as a result of which the applicant's condition had

worsened. According to the applicant, he lodged an appeal against that decision.

39. In their letters to the Court of 28 July 2002 and 25 July 2003 the applicant and his fiancée informed the Court of their desire to marry.

40. On 10 October 2003 the Guardianship Council decided to appoint the applicant's daughter as his guardian. That decision was approved by the municipality on 17 October 2003.

41. On 10 December 2003 the applicant was released from the town hospital. The medical report issued in connection with the applicant's discharge indicated that his mental health during his confinement had been predominantly characterised by "litigious" ideas similar to those he had presented at the time of his admission.

42. It appears that in 2006 the applicant's relatives brought court proceedings seeking to restore the applicant's full legal capacity. The Court has not been provided with any information about the outcome of those proceedings.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Legal capacity

1. Substantive provisions

43. Under Article 21 of the Civil Code of the Russian Federation of 1994, any individual aged 18 or more has, as a rule, full legal capacity (*дееспособность*), which is defined as "the ability to acquire and enjoy civil rights, [and] create and fulfil civil obligations by his own acts". Under Article 22 of the Civil Code, legal capacity can be limited, but only on the grounds defined by law and within a procedure prescribed by law.

44. According to Article 29 of the Civil Code, a person who cannot understand or control his or her actions as a result of a mental disease may be declared legally incapacitated by a court and placed in the care of a guardian (*опека*). All legal transactions on behalf of the incapacitated person are concluded by his guardian. In practical terms this means that the guardian ensures mandatory representation of the incapacitated person in all matters concerning his property, income, work relations, travel and residence, social contacts and so on. The incapacitated person can be declared fully capable if the grounds on which he or she was declared incapacitated cease to exist.

45. Article 30 of the Civil Code provides for the partial limitation of legal capacity. If a person's addiction to alcohol or drugs is creating serious financial difficulties for his family, he can be declared partially incapacitated. That means that he is unable to conclude large-scale

transactions. He can, however, dispose of his salary or pension and make small transactions, under the control of his guardian.

46. Under Article 35 (4), where a person deprived of legal capacity is placed under the supervision of a medical institution, that medical institution must take on the functions of the guardian.

47. It follows from Article 39 (3) of the Civil Code that the guardianship authority may revoke the authority of a guardian who neglects his duties.

2. Incapacitation proceedings

48. Article 258 of the Code of Civil Procedure of 1964, as in force at the material time (hereinafter "the old CCP"), established that members of the family of the person concerned, a prosecutor, a guardianship authority or a psychiatric hospital, as well as "trade unions and other organisations", might apply to a court seeking to deprive a person of his legal capacity. The court, if there was evidence of a mental disorder, was required to commission a forensic psychiatric examination of the person concerned (Article 260). The case was required to be heard in the presence of the person concerned, provided that his presence was compatible with his state of health, and also in the presence of the prosecutor and a representative of the guardianship authority (*орган опеки и попечительства*, Article 261 paragraph 2 of the old CCP). Under Article 263 of the old CCP it was possible for legal capacity to be restored by a court decision upon the application of the guardian or the persons listed in Article 258, but not based on the application of the person declared incapacitated.

49. Article 32 of the old CCP provided that a person declared incapacitated could not bring an action before the courts. The guardian was entitled to do so in order to protect the rights of the incapacitated person.

B. Confinement to a psychiatric hospital

50. The Psychiatric Care Act of 1992, as amended (hereinafter "the Act"), stipulates that any recourse to psychiatric aid must be voluntary. However, a person declared fully incapacitated may be subjected to psychiatric treatment at the request or with the consent of his official guardian (section 4 of the Act).

51. Section 5 (3) of the Act provides that the rights and freedoms of persons with mental illnesses cannot be limited solely based on their diagnosis or the fact that they have undergone treatment in a psychiatric hospital.

52. Under section 5 of the Act a patient in a psychiatric hospital can have a legal representative. However, pursuant to section 7 (2) the interests of a person declared fully incapacitated are represented by his official guardian or, in absence of an officially appointed guardian, the administration of the psychiatric hospital where the patient is confined.

53. Section 28 (1) of the Act ("Grounds for hospitalisation") provides that a person suffering from a mental disorder may be placed in a psychiatric hospital for further examination or treatment on the basis of a decision by a psychiatrist or on the basis of a court order. Section 28 (3) and (4) states that a person declared incapacitated can be placed in a psychiatric hospital at the request or with the consent of his guardian. This hospitalisation is regarded as voluntary and, unlike non-voluntary hospitalisation, does not require court approval (sections 29 and 33 of the Act).

54. Section 29 sets out the grounds for non-voluntary placement in a psychiatric hospital in the following terms:

> "A mentally disturbed individual may be hospitalised in a psychiatric hospital against his will or the will of his legal representative and before a court decision [on the matter] has been taken, if the individual's examination or treatment can only be carried out in in-patient care, and the mental disorder is severe enough to give rise to:
>
> a) a direct danger to the person or to others, or
>
> b) the individual's helplessness, i.e. inability to take care of himself, or
>
> c) a significant health impairment as a result of a deteriorating mental condition, if the affected person were to be left without psychiatric care."

55. Section 32 of the Act specifies the procedure for the examination of patients compulsorily confined in a hospital:

> "1. A person placed in a psychiatric hospital on the grounds defined by section 29 of the present Act shall be subject to compulsory examination within 48 hours by a panel of psychiatrists of the hospital, who shall take a decision as to the need for hospitalisation. ...
>
> 2. If hospitalisation is considered necessary, the conclusion of the panel of psychiatrists shall be forwarded to the court having territorial jurisdiction over the hospital, within 24 hours, for a decision as to the person's further confinement in the hospital."

56. Sections 33-35 set out the procedure for judicial review of applications for the non-voluntary in-patient treatment of mentally ill persons:

Section 33

> "1. Non-voluntary hospitalisation for in-patient psychiatric care on the grounds laid down in section 29 of the present Act shall be subject to review by the court having territorial jurisdiction over the hospital.
>
> 2. An application for the non-voluntary placement of a person in a psychiatric hospital shall be filed by a representative of the hospital where the person is detained ...
>
> 3. A judge who accepts an application for review shall simultaneously order the person's detention in a psychiatric hospital for the term necessary for that review."

Section 34

"1. An application for the non-voluntary placement of a person in a psychiatric hospital shall be reviewed by a judge, on the premises of the court or hospital, within five days of receipt of the application.

2. The person shall be allowed to participate personally in the hearing to determine whether he should be hospitalised. If, based on information provided by a representative of the psychiatric hospital, the person's mental state does not allow him to participate personally in the hearing, the application shall be reviewed by the judge on the hospital's premises. ..."

Section 35

"1. After examining the application on the merits, the judge shall either grant or refuse it. ..."

57. On 5 March 2009 the Constitutional Court of Russia adopted Ruling No. 544-*O-P* in which it examined the compatibility of sections 32 and 34 (1) and (2) of the Psychiatric Care Act with Article 22 of the Constitution of the Russian Federation, which provides that a person can be arrested without a court order for a maximum period of forty-eight hours. The Constitutional Court found that the Psychiatric Care Act did not allow non-voluntary hospitalisation in a mental clinic for more than fourty-eight hours without a court order (point 2.3 of the Ruling). It appears from the last paragraph of point 2.2 of the Ruling that the Constitutional Court did not consider that an interim decision taken by a judge by virtue of section 33 (3) of the Act qualified as a "court order" within the meaning of Article 22 of the Constitution, since the judge in such a situation did not examine the reasons for the confinement and had no power to release the person concerned. However, the Constitutional Court did not declare the relevant provisions of the Psychiatric Care Act unconstitutional.

58. Section 36 (3) of the Act provides for the courts to verify every six months whether the patient's non-voluntary confinement continues to be necessary.

59. Section 37 (2) establishes the rights of a patient in a psychiatric hospital. In particular, the patient has the right to communicate with his lawyer without censorship. However, under section 37 (3) the doctor may limit the patient's rights to correspond with other persons, have telephone conversations and meet visitors.

60. Section 47 of the Act provides that the doctors' actions are open to appeal before a court. Section 48 stipulates *inter alia* that the person whose rights are affected by the actions of the psychiatric institution must participate in the court proceedings if it is compatible with his or her mental condition.

C. State and private expert institutions

61. The State Forensic Expert Activities Act of 2001 (no. 73-FZ) defines the basic principles of the functioning and organisation of the State forensic institutions, which are supposed to assist judges, prosecutors and investigators in their professional activities where technical or scientific knowledge in a particular field is needed. Section 41 of that Act provides that forensic examination may be conducted by experts not belonging to the State forensic institutions, in accordance with Russia's procedural laws.

62. Article 75 of the old CCP provided that an expert examination had to be entrusted to "experts of the appropriate expert institutions or to other specialists appointed by the court. Any person having the appropriate knowledge [to give expert evidence] might be called [to testify before the court]."

D. Family Code

63. Article 14 of the Family Code of the Russian Federation of 1995 (Federal Law No. 223-FZ) makes it impossible to marry if at least one of the would-be spouses has been declared incapable by a court because of a mental illness.

64. Under Article 16 of the Family Code a marriage may be dissolved at the request of the guardian of a spouse who has been declared incapable by the court.

E. International instruments concerning legal capacity and confinement to a psychiatric institution

65. On 23 February 1999 the Committee of Ministers of the Council of Europe adopted "Principles concerning the legal protection of incapable adults", Recommendation No. R (99) 4. The relevant provisions of these Principles read as follows:

Principle 2 – Flexibility in legal response

"1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable suitable legal responses to be made to different degrees of incapacity and various situations. ...

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned."

Principle 3 – Maximum reservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete

removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportionate to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ..."

Principle 13 – Right to be heard in person

"The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity."

Principle 14 – Duration review and appeal

"1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews. ...

3. There should be adequate rights of appeal."

66. The United Nations Convention on the Rights of Persons with Disabilities (the "CRPD"), which Russia signed on 24 September 2008 and ratified on 25 September 2012, provides in Article 12 (3) that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life". Article 12 (4) stipulates:

"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 ... 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. ..."

Article 23 (a) of the CRPD establishes that "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."

F. Comparative law

67. A comparative law research concerning the law of persons with mental disabilities to marry and covering 25 member States of the Council of Europe demonstrated that in approximately one half (13/25) of the States

an incapacitation decision automatically leads to the loss of the right to marry. In approximately one third (9/25) of them a guardian's consent to the conclusion of marriage of an incapacitated person is needed. An express ban on the right to marry for mentally disabled persons is in place in six of the 25 member States. The language and procedures used to verify the legal consequences of the mental insufficiency in the marital sphere vary considerably from one member State to another.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

68. The applicant complained about his inability to have his legal incapacity reviewed. The Court will examine this complaint under Article 8, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The Government

69. The Government started by summarising provisions of the Russian legislation on legal capacity. They admitted that deprivation of legal capacity would constitute an interference with the private life of the person concerned. However, in the applicant's case it had been necessary in view of his diagnosis – schizophrenia, twice confirmed by doctors at the Serbskiy Institute in Moscow and the Omsk Regional Psychiatric Hospital, in 1999 and 2000 respectively. In particular, the psychiatric examination report prepared in 2000 concluded that the applicant was incapable of understanding the meaning of his actions and unable to control them. The incapacitation decision had thus been taken in order to protect the interests of other people, as well as his own interests. Such a limitation of his rights was provided for by Article 29 of the Civil Code and had therefore been "lawful". The decision to deprive him of legal capacity had been taken in the applicant's absence because he was in a psychiatric hospital at that time and his appearance before the court could therefore have been prejudicial to his health. The option of taking a decision without seeing the person

concerned was provided for under Article 261 of the Code of Civil Procedure. The case had been heard by courts at two levels of jurisdiction, which had both concluded that the applicant's illness warranted the deprivation of his legal capacity.

70. The Government further indicated that the applicant's father had ceased to be his guardian on 10 December 2002, when the Public Health Authority approved the decision of the Guardianship Council. Between 10 and 20 December 2002 the applicant had no guardian.

2. The applicant

71. The applicant argued that the decision of 26 February 2002 had been procedurally flawed. The judge conducted the hearing in the applicant's absence without giving any explanation as to why the latter's mental health prevented him from attending the hearing. The applicant acknowledged that he had suffered from some psychiatric problems, but there had been no indication that the applicant was aggressive or incapable of understanding the proceedings. It was therefore important for the judge responsible for deciding whether to restore the applicant's legal capacity to form a personal opinion about his mental capacity.

72. During the 2002 proceedings the applicant's representatives had requested that the District Court commission an independent medical body (a panel of experts from the Independent Psychiatric Association of Russia) to assess his mental capacity. This application was dismissed because in the court's view the law did not allow private entities to perform such assessments. However, Section 41 of the State Forensic Expert Activities Act explicitly stated the contrary. Moreover, Article 75 of the old CCP had provided for expert assessments to be performed by experts from the relevant institutions or by other specialists appointed by the court.

73. The applicant also stressed that, having rejected the request to commission an independent panel of experts, the District Court had not made arrangements for any other expert assessment of his mental capacity. The only State expert psychiatric institution in the Omsk Region was the Omsk Regional Psychiatric Hospital whose actions the applicant had challenged in the proceedings in question, and which had previously sought the incapacity in 2000 by applying to the prosecutor's office. It would have been contrary to the principle of equality of arms to appoint experts from the respondent hospital to assess the applicant's mental capacity.

74. The applicant also complained that after the transferral of the guardianship on 20 December 2002 to the Omsk Regional Psychiatric Hospital he had lost any possibility to have his legal capacity reviewed.

75. As to the substance of the domestic decisions, the applicant recalled that he had been entirely deprived of his legal capacity in accordance with Article 29 of the Civil Code, that is to say on the sole basis that he suffered from a mental disorder. In 2002 the judge had simply reiterated the

conclusion of the 2000 expert report and of the incapacity judgment, without establishing the actual mental capacity of the applicant at the time of the hearing. Thus, in the court's view, the mere diagnosis of a mental disability had been enough to strip the applicant of all his fundamental rights. The judge had not examined the applicant's actual capacity in any meaningful way in order to establish whether his mental health still prevented him from understanding the meaning of his actions and from controlling them. In any event, the existing legislative framework had not left the judge any other choice than to declare the person concerned fully incapacitated. The Russian Civil Code distinguished between full capacity and full incapacity, but did not provide for any borderline situation, except for drug or alcohol addicts.

B. The Court's assessment

76. The Court notes that the applicant's complaint is two-fold. First, he complained that his Article 8 rights had been breached in the 2002 proceedings seeking the restoration of his legal capacity. Second, he complained that after 20 December 2002 he had no possibility to have his legal incapacity reviewed. The Court will start its analysis by addressing the first limb of the applicant's complaint.

1. The applicant's attempts to recover his legal capacity until 20 December 2002

77. The Court recalls that deprivation of legal capacity may amount to an interference with the private life of the person concerned (see *Matter v. Slovakia*, no. 31534/96, § 68, 5 July 1999, and *Shtukaturov v. Russia*, no. 44009/05, § 83, ECHR 2008). The Government in the present case did not contest that the applicant's incapacitation had amounted to such an interference, and the Court does not see any reason to hold otherwise, especially in view of various serious limitations to the applicant's personal autonomy which that measure entailed.

78. Under the six-month rule in Article 35 of the Convention the Court is precluded from examining the original incapacitation proceedings of 2000. That being said, the Court may examine the applicant's situation under Article 8 of the Convention insofar as his attempts to have his capacity restored in 2002 are concerned (see the admissibility decision of 6 January 2011 in the present case).

79. An issue arises as to whether the applicant's inability to obtain the review of his status must be examined in terms of the interference by the State with his Article 8 rights or rather in view of the positive obligations of the State under that provision. The Court recalls in this respect that whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under

paragraph 1 of Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole (see *Oluić v. Croatia*, no. 61260/08, § 46, 20 May 2010, with further references). This approach is fully applicable in the case at hand: the Court will examine whether a fair balance was struck between his Article 8 rights and any other legitimate interest, private or public, which may have been at stake in the 2002 proceedings.

80. The Court accepts that depriving someone of his legal capacity and maintaining that status may pursue a number of legitimate aims, such as to protect the interests of the person affected by the measure. In deciding whether legal capacity may be restored, and to what extent, the national authorities have a certain margin of appreciation. It is in the first place for the national courts to evaluate the evidence before them; the Court's task is to review under the Convention the decisions of those authorities (see, *mutatis mutandis*, *Winterwerp v. the Netherlands*, 24 October 1979, § 40, Series A no. 33; *Luberti v. Italy*, 23 February 1984, Series A no. 75, § 27; and *Shtukaturov v. Russia*, cited above, § 67).

81. That being said, the extent of the State's margin of appreciation in this context depends on two major factors. First, where the measure under examination has such a drastic effect on the applicant's personal autonomy as in the present case (compare *X. and Y. v. Croatia*, no. 5193/09, § 102, 3 November 2011), the Court is prepared to subject the reasoning of the domestic authorities to a somewhat stricter scrutiny. Second, the Court will pay special attention to the quality of the domestic procedure (see *Shtukaturov v. Russia*, cited above, § 91). Whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8 (see *Görgülü v. Germany*, no. 74969/01, § 52, 26 February 2004).

(a) Procedural aspects

82. As to the procedural aspect of the domestic decisions, the Court first of all observes that on 26 February 2002 the domestic court refused to restore the applicant's legal capacity. The court made this decision without seeing or hearing him (see paragraph 16 above). The Court recalls that in such cases the individual concerned is not only an interested party but also the main object of the court's examination (see *X. and Y.*, cited above, § 83, with further references; see also *mutatis mutandis, Winterwerp,* cited above, § 74). There are possible exceptions from the rule of personal presence (see, as an example, *Berková v. Slovakia*, no. 67149/01, §§ 138 et seq., 24 March 2009); however, departure from this rule is possible only where the domestic court carefully examined this issue. In the present case, however,

the District Court merely stated that the applicant's personal presence would be "prejudicial to his health", and there is no evidence that the court ever sought a doctor's opinion on that particular question, namely what effect appearing in court might have had on the applicant. The Court is not aware of any other obstacles to the applicant's personal appearance in court. The Court considers that a simple assumption that a person suffering from schizophrenia must be excluded from the proceedings is not sufficient.

83. The second aspect of the domestic proceedings of concern to the Court is the refusal of the domestic court to commission a new psychiatric examination of the applicant (see paragraphs 14 and 16 above). The Court recalls its findings in *Stanev v. Bulgaria* [GC] (no. 36760/06, § 241), ECHR 2012) where it held, in the context of the right of access to court under Article 6 § 1, that "the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned".

84. The Court observes that in February 2002 more than a year and a half had elapsed since the original incapacitation decision had been taken in June 2000 (see paragraph 10 above). Nothing in the case file indicates that the applicant's condition was irreversible, or that the time elapsed since his incapacitation was too short for the question to be examined again. The Court concludes that in these circumstances the applicant was entitled to a full review of his status, which, as a matter of principle, should have included some sort of fresh expert assessment of his condition.

85. The applicant asked for a fresh examination of his mental condition and asked the court to entrust it to a non-State medical institution. However, the court refused on the sole ground that it was prohibited by law. The Court is not aware of any norm in Russian law that would prohibit a court from seeking an expert opinion from a clinic or a doctor not belonging to the State system of public health institutions. The Government did not refer to any such norm either. The fact that there is a State-run system of forensic institutions (see the domestic court's reasoning in paragraph 16 above) does not mean that they have a monopoly on providing expert opinions to the courts. On the contrary, Russian law at the time explicitly permitted examinations by experts not belonging to the State forensic institutions (see paragraph 61 above). The domestic court's decision in this respect appears to have no basis in the domestic law.

86. Further, the Court does not see what prevented the domestic court from seeking a fresh expert opinion from experts not directly affiliated with the Omsk Regional Psychiatric Hospital. The Court observes that one of the reasons for the applicant's many hospitalisations in the Omsk Regional Psychiatric Hospital were his numerous complaints about the doctors of that institution. His incapacitation was also based on the opinion of the doctors from that hospital. Nevertheless, when the applicant sought to restore his legal capacity (see paragraphs 12 et seq. above), the District Court entrusted his examination to the same hospital. In such circumstances the applicant's

demand was not frivolous: first, he refused to submit himself for an examination in the Omsk Regional Hospital, and then he asked for an examination by the doctors from the Independent Psychiatric Association of Russia (see paragraph 15 above).

87. The Court reiterates that where the opinion of an expert is likely to play a decisive role in the proceedings, as in the case at hand, the expert's neutrality becomes an important requirement which should be given due consideration. Lack of neutrality may result in a violation of the equality of arms guarantee under Article 6 of the Convention (see, *mutatis mutandis*, *Sara Lind Eggertsdóttir v. Iceland*, no. 31930/04, § 47, 5 July 2007, with further references). In the Court's opinion an expert's neutrality is equally important in the context of incapacitation proceedings, where the person's most basic rights under Article 8 are at stake.

88. The Court notes that the applicant never categorically refused to submit himself to an examination, and that he doubted the neutrality of the doctors from the Omsk Regional Psychiatric Hospital. Without taking a position as to whether his doubts were well-founded, the Court considers that in such circumstances it was the District Court's duty to make arrangements for a fresh examination of the applicant by an independent psychiatric institution – not necessarily private, but lacking direct affiliation to the Omsk Regional Psychiatric Hospital. The Government have not referred to any serious considerations that might have prevented the court from seeking such an examination.

89. The Court recalls that according to the judgment of 26 February 2002 the applicant continued to suffer from a mental disorder which had warranted his incapacitation in 2000. However, in a situation where the court did not see the person concerned personally and did not obtain a fresh assessment of his mental condition, such a conclusion cannot be regarded as reliable.

(b) Substantive aspects

90. As to the substance of the domestic decisions, the Court observes that the judgment of 26 February 2002 relied on the medical report prepared in 2000. The Court does not cast doubt on the findings of that report, in particular that in 2000 the applicant suffered from schizophrenia. However, the Court recalls that in the *Shtukaturov* case, cited above, § 94, it held that "the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation. By analogy with cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder must be "of a kind or degree" warranting such a measure". In *Shtukaturov* the Court found that in the domestic proceedings the issue of "the kind and degree" of the applicant's mental illness remained unresolved.

91. In the present case the Court faces essentially the same situation as in *Shtukaturov*. On the one hand, it is clear that the applicant suffered from a

serious and persistent mental disorder: he had delusory ideas, was a vexatious litigant, etc. On the other hand, the Serbskiy Institute report of 1999 did not refer to any particular incident of violent, self-destructive or otherwise grossly irresponsible behaviour on the part of the applicant since 1996, and did not allege that the applicant was completely unable to take care of himself (see paragraph 8 above).

92. The Court is ready to admit that some measure of protection in respect of the applicant might have been advisable. However, the Russian Civil Code did not provide for any intermediate form of limitation of legal capacity for mentally ill persons – this existed only in respect of drug or alcohol addicts (*ibid.*, § 95). Therefore, the domestic court in the present case, as in *Shtukaturov*, had no other choice than to apply and maintain full incapacity – the most stringent measure which meant total loss of autonomy in nearly all areas of life. That measure was, in the opinion of the Court and in the light of materials of the case, disproportionate to the legitimate aim pursued.

(c) Conclusion

93. In sum, the confirmation of the applicant's incapacity status in 2002 based on the report of 2000 was not justified for at least two reasons: first, because no fresh assessment of the applicant's mental condition was made (either by the doctors, or by the court itself) and the applicant was not personally present in court, and, second, because it is doubtful whether the applicant's mental condition, as described in the report of 2000, required full incapacitation. Therefore, there was a breach of Article 8 of the Convention on that account.

2. The applicant's inability to restore his legal capacity after 20 December 2002

94. The Court will now turn to the applicant's situation after 20 December 2002, when the guardianship was transferred to the Omsk Regional Psychiatric Hospital (see paragraph 31 above). The Court recalls that before that date the applicant's guardian (his father) supported the applicant's attempts to restore legal capacity. Afterwards, the situation changed when the guardianship was transferred to the hospital administration. It is clear from the materials of the case that the hospital sought the applicant's confinement and was opposed to his attempts to recover his legal capacity. Thus, from 20 December 2002 onwards, the applicant had no opportunity of challenging his status.

95. Subsequently, the applicant's father tried to reinstate himself as the applicant's guardian (see paragraph 38 above). If successful, he would have been able to challenge the applicant's status again. However, the attempt failed with the judgment of 16 July 2003 by the Kuybyshevskiy District Court, which appears to have been the final decision on that matter. From

that date onwards the applicant was fully dependant on the psychiatric hospital.

96. The Court recalls its findings in the *Shtukaturov* case, cited above, § 90, where it criticised the Russian law on incapacitation in the following terms:

> " [T]he Court notes that the interference with the applicant's private life was very serious. As a result of his incapacitation the applicant became fully dependant on his official guardian in almost all areas of life. Furthermore, "full incapacitation" was applied for an indefinite period and could not, as the applicant's case shows, be challenged otherwise than through the guardian, who opposed any attempts to discontinue the measure ..."

In the present case the situation was identical: the applicant could only challenge his status through the guardian, who opposed any attempts to discontinue the measure. That situation continued at least until 10 October 2003, when the applicant's daughter was appointed as his guardian (see paragraph 40 above). It is unclear whether she wished to restore the applicant's status: the Court does not have sufficient information about the proceedings allegedly initiated in 2006 by the applicant's relatives (see paragraph 42 above). Be that as it may, it is clear that at least during the time when the role of the applicant's guardian was assumed by the psychiatric hospital the applicant was unable to institute any legal proceedings to challenge his status.

97. The Court reiterates that in the vast majority of cases where the ability of a person to reason and to act rationally is affected by a mental illness, his situation is subject to change. This is why the Principles concerning the legal protection of incapable adults of 1999 (see paragraph 65 above, Principle 14), recommend a periodical re-assessment of the condition of such persons. A similar requirement follows from Article 12 (4) of the CPRD (see paragraph 66 above). In *Stanev*, cited above, the Court observed that "there is now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity" (§ 243). In Russia at the time the law neither provided for an automatic review nor for a direct access to the court for an incapacitated person, so the latter was fully dependant on his guardian in this respect (see, *mutatis mutandis*, *Salontaji-Drobnjak v. Serbia*, no. 36500/05, § 134, 13 October 2009). Where, as in the present case, the guardian opposed the review of the status of his ward, the latter had no effective legal remedy to challenge the status. Having regard to what was at stake for the applicant, the Court concludes that his inability for a considerable period of time to assert his rights under Article 8 was incompatible with the requirements of that provision of the Convention. Consequently, there was a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

98. The applicant complained that his confinement in a psychiatric hospital in 2002-2003 was contrary to Article 5 §§ 1 (e) and 4 of the Convention, which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (e) the lawful detention of persons ... of unsound mind ...;
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' submissions

1. The Government

99. The Government claimed that the applicant's rights under Article 5 of the Convention had not been violated. As to the placement of the applicant in a psychiatric hospital in December 2002, the Government indicated that he had been taken there at the request of the district psychiatrist. Upon his arrival at the hospital the applicant had been immediately examined by a doctor on duty. In the ensuing forty-eight hours he had been examined by a panel of three psychiatrists. Following that examination the hospital had sent a hospitalisation request to the court. Consequently, his confinement had been requested and authorised in accordance with the domestic procedural rules established in the Psychiatric Care Act of 1992.

100. Subsequently, his further hospitalisation had been ordered in connection with the state of his health. The applicant's mental illness had been diagnosed on many occasions. Thus, according to the letter of the Ministry of Public Health and Social Development, the applicant suffered from severe schizophrenia. He had thus been incapable of understanding his actions or controlling them. Occasionally he had been in remission, but without any stable improvement in his health. Towards the end of 2002 the applicant had suffered yet another deterioration of his mental condition. He had stopped taking his medicine and visiting the district psychiatrist regularly. As a result, without proper medical supervision and treatment, there had been a risk of further deterioration of his health. In such circumstances the doctors, in accordance with the Psychiatric Care Act of 1992, had ordered the applicant's confinement against his will.

101. As to the legal remedies in force at the material time, the Government submitted that the applicant's father had been stripped of his guardianship in accordance with the law. The applicant's further

hospitalisation had been requested by the hospital, which, from 20 December 2002, had been appointed to act as his guardian. The proceedings concerning the applicant's confinement had been terminated because, after the appointment of the hospital as his guardian, his confinement had become, in domestic law, voluntary. The first-instance court had examined the case on the merits because the judge had not been informed by the parties of the decision of the Guardianship Council stripping the applicant's father of his guardianship. Under the domestic law, the applicant had been able to act, including before the courts, albeit only through his guardian.

2. The applicant

102. The applicant maintained that he had been admitted to the mental hospital against his own and his guardian's will. His psychiatric confinement in 2002 had probably been formally lawful, but his disorder had not been of a kind or degree warranting the confinement. It appears from the hospitalisation order that the psychiatrist had decided to confine the applicant in order to prevent him from lodging complaints. The Government had provided no explanation as to why the applicant's "reformist" behaviour indicated any real threat of further worsening of his state, if left without the prescribed treatment. The hospital's psychiatric report had never considered less restrictive measures such as out-patient treatment. The applicant had been detained in the mental hospital for a year, and upon his discharge his mental health remained the same as at the time of his admission.

103. The applicant noted that from 11 December 2002 his confinement had been authorised by the provisional detention order. However, in its decision of 5 March 2009 the Constitutional Court of the Russian Federation had held that a provisional detention order was not a judicial decision required in constitutional terms (see paragraph 57 above). Furthermore, in the present case the court had issued the order without hearing the applicant or his representative. Lastly, under Russian law its validity had been limited to five days, whereas the applicant had been detained pursuant to that provisional order at least until 20 December 2002, when his further confinement had been authorised by the Guardianship Council.

104. As regards the applicant's detention from 20 December 2002 onwards, the applicant noted that, formally speaking, his hospitalisation had become voluntary: the consent of the hospital – his new guardian and at the same time the detaining authority – had been considered sufficient under the domestic law for his indefinite detention without court order. In other words, he was detained on the basis of an administrative decision which was issued without the applicant being heard, and his objection to the hospital placement had been ignored. In the applicant's opinion, such consent was

no substitute for a judicial decision. His subsequent detention was therefore arbitrary.

105. The applicant further submitted that, under Russian law, the courts were required to verify every six months whether the patient's non-voluntary confinement continues to be necessary (see paragraph 58 above). It was not evident from the Government's submissions and from the documents appended thereto that the applicant had been regularly examined by a panel of psychiatrists in order to decide on the need for his continued confinement, and thus that the procedure prescribed by domestic law had been followed in this regard.

106. The applicant noted that the only way he could have applied for release from the hospital was through his guardian. However, since the detaining authority had become the applicant's guardian by virtue of law, it obtained unrestricted discretion to decide on the continuation of his detention. Thus, judicial review provided by Section 47 of the Psychiatric Care Act could not have been regarded as an effective remedy.

B. The Court's assessment

1. Compliance with Article 5 § 1

107. Insofar as the applicant's complaint under Article 5 § 1 of the Convention is concerned, his confinement in the mental hospital can be divided into two periods: between 9 and 20 December 2002, and after 20 December 2002, when the hospital became his guardian.

108. At the outset, the Court notes that it is not disputed by the parties that the applicant's confinement in the mental hospital constituted "deprivation of liberty" within the meaning of Article 5. The Government also conceded that the applicant had been confined against his will, even though subsequently the newly appointed guardian had approved that measure.

(a) General principles

109. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must comply with two major requirements. First of all, it must be "lawful" in domestic terms, including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Secondly, the Court's case-law under Article 5 requires that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Creangă v. Romania* [GC], no. 29226/03, § 84, 23 February 2012; *Herczegfalvy v. Austria*, 24 September 1992, § 63, Series A no. 244; see also *Venios v. Greece*, no. 33055/08, §§ 48, 5 July 2011, and

Karamanof v. Greece, no. 46372/09, §§ 40 et seq., 26 July 2011). That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III).

110. As to the second of the above conditions, an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement (i.e. where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, or where he needs control and supervision to prevent him, for example, causing harm to himself or other persons - see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV); thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp*, cited above, § 39; *Shtukaturov*, cited above, § 114; and *Varbanov v. Bulgaria*, no. 31365/96, § 45, ECHR 2000-X).

(b) The period between 9 and 20 December 2002

111. The Court will first examine whether the applicant's detention between 9 and 20 December 2004 was lawful under domestic law. The Court observes that the parties involved in the proceedings at that moment seemed to be uncertain about the legal framework in which they operated. Thus, the Guardianship Council decided to strip the father of his status as guardian on 6 December 2002. It is difficult to say whether that decision became effective in its own right, or only upon further confirmation by the Public Health Authority (which was obtained on 10 December 2002). Be that as it may, during that period the hospital and the court acted as if the father was still the applicant's guardian and, therefore, as if the confinement in the mental hospital was "non-voluntary".

112. In this assumption, the provisions of Sections 32 et seq. of the Psychiatric Care Act of 1992 (see paragraphs 55 and 56 above) concerning non-voluntary confinement must have applied. According to the Act, the authorities may place a person in the "preliminary confinement" for eight days in order to decide whether his further confinement is necessary. Thus, the hospital has forty-eight hours to examine the patient (Section 32 (1) of the Act), and then twenty-four hours to submit a hospitalisation request to a competent judicial authority (Section 32 (2) of the Act), which, in turn, has five days to decide on that request (Section 34 (1) of the Act).

113. The Court notes that in 2009 the Constitutional Court examined the compatibility of those provisions with Article 22 of the Constitution (see paragraph 57 above). While the Psychiatric Care Act was not declared unconstitutional, the Ruling can reasonably be construed as requiring that a person confined in a psychiatric hospital obtain full judicial review of his situation not within eight days, as provided by the Act, but within forty-

eight hours – the maximum period of detention without a court order provided for by the Constitution. The Court observes, however, that the Ruling of the Constitutional Court was formulated in indecisive terms, and the validity of the Act was finally confirmed. In any event, nothing suggests that the 2009 Ruling should have had a retroactive effect and apply to the applicant's situation. The Court concludes, therefore, that the "lawfulness" of the applicant's confinement in 2002 must be established in terms of the provisions of the Psychiatric Care Act, as it could have reasonably be interpreted at the time of the events.

114. The applicant's initial admission to the Omsk Regional Psychiatric Hospital was ordered by a district psychiatrist on 4 December 2002 (see paragraph 21 above). It appears that at that stage the requirements of the law were respected: the applicant was suffering from a mental disorder and there was a decision of a psychiatrist to conduct his further examination in the hospital (see paragraph 53 above). After the applicant's placement in the hospital on 9 December 2002, the hospital, under Section 32 of the Act, had forty-eight hours to conduct a further assessment of the applicant's mental health and twenty-four hours to seek a hospitalisation order from the court (see paragraph 55 above). Although the panel examined the applicant on the same day, which was within the time-limits, the request for further detention was received by the court only on 11 December 2002, that is more than twenty-four hours. The court then had five days under the Act to examine the request and authorise further detention or order the applicant's release (see paragraph 56 above). That time-limit was not observed either – the first hearing on was held on 17 December 2002, and at the end of that hearing the judge, without taking any decision on the substance of the case, adjourned the hearing until 24 December 2002, although the Act did not provide for such a possibility (see *Rakevich v. Russia*, no. 58973/00, § 35, 28 October 2003). The Court concludes that the applicant's detention during this first period was not authorised in accordance with the procedure prescribed by the Psychiatric Care Act.

(c) The period after 20 December 2002

115. On 20 December 2002 the hospital, which had earlier requested the applicant's confinement, became the applicant's guardian by virtue of the decision of the Guardianship Council and in accordance with Article 35 (4) of the Civil Code. According to Section 28 of the Psychiatric Care Act, if the guardian consented to the hospitalisation it was deemed "voluntary", regardless of the actual wishes of the ward, and no court authorisation for the hospitalisation was required (see paragraph 53 above). The court proceedings concerning the applicant's confinement were consequently terminated.

116. The applicant's situation during the second period closely resembles the one examined by the Court in the *Shtukaturov* case (cited

above, § 21). The Court reiterates that confinement in a psychiatric hospital does not necessarily become "voluntary" in Convention terms because the consent of the guardian was obtained. Although it is sometimes difficult to discern the genuine will of a mentally ill person (see, for example, *Storck v. Germany*, no. 61603/00, § 74, ECHR 2005-V), the Court is confident that in the present case the applicant did not agree to the hospitalisation. This is clearly demonstrated by the fact that his confinement was originally regarded as non-voluntary by all the parties involved. Despite that, from 20 December 2002 it became possible to keep him confined without a court order. As a result, the applicant was unable to enjoy the safeguards associated with the judicial process. This factor alone is sufficient, in the Court's view, to conclude that the applicant's detention was incompatible with Article 5 § 1 of the Convention.

117. Moreover, the guardian was the same medical institution which had initiated the hospitalisation, which was responsible for the patient's further treatment and which had previously been attacked in court proceedings by the applicant. In other words, the impartiality of the newly appointed guardian vis-à-vis the applicant were open to doubt.

118. Finally, in the absence of a judicial decision on the substance of the applicant's situation, it is difficult to say whether his confinement was justified in the light of the criteria set out in the *Winterwerp* case, cited above, § 39. Having examined the reports prepared by the district psychiatrist on 4 December 2002 and by the panel of three doctors inform the Omsk Regional Psychiatric Hospital on 9 December 2002, the Court notes that the applicant did indeed suffer from schizophrenia. However, those reports mostly referred to the history of the applicant's illness and did not mention recent instances of aggressive or self-destructive behaviour. It appears that the major reason for the confinement in 2002 were his numerous complaints to various State bodies, in particular his complaints against his doctors, but those incidents were clearly not such as to warrant his confinement (cf. *Stanev v. Bulgaria*, cited above, § 157).

119. The Court reiterates that normally it would not review the opinion of a doctor whose impartiality and qualifications were not called into question and who had the benefit of direct contact with the patient. In the present case, however, the Court is prepared to take a critical view of the findings of the psychiatrists, mostly because (a) their conclusions were not submitted to judicial scrutiny at the domestic level, (b) their neutrality was open to doubt, and (c) their reports were not specific enough on points which are crucial for deciding whether compulsory hospitalisation was necessary.

(d) Conclusion

120. The above elements are sufficient for the Court to conclude that the applicant's hospitalisation between 9 December 2002 and 10 December 2003 was contrary to Article 5 § 1 of the Convention.

2. Compliance with Article 5 § 4 of the Convention

121. The Court reiterates the principle established in § 39 of the *Winterwerp* judgment to the effect that the validity of a person's continued confinement depends upon the persistence of mental illness of a kind or degree warranting compulsory confinement. The Psychiatric Care Act contains similar requirements, providing that the court should consider this issue every six months. However, its provisions concern only those who are confined to a hospital against their will. In domestic terms the applicant's detention was "voluntary" (see paragraph 53 above). Therefore, while the hospital remained the applicant's guardian, there was no possibility of automatic judicial review. In addition, the applicant himself, as an incapacitated person, was unable to seek release from the hospital. In a nearly identical situation the Court found that the inability of a patient of a psychiatric hospital to seek release from it otherwise than through his guardian, where there was no periodic judicial review of the lawfulness of his confinement, amounted to a violation of Article 5 § 4 of the Convention (see *D.D. v. Lithuania*, (no. 13469/06, §§ 164 et seq., 14 February 2012).

122. The Court concludes that in this situation the applicant was unable to "take proceedings by which the lawfulness of his detention [would] be decided ... by a court". There was, therefore, a breach of Article 5 § 4 of the Convention on this account.

III. ALLEGED VIOLATION OF ARTICLES 12 OF THE CONVENTION

123. The applicant complained that he had not been able to register a marriage with his fiancée. He referred to Article 12 of the Convention (right to marry), which reads as follows:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

124. The Court observes that the applicant's inability to marry was one of many legal consequences of his incapacity status. The Court has already found that the maintenance of that status (the only measure of protection applicable under the Russian Civil Code to mentally ill persons) was in the circumstances disproportionate and violated Article 8 of the Convention (see paragraph 97 above). In other words, the applicant was unable to marry primarily because of the same two major factors analysed under Article 8, namely the deficiencies in the domestic decision-making process and the rigidity of the Russian law on incapacity. In view of its findings under

Article 8 of the Convention, the Court considers that there is no need for a separate examination under Article 12 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

125. The applicant also complained that he did not have effective remedies under Article 13 of the Convention in connection with his complaints under Articles 8 and 12, set out above. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

126. The Court notes that in analysing the proportionality of the measure complained of under Article 8 it took account of the fact that the applicant had been unable to challenge that measure independently from his guardian, and that the applicant had not obtained an effective review of his status even when his guardian had sought it. In these circumstances the Court does not consider it necessary to re-examine the issue of effective remedies under Article 13 of the Convention separately (see *Shtukaturov*, cited above, §§ 132-133).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

128. The applicant claimed EUR 30,000 (thirty thousand euros) under the head of non-pecuniary damages. The Government disputed that figure as excessive and considered that the mere finding of a violation would constitute sufficient just satisfaction. The Court, taking into account the cumulative effect of the violations of the applicant's rights, their duration, and the fact that the applicant, who suffered from a mental disorder, was in a particularly vulnerable situation, and ruling on an equitable basis, awards the applicant EUR 25,000 in respect of non-pecuniary damage.

129. If, at the moment of payment of the award, the applicant is legally incapacitated, the Government should ensure that the amount awarded is transferred to the guardian, on the applicant's behalf and in his best interest.

B. Costs and expenses

130. The applicant did not ask for reimbursement of costs and expenses incurred in connection with the proceedings. The Court therefore does not award anything under this head.

C. Default interest

131. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention on account of the maintenance of the applicant's status as an incapacitated person and his inability to have it reviewed in 2002 and 2003;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's hospitalisation in the psychiatric hospital in 2002-2003;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention on account of the applicant's inability to obtain a review of the lawfulness of his detention in the psychiatric hospital;

4. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 12 of the Convention;

5. *Holds* that it is not necessary to examine separately the applicant's complaint under Article 13 of the Convention;

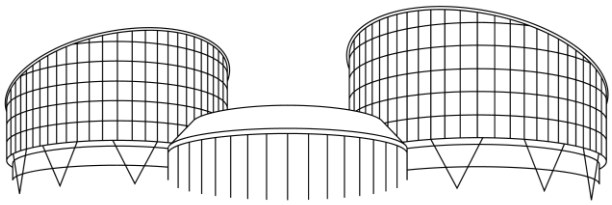
6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 25,000 (twenty-five thousand euros) in respect of non-pecuniary damage, to be converted into the Russian Roubles at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 January 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Isabelle Berro-Lefèvre President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SÝKORA v. THE CZECH REPUBLIC

(Application no. 23419/07)

JUDGMENT

STRASBOURG

22 November 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sýkora v. the Czech Republic,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Angelika Nußberger,
André Potocki,
Paul Lemmens, *judges,*
and Stephen Phillips, *Deputy Section Registrar,*

Having deliberated in private on 23 October 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 23419/07) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Czech national, Mr Milan Sýkora ("the applicant"), on 30 May 2007.

2. The applicant was represented by Mr D. Zahumenský, Ms B. Bukovská, and Mr J. Fiala, lawyers from the Mental Disability Advocacy Center in Brno. The Czech Government ("the Government") were represented by their Agent, Mr Vít A. Schorm, of the Ministry of Justice.

3. The applicant alleged, in particular, that his right to liberty and private life had been violated on account of the removal of legal capacity from him and his subsequent detention in a psychiatric hospital.

4. On 29 June 2010 the application was communicated to the Government.

5. The applicant and the Government each submitted observations on the admissibility and merits. In addition, third-party comments were received from the Harvard Law School Project on Disability, which had been granted leave by the President of the Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1949 and lives in Brno. He is a person with a psycho-social disability. He has been treated in psychiatric hospitals in the past, most recently in 1995. He has not taken any medication for many years, because he considers that it has an adverse impact on his eyesight, and has used other methods to cope with his illness.

A. Proceedings concerning the removal of the applicant's legal capacity

7. In a judgment of 15 November 2000 the Brno Municipal Court (*městský soud*) deprived the applicant of his legal capacity at the request of the City of Brno, which maintained that the applicant had not collected his pension since 1996 because he did not have an identity card. The court based its decision on an expert report by Dr. H., who had concluded in 1998 that the applicant was suffering from paranoid schizophrenia. The applicant, although aware of the proceedings, was not summoned to appear before the court and the decision was not served on him, the court referring to an opinion of Dr. H., who was heard by the court and did not recommend that this be done. The applicant was represented by Ms. M., an employee of the court, who had never met him, did not participate at the hearing and took no substantive part in the proceedings. The judgment became final on 21 December 2000.

8. On an unspecified date the applicant became aware of the court's judgment and appealed. On 27 August 2001 the Brno Regional Court (*krajský soud*) quashed the first-instance decision and remitted the case to the Municipal Court which, in a judgment of 24 November 2004, again deprived the applicant of his legal capacity and appointed the City of Brno as his guardian.

9. It based its decision on a new expert report drawn up by Dr. H. on 20 May 2004 who, however, had not been able to examine the applicant because of his refusal to have any medical examinations. She concluded that there had been no improvement in the applicant's mental health since the first report. She reiterated her findings in the 1998 report that the applicant was unable to care for himself or to manage any property, and that he was dependent on others even for daily needs. The report further stated that the applicant's presence at the hearing would not be appropriate, because he did not understand the purpose of the proceedings and was denying his mental illness, but a court judgment could be sent to him. At a hearing, the expert stated that the notification of the court judgment to the applicant would not

worsen his health, but he would not understand. She thus recommended that the judgment not be sent to the applicant.

10. The court did not hear the applicant, who continued to be formally represented by a court employee. The judgment was not served on him and became final on 1 January 2005.

11. The applicant became aware of the judgment on 20 June 2006 and appealed on 4 July 2006. He stated that the court had not notified him about the institution and outcome of the incapacitation proceedings and that Dr. H had drawn up her expert opinion without examining him. The applicant was represented by a lawyer from the Mental Disability Advocacy Center ("the MDAC").

12. On 25 October 2006 the Regional Court again quashed the Municipal Court's judgment and sent the case back to it, disputing the relevance of the expert opinion which had been drawn up without the applicant being examined. It suggested that the Municipal Court should appoint a new expert.

13. On 19 September 2007 the Municipal Court decided not to deprive the applicant of his legal capacity, basing its decision on an expert report by Dr. B., who had concluded on 11 May 2007 that the applicant was mentally ill but did not show signs of schizophrenia, was not dangerous or aggressive and was fully capable of making legal assessments. The court heard the expert, the applicant, who was legally represented, and his guardian. The judgment became final on 23 November 2007.

14. In total the applicant was deprived of legal capacity from 21 December 2000 to 27 August 2001 and from 1 January 2005 to 25 October 2006, that is for two years and six months.

B. Proceedings for damages against the State

15. On 15 January 2008, in two separate documents, the applicant requested the Ministry of Justice to award him non-pecuniary damages for the unreasonable length of incapacitation proceedings and violations of other procedural rights.

16. The Ministry joined the two requests of the applicant and on 1 September 2008 awarded him 102,000 Czech korunas (CZK, 4,602 euros (EUR)) in damages for the unreasonable length of proceedings. Regarding the rest of the applicant's claims, the Ministry accepted that the judgments had not been served on the applicant and that his rights had therefore been violated. It stated, however, that a finding of a violation constituted in itself sufficient satisfaction for any non-pecuniary damage he might have sustained.

17. The applicant brought proceedings for damages at the Prague 2 District Court (*obvodní soud*), claiming violations of his procedural rights in the incapacitation proceedings.

18. On 12 November 2008 the District Court rejected the applicant's action. On the basis of established case-law it held that the alleged shortcomings in the incapacitation proceedings could not constitute irregular official conduct for which the State could be held responsible, because there had been a decision. The applicant could have claimed damages only for a decision that became final but was later quashed as illegal. That situation however did not arise in the present case.

19. On 10 December 2009 the Municipal Court upheld the judgment of the lower court.

20. On 16 February 2012 the Constitutional Court (*Ústavní soud*) dismissed a constitutional appeal by the applicant as manifestly ill-founded. It held that the legal opinion of the ordinary courts was not unconstitutional. It noted that by claiming damages for irregular official conduct the applicant had been trying to circumvent the fact that he had not met the conditions for claiming damages for an unlawful decision. Furthermore, the decisions for which the applicant was claiming damages had never become final and so could not have interfered with his rights.

C. The applicant's detention in the Brno-Černovice Psychiatric Hospital and the ensuing proceedings

21. On 9 November 2005 the applicant had a verbal, non-violent argument with his partner, Ms J., who called the police and an ambulance. Although the police found no signs of violence and the applicant's partner confirmed that the applicant had not been aggressive, the ambulance doctor decided to take the applicant to a psychiatric hospital. The applicant disagreed but did not resist.

22. At his admission to the Brno-Černovice Psychiatric Hospital, the applicant was subjected to two specialist medical examinations. They both concluded that the applicant suffered from schizophrenia. The applicant insisted at the examinations that there were no reasons for his detention. Despite his warning that neuroleptic psychiatric medication had a negative effect on his eyesight, he was nevertheless ordered to take the medication, and when he refused it was administered by injection. As a result, according to the applicant, his eyesight deteriorated.

23. On 10 November 2005 the applicant complained about his treatment in a letter to the director of the hospital, but his letter was retained by the staff; he was informed of this on 14 November 2005. He has never received any reply from the director.

24. On 11 November 2005 the hospital notified the Municipal Court of the applicant's involuntary admission so that the court could start to review its lawfulness under Article 191a of the Code of Civil Procedure. On an unspecified date the hospital contacted the applicant's guardian (the City of Brno) which, on 14 November 2005, consented to his detention. The

employee who signed the consent had never met the applicant and did not inform him that consent had been given.

25. On an unspecified date the applicant was moved to a department with a more lenient regime, but was still not allowed to leave.

26. On 14 November 2005 he contacted the MDAC. On the same day, an MDAC lawyer stated to the Municipal Court that the applicant's involuntary detention was unlawful, and requested his release.

27. On 29 November 2005 the applicant was released from the hospital. He stated that he suffered from impaired vision and mental health for almost a year as a consequence of the treatment he received in the hospital.

28. On an unspecified date a judge of the Municipal Court informed the MDAC lawyer that the applicant had been deprived of legal capacity and that a power of attorney therefore had to be signed by his guardian. Due to the applicant's poor health after his release from the hospital, the applicant was able to visit his guardian in an office of the City of Brno only on 8 November 2006. The employee of the City of Brno he approached refused however to sign the power of attorney. On the same day, the applicant himself asked the Municipal Court for a further review of the lawfulness of his involuntary admission to the psychiatric hospital. On 24 November 2006 he was told in a letter that no proceedings in that regard had been instituted.

29. On 2 January 2007 the applicant complained to the President of the Municipal Court about delays in the proceedings. On 5 March 2007 he received a reply that no such proceedings had been instituted because his guardian had consented to his detention.

30. On 31 January 2007 the applicant lodged a constitutional appeal (*ústavní stížnost*) alleging a violation of his rights to liberty, fair hearing, respect for private life and non-discrimination due to his involuntary hospitalisation and removal of his legal capacity.

31. On 8 January 2009 the Constitutional Court dismissed his constitutional appeal for non-exhaustion of ordinary remedies. Regarding the proceedings on the review of the lawfulness of his involuntary hospitalisation, the court held that the applicant had not lodged a complaint under section 174a of the Act on Courts and Judges (no. 6/2002) requesting the court to set a date for action. Regarding the incapacitation proceedings, it held that at the time the constitutional appeal was lodged those proceedings were pending before the Municipal Court.

32. On 6 February 2009 the applicant lodged a new complaint of delays in the proceedings on the review of the lawfulness of his involuntary admission to the psychiatric hospital, and requested the court to set a date for action. On 13 March 2009 the Regional Court refused his request on the grounds that since the applicant was no longer detained no proceedings on lawfulness of his detention had been held, so there were no proceedings in which any delays could be found and which could be expedited.

33. On 21 May 2009 the applicant lodged a constitutional appeal, claiming that his psychiatric detention had never been reviewed by a court.

34. On 11 January 2012 the Constitutional Court dismissed his constitutional appeal as unsubstantiated, holding that the courts had rightly not instituted proceedings to review the applicant's detention, because his guardian had consented to it, and moreover when the applicant had requested the continuation of the proceedings he was no longer detained, which was another reason why the proceedings had had to be abandoned. It added that the applicant could institute civil proceedings for damages against the hospital, in which the lawfulness of its actions could be reviewed.

II. RELEVANT DOMESTIC LAW

A. Civil Code (Act no. 40/1964) in force at the material time

35. Under Article 10 § 1, if a natural person, because of a mental disorder which is not temporary, is totally unable to make legal decisions, the court will deprive him of legal capacity.

36. Under Article 26, if natural persons are legally incapacitated, their guardians act in their name.

B. Code of Civil Procedure (Act no. 99/1963)

37. Under Article 191a a hospital which admits a patient against his or her will must inform an appropriate court within twenty-four hours; the court will review the lawfulness of the person's involuntary admission to the hospital.

C. The Public Health Care Act (Act no. 20/1966) in force at the material time

38. Under section 23(4)(b) a person may be compulsorily medically treated and even hospitalised if he appears to show signs of a mental illness and endangers himself or his surroundings.

D. Act no. 82/1998 on State liability for damage caused in the exercise of public authority by an irregularity in a decision or the conduct of proceedings

39. Under sections 7 and 8 individuals who suffer loss because of a final unlawful decision that is later quashed or changed are entitled to claim just satisfaction.

40. Section 13 provides that the State is also liable for damage caused by an irregularity in the conduct of proceedings, including non-compliance with the obligation to perform an act or to give a decision within the statutory time-limit.

III. RELEVANT INTERNATIONAL INSTRUMENTS

A. Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006 (Resolution A/RES/61/106)

41. This Convention entered into force on 3 May 2008. It was ratified by the Czech Republic on 28 September 2009. The relevant parts of the Convention provide:

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.

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. ..."

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."

B. Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults (adopted on 23 February 1999)

42. The relevant parts of this Recommendation read as follows:

Principle 3 – Maximum reservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ..."

Principle 9 – Respect for wishes and feeling of the person concerned

"3. [This principle] also implies that a person representing or assisting an incapable adult should give him or her adequate information, whenever this is possible and appropriate, in particular concerning any major decision affecting him or her, so that he or she may express a view."

Principle 13 – Right to be heard in person

"The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity."

Principle 14 – Duration, review and appeal

"1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews ...

3. There should be adequate rights of appeal. ..."

Principle 16 – Adequate control

"There should be adequate control of the operation of measures of protection and of the acts and decisions of representatives."

Principle 19 – Limitation of powers of representatives

"1. It is for national law to determine which juridical acts are of such a highly personal nature that they can not be done by a representative.

2. It is also for national law to determine whether decisions by a representative on certain serious matters should require the specific approval of a court or other body..."

Principle 22 – Consent

"1. Where an adult, even if subject to a measure of protection, is in fact capable of giving free and informed consent to a given intervention in the health field, the intervention may only be carried out with his or her consent. The consent should be solicited by the person empowered to intervene.

2. Where an adult is not in fact capable of giving free and informed consent to a given intervention, the intervention may, nonetheless, be carried out provided that:

- it is for his or her direct benefit, and

authorisation has been given by his or her representative or by an authority or a person or body provided for by law.

3. ... Consideration should also be given to the need to provide for the authorisation of a court or other competent body in the case of certain serious types of intervention."

C. Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006

43. In this report the CPT also assessed the guardianship regime in the Czech Republic in connection with the admission of incapacitated persons to social care institutions and psychiatric hospitals. It noted that guardians have far-reaching powers with respect to their wards, and criticised the fact that they may also decide on the question of admission to a psychiatric hospital or a social care home (§ 149). It recommended that the Czech authorities consider incorporating the Council of Europe's Principles Concerning the Legal Protection of Incapable Adults and, in particular, Principle 19 (2), into the legal norms governing guardianship in the Czech Republic (§ 154).

D. Concluding Observations of the Human Rights Committee on the Czech Republic, 25 July 2007

44. The Committee expressed concern that confinement in psychiatric hospitals can be based on mere "signs of mental illness". It regretted that court reviews of admissions to psychiatric institutions do not sufficiently

ensure respect for the views of the patient, and that guardianship is sometimes assigned to attorneys who do not meet the patient. It concluded:

> "The State party should ensure that no medically unnecessary psychiatric confinement takes place, that all persons without full legal capacity are placed under guardianship that genuinely represents and defends the wishes and interest of those persons, and that an effective judicial review of the lawfulness of the admission and detention of such person in health institutions takes place in each case."

E. Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Doc. no. E/CN.4/2005/51, 11 February 2005

45. In his report the Special Rapporteur emphasised that human rights must be supported by a system of accountability, and called for the introduction of appropriate safeguards against abuse of the rights of people with mental disabilities. He advocated that an independent review body must be made accessible to individuals with mental disabilities to periodically review cases of involuntary admission and treatment (§ 71). He was further concerned by the fact that guardianship had been overused and abused in the medical, as well as other, contexts, including at the most extreme level the compulsory admission of individuals with learning disabilities in psychiatric institutions (§ 79).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

46. The applicant complained that his admission and detention in the Brno-Černovice Psychiatric Hospital violated his right to liberty. He relied on Article 5 § 1 of the Convention, the relevant part of which reads:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

A. Admissibility

47. The Court first notes that the applicant was confined to a psychiatric hospital from 9 November 2005 to 29 November 2005, that is a total of twenty days, without his consent. While his confinement was confirmed

after five days by the guardian this does not alter the fact that the applicant was deprived of his liberty involuntarily and that his continued hospitalisation against his will constituted a deprivation of liberty within the meaning of that provision (see *Stanev v. Bulgaria* [GC], no. 36760/06, §§ 122-123, ECHR 2012; *D.D. v. Lithuania*, no. 13469/06, § 122, 14 February 2012; and *Shtukaturov v. Russia*, no. 44009/05, § 109, ECHR 2008).

48. The Government maintained that the applicant had lost his status as a victim after the Ministry of Justice had acknowledged that incorrect official procedure had taken place both as a result of delays in the proceedings and as a result of failure to serve courts' decisions on the applicant, and had awarded him CZK 102,000 (see paragraph 16 above). Even though the acknowledgement concerned the proceedings on legal capacity, this must be viewed in the context of the narrow inter-connection of these proceedings and the admission of the applicant to the hospital with the consent of his guardian.

49. The applicant disagreed, arguing that his right to liberty was not an issue in those proceedings, which concerned only his incapacitation.

50. The Court observes that while compensating the applicant for the unreasonable length of the incapacitation proceedings, the Ministry did not acknowledge a violation of the applicant's right to liberty. It cannot therefore be said that the authorities have acknowledged the breach of Article 5 of the Convention and afforded redress for it. As a result, the Government's objection must be dismissed.

51. The Government further argued that the applicant had failed to exhaust domestic remedies, pointing out that his first constitutional appeal had been dismissed for non-compliance with procedural requirements. Moreover, the applicant should have instituted proceedings for damages against the State on the basis that the Brno Municipal Court had failed to decide on the lawfulness of his involuntary admission to the hospital.

52. The applicant disagreed, maintaining that he could not claim compensation from the State for unlawful detention given that his detention had been based on the national law.

53. Regarding the dismissal of the applicant's first constitutional appeal for formal reasons, the Court notes that, subsequently, the applicant's second constitutional appeal was dismissed on the merits (see paragraph 33 above). It cannot therefore be said that the applicant failed to exhaust this remedy in compliance with the procedural requirements.

54. As regards the possibility of bringing an action for damages against the State, the Court recalls that the Constitutional Court, in its decision of 11 January 2012, found the approach of the courts in the applicant's case to have been lawful and constitutional. Moreover, the Government have failed to submit any example of a decision in which an action for damages in comparable circumstances was successful. The Court therefore concludes

that an action for damages was not a remedy which the applicant was required to exhaust, and dismisses the Government's objection of non-exhaustion of domestic remedies.

55. Lastly, the Government requested the Court to apply the admissibility criterion under Article 35 § 3 (b) of the Convention, maintaining that the applicant had suffered no significant disadvantage.

56. The Court does not accept that questions going to the lawfulness of a deprivation of liberty which lasted twenty days could constitute an "insignificant" disadvantage. It accordingly dismisses this objection.

57. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions of the parties and third-party intervener

58. The applicant complained that his detention could not have been justified under Article 5 § 1 (e) of the Convention because he was not a person of unsound mind of a kind or degree warranting compulsory confinement. He stated that his detention had been neither lawful nor in accordance with a procedure prescribed by law. He had been detained on the basis of retrospective consent given by his guardian, who had never met him and had showed no interest in his hospitalisation. In his view, the Convention did not allow guardians to decide on questions of such fundamental importance without court approval and thus his detention could not be lawful as there had been no safeguards against his detention. The guardian's powers were total and unchecked.

59. The Government maintained that the applicant had a serious and long term mental disorder. He had been taken to the health care institution as a result of an emergency call by Ms J., who had reported that the applicant was being aggressive and that she had felt threatened by him. It can therefore be assumed that from the perspective of the medical specialists at the time of the confinement, the applicant's disorder had required hospitalisation, even though the aggressive behaviour had not been confirmed and Ms J. later described it as fabricated.

60. They added that the applicant's hospitalisation had been in compliance with the domestic law. As far as compliance with the procedural criteria in the light of the requirements of the Convention was concerned, the Government left that assessment to the Court's discretion.

61. The Harvard Law School Project on Disability, as third party to the proceedings, referred in their submissions to the Convention on the Rights

of Persons with Disabilities, which the Court should, in their view, take into account in interpreting the Convention.

2. The Court's assessment

62. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Moreover, any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. Furthermore, the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Stanev*, cited above, § 143).

The Court has outlined three minimum conditions for the lawful detention of an individual on the basis of unsoundness of mind under Article 5 § 1 (e) of the Convention: he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement must depend upon the persistence of such a disorder (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; and *Stanev*, cited above, § 145).

63. Moreover, a detention cannot be considered "lawful" within the meaning of Article 5 § 1 if the domestic procedure does not provide sufficient guarantees against arbitrariness (see *H.L. v. the United Kingdom*, no. 45508/99, § 124, ECHR 2004-IX; *Shtukaturov*, cited above, § 113; and *L.M. v. Latvia*, no. 26000/02, § 54, 19 July 2011). In addition, deprivations of liberty must be subject to thorough scrutiny by the domestic authorities (*Ťupa v. the Czech Republic*, no. 39822/07, §§ 37 and 61, 26 May 2011).

64. In the *H.L. v. the United Kingdom* case the Court found that the detention had not been lawful because of the absence of safeguards, understood both in the sense of procedural safeguards and of substantive guarantees to prevent arbitrariness (§ 120).

65. Turning to the present case, the Court first observes that the applicant was admitted to the psychiatric hospital as an emergency case, the doctors acting on the belief that he had been aggressive to his partner. He underwent two independent medical examinations on his admission and both doctors concluded that the applicant suffered from a mental disorder. Therefore, his detention was initially based on an objective medical expertise. However, before deciding whether also the other above

mentioned Winterwerp criteria were complied with in the present case, the Court must establish whether the applicant's detention was "lawful", in particular whether the domestic procedure provided sufficient guarantees against arbitrariness (see *L.M. v. Latvia*, cited above, § 45).

66. The Court notes that no domestic court reviewed the lawfulness of the applicant's detention as would be the normal procedure in cases of involuntary hospitalisations (see § 37 above). The reason was that since the guardian gave consent to the applicant's detention the applicant was considered, as a matter of domestic law, to be in the psychiatric hospital voluntarily. As a result, he was deprived of his liberty for twenty days solely on the basis of the consent of his guardian. The requirements for involuntary hospitalisation, both substantive in section 23(4)(b) of the Public Health Care Act and procedural in the Code of Civil Procedure, did not apply.

67. The Court observes that the opinions and reports issued by the various international bodies indicate a trend in international standards to require that detentions of incapacitated persons be accompanied by requisite procedural safeguards, namely by way of judicial review (see Principles 3, 16, 19 and 22 in paragraph 42 above; the views of the international bodies in paragraphs 42-44 above; and also *Ťupa v. the Czech Republic*, cited above, §§ 37 and 61). Judicial review, instituted automatically or brought about by the ward or some other suitable person, of a guardian's consent to deprivation of liberty of their ward could provide, in view of the Court, a relevant safeguard against arbitrariness. The trend towards such judicial review has not yet found full implementation in most Council of Europe Member States (see the Comparative Law part in *Stanev*, cited above, §§ 91-95), and it is not available in the Czech Republic in circumstances like the present case.

68. The Court observes that the only possible safeguard against arbitrariness in respect of the applicant's detention was the requirement that his guardian, which was the City of Brno, consent to the detention. However, the guardian consented to the applicant's detention without ever meeting or even consulting the applicant. Moreover, it has never been explained why it would have been impossible or inappropriate for the guardian to consult the applicant before taking this decision, as referred to in the relevant international standards (see Principle 9 in paragraph 42 above). Accordingly, the guardian's consent did not constitute a sufficient safeguard against arbitrariness.

69. There were no other substantive safeguards protecting the applicant from detention than the guardian's consent, which was not sufficient as found above. Even the protection of section 23(4)(b) of the Public Health Care Act was inapplicable once the guardian gave his consent.

70. The Court considers that, even after the applicant's detention became voluntary under domestic law, it was not lawful as it was not accompanied

by sufficient guarantees against arbitrariness. It is thus not necessary to consider the other arguments of the applicant.

71. There has accordingly been a violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

72. The applicant further complained that he did not have any opportunity to seek a judicial review of his detention. He relied on Article 5 § 4 of the Convention:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

73. The Government repeated their objection of inadmissibility already raised under Article 5 § 1 (see paragraphs 48, 51 and 55 above). They further maintained that Article 5 § 4 of the Convention was applicable only when a person was in detention, and that therefore this complaint as far as it concerned proceedings after 29 November 2005 was incompatible *ratione materiae* with the Convention.

74. The applicant disagreed. He challenged the accuracy of the Government's objection *ratione materiae*, and maintained furthermore that it was irrelevant, as his complaint concerned the absence of any opportunity to seek judicial review of his detention.

75. The Court has already rejected the Government's objection as to the victim status of the applicant above (see paragraph 50 above). As to their view that any disadvantage to the applicant was insignificant, the Court does not accept that the absence of an opportunity for the applicant to seek judicial review of his detention, which goes to the essence of Article 5 § 4 of the Convention, can constitute an insignificant disadvantage and, accordingly, dismisses the Government's objection.

76. The Court further agrees with the applicant that the question whether Article 5 § 4 applied to any proceedings after the applicant's release is not relevant to the present complaint.

77. It finally considers that the Government's objection of non-exhaustion of domestic remedies must be joined to the examination of the merits of the complaint (see *Rashed v. the Czech Republic*, no. 298/07, § 46, 27 November 2008).

78. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

79. The applicant complained that having been deprived of his legal capacity he had had no access to any judicial proceedings for a review of the lawfulness of his detention. He argued that Article 5 § 4 guaranteed this right to everyone, and therefore the consent of his guardian could not forfeit this right on his behalf without any safeguards. If that were the case the whole purpose of Article 5, which was to prevent arbitrary detentions, would be compromised.

80. The Government pointed out that under the domestic law the applicant had been admitted to the psychiatric hospital with the consent of his guardian. Moreover, his detention had not been particularly lengthy. Had it been a long-term detention the situation would have been different, as after the quashing of the Municipal Court's judgment depriving the applicant of his legal capacity, the applicant would no longer have been considered a patient detained by consent, and remedies in respect of his detention would have been available to him.

81. Article 5 § 4 of the Convention deals only with those remedies which must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention leading, where appropriate, to his or her release (*Slivenko v. Latvia* [GC], no. 48321/99, § 158, ECHR 2003-X).

82. As to the substantive content of the provision, the Court has recently considered the requirements of Article 5 § 4 of the Convention in the case of *Stanev* (cited above). It recalled that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness" of their deprivation of liberty (§ 168). The remedy must be accessible to the detained person and must afford the possibility of reviewing compliance with the conditions to be satisfied if the detention of a person of unsound mind is to be regarded as "lawful" for the purposes of Article 5 § 1 (e). The Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness; in the case of mental illness, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental illness, are not fully capable of acting for themselves (§ 170, with further references). In the case of *Shtukaturov* (cited above), the Court found that a remedy which could only be initiated through the applicant's mother – who was opposed to his release – did not satisfy the requirements of Article 5 § 4 (§ 124).

83. Turning to the present case, the Court notes that the applicant's detention lasted twenty days, which cannot be considered too short to initiate judicial review (compare for example, *a contrario*, *Slivenko*, cited

above, § 158 and *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 45, Series A no. 182). Accordingly, Article 5 § 4 is applicable in the present case.

84. The Court observes that the domestic courts were not empowered to intervene in the applicant's psychiatric confinement, the applicant having been considered to be in the psychiatric hospital voluntarily because of the consent of his guardian (see paragraph 66 above), and the Government did not indicate any other adequate remedy available to the applicant.

85. In the light of these considerations, the Court concludes that there were no proceedings in which the lawfulness of the applicant's detention could have been determined and his release ordered.

86. Consequently, it dismisses the Government's objection of failure to exhaust domestic remedies, and finds that there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

87. The applicant complained that during his detention he had been subjected to medical treatment against his will which had negatively affected his health. He further complained that the total removal of his legal capacity had interfered with his right to private and family life and that the proceedings depriving him of legal capacity suffered from procedural deficiencies. He relied on Articles 6 and 8 of the Convention. The Court considers it appropriate to examine the complaints under Article 8, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

88. The Court first reiterates that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States that have the primary responsibility for implementing and enforcing the guaranteed rights, of preventing or putting right the violations alleged against them. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *McFarlane v. Ireland* [GC], no. 31333/06,

§ 112, 10 September 2010; *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI; and *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

89. Regarding the complaint about the medical treatment in the psychiatric hospital, the Court notes that the applicant did not institute proceedings for damages against the hospital as he could have, at the latest from 25 October 2006, when the decision once to deprive him of legal capacity had been quashed. The Court considers that in these proceedings the question of compliance of the involuntary administration of medication with the applicant's rights would have been assessed and the actions of the psychiatric hospital could have been found unlawful and just satisfaction awarded to the applicant (see *Storck v. Germany*, no. 61603/00, §§ 24 and 40, ECHR 2005-V). The instant case, where the forced administration of medication lasted for twenty days, differs from the case of *X v. Finland* (no. 34806/04, § 220, 3 July 2012) where the Court did not consider a compensatory remedy sufficient, and required a preventive remedy because there the forced administration of medication lasted for almost a year. In failing to institute those proceedings, the applicant did not give the State the opportunity to put right the violations alleged against it before those allegations were submitted to the Convention institutions.

90. This part of the application must thus be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

91. Regarding the applicant's complaint about deprivation of legal capacity the Government maintained that he had lost his victim status. They referred to the decision of the Ministry of Justice acknowledging the violation of the applicant's rights by the failure to notify him of the judgments, which constituted sufficient just satisfaction given the limited time when the applicant had been deprived of his legal capacity and the not very severe consequences for the applicant.

92. The applicant argued that the consequences for him had been serious and that he had been deprived of his legal capacity for a substantial period of time.

93. The Court reiterates that an applicant may lose his victim status if two conditions are met: first, the authorities must have acknowledged, either expressly or in substance, the breach of the Convention and, second, they must have afforded redress for it. The alleged loss of the applicant's victim status involves an examination of the nature of the right in issue, the reasons advanced by the national authorities in their decision and the persistence of adverse consequences for the applicant after the decision. The appropriateness and sufficiency of redress depend on the nature of the violation complained of by the applicant (see *Sakhnovskiy v. Russia* [GC], no. 21272/03, §§ 67 and 70, 2 November 2010).

94. In the instant case the Court observes that the Ministry acknowledged a violation of the applicant's rights because the judgments

depriving him of his legal capacity had not been delivered to him but awarded no just satisfaction for that. The Court takes the view that such redress is only partial and insufficient under the case-law to deprive the applicant of his status of a victim for two primary reasons. First, the lack of delivery of the judgments, even though crucial, is just one of the applicant's complaints. The other alleged violations were thus not acknowledged. Second, a mere acknowledgement of a violation without affording redress is insufficient to deprive the applicant of his status as a victim in the context of deprivation of his legal capacity, which is a serious interference with his rights (see, *mutatis mutandis*, *Radaj v. Poland* (dec.), nos. 29537/95 and 35453/97, 21 March 2002).

95. The Court adds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

96. The applicant complained that the removal of his legal capacity had not been in accordance with the law, which was not sufficiently precise, nor was its application foreseeable. The law also had not provided sufficient procedural guarantees, only requiring that a decision must be based on an opinion of an expert who is, however, not even required to appear before the a court.

97. Furthermore, the interference had not pursued any legitimate aim and was not necessary in a democratic society. The court depriving him of legal capacity had not established any valid reasons for doing so. Moreover, he had not benefited from adequate procedural safeguards: he had not participated in the proceedings, he had not been heard at them or even notified of them, he had not been adequately represented, he could not appeal and the decision had been based only on one opinion of an expert who had not examined him.

98. The Government maintained that the proceedings on legal capacity as a whole, in connection with the compensation proceedings, had resulted in the due protection of the applicant's rights against arbitrary interference and remedy of grievances caused to him. In the end, the proceedings had resulted in an explicit rejection of the application for removal of legal capacity and acceptance of the relevant arguments of the applicant. Any interference with the applicant's rights by the decisions of the first-instance court had been very limited, as for most of the time the applicant had not even been aware that he had been deprived of legal capacity.

99. They added that the applicant was a person with a serious mental illness, and the removal of his legal capacity had also protected his own interests, such as protecting him from entering into disadvantageous or fraudulent legal contracts, or from neglecting contact with social welfare authorities or health care. Moreover, because of his often unknown official and actual place of residence, delivery of documents and contact with him had been objectively very difficult for the authorities. The applicant himself had sometimes refused to give the authorities a usable delivery address. The applicant had generally distrusted and often refused to cooperate with the authorities and especially with the expert in the period before the second judgment of the Municipal Court, which had resulted in elaboration of the expert testimony without direct examination of the applicant.

2. The Court's assessment

100. The Court notes that the applicant in the present case was initially deprived of legal capacity on 15 November 2000, on the request of the City of Brno, as he had not collected his pension for four years. The applicant, represented by a court employee who had never met him, was not summoned or present, although he was aware of the proceedings. The decision was quashed on 27 August 2001, and a fresh decision was taken on 24 November 2004. The new decision was taken on the basis of a fresh report, although the applicant had refused to be examined. The applicant, still nominally represented by a court employee, was not present and did not receive a copy of the judgment. The applicant, now represented by the MDAC, appealed on 4 July 2006, and on 25 October 2006 the first instance decision was quashed as the applicant had not been examined. In September 2007, the court decided not to deprive the applicant of his legal capacity. The applicant was thus deprived of his legal capacity for a total of two years and six months (see § 14 above).

101. The Court considers that the removal of the applicant's legal capacity for two and a half years over a period of six years constituted an interference with his private life within the meaning of Article 8 of the Convention, and notes that indeed there is no dispute between the parties on this point. It recalls that any interference with an individual's right to respect for his private life will constitute a breach of Article 8 unless it was "in accordance with the law", pursued a legitimate aim or aims under paragraph 2, and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought.

102. In such a complex matter as determining somebody's mental capacity the authorities should enjoy a wide margin of appreciation. This is mostly explained by the fact that the national authorities have the benefit of direct contact with those concerned, and are therefore particularly well placed to determine such issues. However, whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-

making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8. The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism (see *Shtukaturov*, cited above, § 87-89). Regarding the procedural guarantees, the Court considers that there is a close affinity between the principles established under Articles 5 § 1 (e), 5 § 4, 6, and 8 of the Convention (see *Shtukaturov*, cited above, §§ 66 and 91).

103. Any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence. An expert medical report should explain what kind of actions the applicant is unable to understand or control and what the consequences of his illness are for his social life, health, pecuniary interests, and so on. The degree of the applicant's incapacity should be addressed in sufficient detail by the medical reports (see *Shtukaturov*, cited above, §§ 93-94).

104. The Court takes note of the applicant's contention that the measure applied to him had not been lawful and did not pursue any legitimate aim. However, in its opinion, it is not necessary to examine these aspects of the case, since the decision to remove legal capacity from the applicant was in any event disproportionate to the legitimate aim invoked by the Government for the reasons set out below (see *Shtukaturov,* cited above, § 86). In taking this approach, the Court notes also the fact that the Civil Code on the basis of which the applicant was deprived of his legal capacity will be superseded by a new Civil Code which takes effect on 1 January 2014. Consequently, the effect of any pronouncement by the Court on the current domestic provisions concerning deprivation of legal capacity would be limited.

105. The Court first considers, unlike the Government, that, even though only temporary, the removal of the applicant's legal capacity had serious consequences for him. In particular, once the authorities realised that he was subject to guardianship, he no longer benefitted from the guarantees available in domestic law to persons who were detained under the Public Health Care Act as in domestic law consent had been granted by the guardian without any reference being made to the applicant (see above, § 68).

106. The Court next notes that although the domestic courts ultimately decided not to deprive the applicant of his legal capacity (in the decision of 19 September 2007), the applicant was nevertheless substantially affected by the deprivation of capacity. In the second period, which lasted from 24 November 2004 until 25 October 2006, the applicant was detained, ultimately on the sole ground that the guardian had consented. The Court thus considers, unlike the Constitutional Court (see paragraph 20 above), that the first-instance decisions taken in this respect did seriously interfere with the applicant's rights (see *Berková v. Slovakia*, no. 67149/01, § 175,

24 March 2009 and *Shtukaturov*, cited above, § 90). Furthermore, the applicant was not compensated for the alleged violations of his rights in the subsequent civil proceedings against the State for damages (see paragraph 94 above).

107. The Court observes that the Municipal Court did not hear the applicant, either in the first round or the second round of proceedings, and indeed he was not even notified formally that the proceedings had been instituted (see *Shtukaturov*, cited above, §§ 69-73 and 91). The Court does not accept the Government's argument that the applicant's place of residence was unknown to the authorities and therefore it was difficult to deliver official mail to him. Nowhere in the case file is there anything to indicate that the Municipal Court made an attempt to inform the applicant of the proceedings and summon him to the hearings. In such circumstances it cannot be said that the judge had "had the benefit of direct contact with those concerned", which would normally call for judicial restraint on the part of this Court. The judge had no personal contact with the applicant (see *X and Y v. Croatia*, no. 5193/09, § 84, 3 November 2011).

108. As to the way in which the applicant was represented in the legal capacity proceedings, the Court is of the opinion that given what was at stake for him proper legal representation, including contact between the representative and the applicant, was necessary or even crucial in order to ensure that the proceedings would be really adversarial and the applicant's legitimate interests protected (see *D.D. v. Lithuania*, cited above, § 122; *Salontaji-Drobnjak v. Serbia*, no. 36500/05, §§ 127 and 144, 13 October 2009; and *Beiere v. Latvia*, no. 30954/05, § 52, 29 November 2011). In the present case, however, the representative never met the applicant, did not make any submissions on his behalf and did not even participate at the hearings. She effectively took no part in the proceedings.

109. Moreover, the judgments were not served on the applicant (see *X and Y v. Croatia*, cited above, § 89). The judgments expressly stated that they would not be delivered to the applicant, with a simple reference to the opinion of the court-appointed expert, even though in her second report the expert in fact stated that a judgment could be sent to the applicant. Even at the hearing she did not give any warnings about adverse effects if the applicant received the judgment, but merely recommended not sending it because he would not understand it.

110. The Court, however, considers that being aware of a judgment depriving oneself of legal capacity is essential for effective access to remedies against such a serious interference with private life. Whilst there may be circumstances in which it is appropriate not to serve a judgment on the person whose capacity is being limited or removed, no such reasons were given in the present case and, indeed, in the present case, when the applicant was aware of the judgment and was able to appeal, his appeal was successful. Therefore, had the Municipal Court respected the applicant's

right to receive the judgments, the interference would not have happened at all as the judgments would not have become final.

111. Finally, the Court observes that the 2004 decision was based only on the opinion of an expert who last examined the applicant in 1998 (see paragraph 9 above). In this context the Court cannot lose sight of the fact that development takes place in mental illness, as is also evidenced in the present case by the expert report on the applicant drawn up in 2007, on the basis of which the request to deprive the applicant of legal capacity was refused. Consequently, relying to a considerable extent on the medical examination of the applicant conducted six years earlier cannot form sufficiently reliable and conclusive evidence justifying such a serious interference with the applicant's rights (see, *mutatis mutandis*, *Stanev*, cited above, § 156). The Court notes that the expert attempted to examine the applicant between 2002 and 2004, but he refused to cooperate. Nevertheless, in the absence of strong countervailing considerations, this fact alone is not enough to dispense with a recent medical report involving direct contact with the person concerned.

112. Overall, the Court considers that the procedure on the basis of which the Municipal Court deprived the applicant of legal capacity suffered from serious deficiencies, and that the evidence on which the decision was based was not sufficiently reliable and conclusive.

113. In the light of these considerations, the Court finds that the interference with the applicant's private life was disproportionate to the legitimate aim pursued and there has been a violation of Article 8 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

115. The applicant claimed EUR 25,000 in respect of non-pecuniary damage.

116. The Government considered the claim excessive.

117. The Court is of the view that as a result of the circumstances of the case the applicant must have experienced considerable anguish and distress which cannot be made good by a mere finding of a violation of the Convention. Having regard to the circumstances of the case seen as a whole and deciding on an equitable basis, the Court awards the applicant EUR 20,000 for non-pecuniary damage.

118. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning Article 5 and 8 as far as it concerns the deprivation of applicant's legal capacity admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds* that there has been a violation of Article 8 of the Convention;

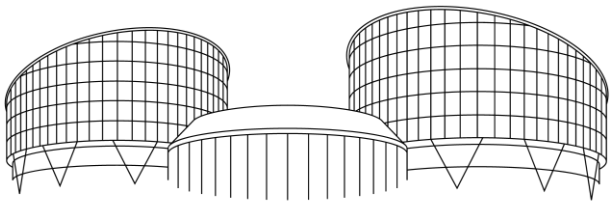
5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Czech korunas at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Dean Spielmann
President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF BUREŠ v. THE CZECH REPUBLIC

(Application no. 37679/08)

JUDGMENT

STRASBOURG

18 October 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bureš v. the Czech Republic,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Dean Spielmann, *President*,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Angelika Nußberger,
André Potocki,
Paul Lemmens, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 25 September 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37679/08) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Czech national, Mr Lukáš Bureš ("the applicant"), on 1 August 2008.

2. The applicant was represented by Ms B. Bukovská, Mr J. Fiala, Ms J. Marečková and Mr M. Matiaško, lawyers from the Mental Disability Advocacy Centre in Brno. The Czech Government ("the Government") were represented by their Agent, Mr V.A. Schorm, of the Ministry of Justice.

3. The applicant alleged that he was ill-treated in a sobering-up centre in violation of Article 3 of the Convention and detained in a psychiatric hospital in violation of Article 5 of the Convention.

4. On 16 June 2010 the application was communicated to the Government.

5. The applicant and the Government each filed observations on the merits. In addition, third-party comments were received from the Harvard Law School Project on Disability, which had been granted leave by the President of the Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1985 and lives in Brno. He is a violoncello player and has been diagnosed as having a psycho-social disability. At the material time he weighed 64 kg and was 176 cm tall. In the past, he has been treated in Italian psychiatric hospitals as a voluntary patient. At the time of the events at issue, he was using Akineton, a calming psychiatric medication prescribed to him by his psychiatrist.

7. On 9 February 2007 the applicant inadvertently overdosed on Akineton. In the evening, he left his flat and went to buy some food. Being under the influence of the medication, he did not notice that he was wearing only a sweater, but no trousers or underwear. On the way he was stopped by a police patrol that assumed that he was a drug addict and called an ambulance, which took him to Brno-Černovice Psychiatric Hospital. The record drawn up by the ambulance staff states that the applicant was receiving psychiatric treatment and that he was calm during transport.

8. At the hospital he was examined by Dr V., who did not find any injuries on the applicant's body and sent him to the sobering-up centre in the same hospital at about 8 p.m. The applicant was calm during the medical examination. In the sobering-up centre he was again examined by Dr H., who confirmed that there were no injuries on the applicant's body when he was admitted to the centre.

9. On 10 February 2007 at 7:24 a.m. the applicant was transferred to the Intensive Psychiatric Care Unit where, according to the admission record, he had visible abrasions on the front of his neck, both wrists and both ankles, caused probably by friction against textile, and abrasions of an unspecified different type on his knees. He complained about his treatment in the sobering-up centre to the hospital authorities, but they did not take any action.

10. On 15 February 2007 the applicant was examined by a neurologist, who stated that as a result of the use of straps the applicant suffered severe paresis of the left arm and medium to severe paresis of the right arm. He began a course of intensive treatment at the Rehabilitation Unit.

11. The applicant remained in the hospital involuntarily until released on 13 April 2007.

12. However, because of his two-month hospitalisation, he was confused and was not able to fully take care of himself. He voluntarily returned to the hospital on 14 April 2007 and remained there until 1 July 2007.

A. The applicant's treatment in the sobering-up centre

13. The following facts are disputed by the parties.

14. According to the applicant, at 8.10 p.m. on 9 February 2007 he was strapped to a bed with leather straps around his wrists, knees and ankles by two male nurses, Mr M. and Mr H. While strapping him, they kneeled on his chest and verbally abused him. He remained strapped for the whole night, until 6.30 a.m. The staff did not check up on him during that time. As the straps were too tight, he struggled to breathe and as a result of insufficient blood circulation the nerves in his arms were damaged.

15. According to the Government the applicant was strapped to a bed for three intervals, namely, from 8.10 p.m. to 10 p.m., 4.30 a.m. to 5 a.m. and 6.30 a.m. to 7.15 a.m.

16. They submitted a record from the sobering-up centre containing the following information. When brought to the centre the applicant was intoxicated and was put to bed. He was unstrapped at 10 p.m. At 4.30 a.m. he attacked a nurse and was strapped again. Checks were carried out. The applicant was restless. At 6.30 a.m. he was checked on and again strapped. The record noted that he showed destructive behaviour. He was released at 7.15 a.m. and sent to the psychiatric hospital.

17. The version of the record submitted by the applicant and obtained from his medical files contains less information. The information about the release of the applicant at 10 p.m. is illegible. According to the Government, the version submitted by the applicant was an incomplete version sent to the psychiatric hospital as an accompanying document.

B. Review of the lawfulness of the applicant's involuntary admission to the psychiatric hospital

18. On 12 February 2007 the hospital informed the Brno Municipal Court (*městský soud*) that the applicant had been detained because he showed signs of a mental illness and was a danger to himself and his surroundings. He was described as –"restless, aggressive and suspected of intoxication by psycho-stimulants".

19. On 16 February 2007 the court began reviewing the lawfulness of the applicant's involuntary admission under Article 191b of the Code of Civil Procedure. At the same time, it appointed an attorney, Ms P., to represent the applicant in the proceedings. On the same day a court employee visited the hospital and questioned the applicant's treating doctor, Dr V., in the absence of the applicant and his representative. Dr V. testified that the applicant had been admitted to the hospital due to his confusion, restlessness and inappropriate behaviour and that he had been intoxicated when admitted. He further stated that the applicant was only partly able to understand the proceedings. The court employee did not question or even see the applicant because Dr V. told her that contact with him "would not be entirely beneficial".

20. On the same day and without any further evidence the court ruled that the applicant's involuntary admission had been lawful because he suffered from an illness that made him dangerous to himself and his surroundings. The decision was served on the applicant's representative only. The latter did not take part in the proceedings, not being aware of them as the decision on her appointment was sent to her together with the decision on the merits. The applicant never saw her during his detention.

21. After his release in July 2007, the applicant contacted a local office of the Mental Disability Advocacy Center ("the MDAC"). On 10 July 2007 an MDAC lawyer lodged an appeal on his behalf, applying at the same time for a waiver of the deadline for lodging the appeal.

22. On 20 August 2007 the Municipal Court granted the waiver. However, on 31 October 2007, the Brno Regional Court (*krajský soud*), terminated the appeal proceedings without deciding on the merits. It stated that the applicant had been released on 13 April 2007, that on 30 May 2007 the Municipal Court had stayed the proceedings on the applicant's continuing detention and that, therefore, the court did not have the authority to deal with the case.

23. In the meantime, on 23 July 2007, the applicant lodged an action for nullity (*žaloba pro zmatečnost*) under Article 229 § 1 c) of the Code of Civil Procedure seeking to have the Municipal Court's decision of 16 February 2007 quashed on the ground that he had been denied the right to participate in the proceedings and had not been properly represented. On 22 May 2008 the Municipal Court dismissed the applicant's action, finding, *inter alia*, that Ms P. had not been wholly inactive, referring to a letter of 26 February 2007 by which she had allegedly tried to establish contact with the applicant, but which, according to the applicant, had never been delivered to him. On 25 February 2009 the Regional Court upheld the decision.

24. On 5 February 2008 the applicant lodged a constitutional appeal challenging the decision of 31 October 2007 and alleging a violation of his rights to liberty, a fair trial and an effective remedy because the Regional Court had failed to rule on the merits of his appeal and thus the legality of his detention in the psychiatric hospital.

25. On 18 March 2008 the Constitutional Court (*Ústavní soud*) dismissed his appeal on the grounds that he had not exhausted all available remedies. It held that the applicant should have lodged a plea of nullity under Article 229 § 4 of the Code of Civil Procedure against the 31 October 2007 decision of the Regional Court.

C. Review of the lawfulness of the applicant's continuing detention

26. After ruling on the lawfulness of the applicant's involuntary admission to the hospital, the Municipal Court continued proceedings under Article 191d of the Code of Civil Procedure to review the lawfulness of the

applicant's continuing detention. On 6 March 2007 a forensic psychiatric expert was appointed for these purposes. On 30 May 2007 the court terminated the proceedings without deciding on the merits, the applicant having been released in the meantime.

D. Proceedings regarding the applicant's alleged inhuman and degrading treatment

27. On 7 June 2007 the applicant filed a criminal complaint concerning the measure of restraint applied to him and alleged ill-treatment on the night from 9 to 10 February 2007 in the sobering-up centre of the psychiatric hospital.

28. He was questioned by the police on 29 June 2007 and gave a full account of the events. The police then questioned numerous other persons.

29. The male nurses on duty, Mr M. and Mr H., did not recall the applicant at all and were not able to provide any specific information about him. Mr. M noted that during the winter of 2007 checks had been always carried out in accordance with the instructions of the psychiatric hospital management.

30. The third nurse on duty that night, Ms K., stated that the applicant had been strapped to the bed because he had been restless and intoxicated by an unknown substance and had refused to undergo a blood test to identify the substance. She admitted that it was possible that regular checks every twenty minutes might not have been performed due to the high number of patients at the centre that night. She also alleged that the applicant had attacked a male nurse at 4.30 a.m. but she could not remember who exactly.

31. Dr H., who had been on duty at the sobering-up centre that night, confirmed that the applicant had had no injuries when he had been admitted. He noted that the applicant had been strapped to the bed due to his restlessness but that he and other staff had duly checked on him.

32. Nurse P. recalled that while she was taking over patients from Ms K. at around 6 a.m. in the morning of 10 February, the applicant's arms and legs had been strapped. They had tried releasing the straps one by one but because he defended himself each time a limb was released he was strapped again.

33. In his report of 10 December 2007 commissioned by the police, a forensic expert, Dr V., stated that the applicant had suffered bilateral severe paresis of the elbow nerves as a result of compression of the nerves and blood vessels. He confirmed that these injuries corresponded to the cause as described by the applicant. According to him, the injury on the applicant's left arm limited his ability to play the violoncello. He concluded that the injury would have a long-lasting effect which was unlikely to be permanent.

34. On 11 December 2007 the Brno-Komárov Municipal Police Directorate (*městské ředitelství policie*) terminated the criminal proceedings, finding that no criminal offence had been committed regarding the applicant's strapping on the night of 9 to 10 February 2007. It held that the applicant had suffered the injuries partly as a result of the staff's failure to check on him regularly but that the extent of the guilt of individual suspects could not be determined. It also held that the injuries had almost healed and that the applicant was partly responsible for them.

35. The applicant appealed, disputing the conclusions of the police, and requested that the doctors and nurses give evidence again.

36. On 12 February 2008 the Brno Municipal Prosecutors' Office (*městské státní zastupitelství*) dismissed the applicant's appeal. Without examining any additional evidence it stated that the strapping of the applicant on account of his aggressive behaviour at the time of his admission to the sobering-up centre had been in compliance with the law and the hospital's internal rules and he had been checked on every twenty minutes. The applicant had been strapped from 8.10 p.m. to 10 p.m., from 4.30 a.m. to 5 a.m. and from 6.30 a.m.

37. The applicant lodged a constitutional appeal claiming a violation of Articles 3, 6 § 1 and 13 of the Convention. He alleged that the investigation had not been effective because, *inter alia*, he had not been allowed to be present during the questioning of witnesses and put questions to them.

38. On 30 October 2008 the Constitutional Court dismissed his constitutional appeal as manifestly ill-founded. It held that there was no right to have a third person prosecuted so the applicant could claim his rights only in civil proceedings for damages and protection of his personality rights (*ochrana osobnosti*). It further found no violation of procedural obligations as developed by the Court under Article 3 of the Convention. It noted that the police had conducted a number of interviews and examined other evidence and that the investigation had also been independent and prompt. Lastly, it held that it had no jurisdiction to rule on the ill-treatment in the hospital because that was an instantaneous act, whereas it could only rule on interference with rights that was ongoing and that could be remedied by a decision on its part.

E. Proceedings for protection of his personal rights

39. On 8 December 2008 the applicant instituted proceedings for protection of his personality rights against Brno-Černovice Psychiatric Hospital, claiming a violation of his right to liberty, inhuman treatment and interference with his health and physical integrity.

40. On 19 January 2012 the Brno Regional Court rejected his claim, holding that the applicant's internment in the sobering-up centre and the use

of restraints had been necessary for his own protection and that of his surroundings.

41. The applicant appealed and the proceedings are pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Code of Civil Procedure (Act no. 99/1963)

42. Under Article 191a a health-care facility that admits a patient against his or her will must inform the competent court within twenty-four hours.

43. Under Article 191b § 1 a court has to review the lawfulness of an involuntary admission to a health-care facility within seven days. Article 191b § 2 provides that the patient has a right to be represented by counsel of his or her own choosing. If he or she does not have counsel, the court shall appoint him or her an attorney. In accordance with Article 191b § 3, the court shall assess evidence, hear the detained person, his or her treating doctor and other persons at the detained person's request unless it considers it unnecessary.

44. Under Article 191c an appeal can be lodged against a decision taken under Article 191b, but does not have a suspensive effect. The health-care facility can release the patient even if a court has declared that the involuntary admission was lawful.

45. Article 191d § 1 provides that if the court finds that the admission was lawful, it shall continue to review the lawfulness of the continued confinement. Pursuant to paragraph 2, the court shall appoint an expert to assess the necessity of the confinement. That expert must not be working in the health-care facility where the person is detained. In accordance with paragraph 3 the court shall hold a hearing and summon the patient and his or her counsel (provided that according to the treating doctor or written expert opinion the patient is able to follow and understand the meaning of the proceedings). At the hearing, the court shall hear the expert, the treating doctor if needed and the patient and assess any other relevant evidence. Its decision must be issued no later than three months from the decision by which the admission to the health care facility was approved.

46. Under Article 191f the patient, his or her counsel, guardian and other persons close to him may, before the expiration of the time for which his or her admission to the health-care facility was approved, request a new medical examination and release, if there is a reasoned presumption that continued confinement is not necessary.

47. Under Article 229 § 1 c) a final court decision may be challenged by an action for nullity on the ground that a party to the proceedings lacked legal capacity to act or could not attend the court and was not properly represented. Paragraph 4 provides that an action for nullity may also be

lodged against a final decision of an appellate court by which an appeal was dismissed or the appellate proceedings were terminated.

B. The Public Health Care Act (Act no. 20/1996)

48. Under section 23(4)(b) a person can be involuntarily hospitalised if he shows signs of a mental illness and is a danger to himself or his surroundings.

C. Act no. 379/2005, on measures for the protection against damage caused by tobacco products, alcohol and other drugs

49. Section 17(1) defines an alcohol and drug sobering-up centre as a health-care facility established by a regional self-governing unit.

50. Section 17(2) stipulates that should a health-care facility find that a person's life is not endangered by failure of basic vital functions but that he or she is under the influence of alcohol or another drug and cannot control his or her behaviour, thereby directly endangering him or herself or other persons, public order or property, or is causing public annoyance, that person shall undergo treatment and stay at the sobering-up centre for however long is necessary for the acute intoxication to subside.

D. Guideline no. 1/2005 of the Journal of the Ministry of Health, on the use of measures of restraint on patients in psychiatric facilities in the Czech Republic

51. This guideline stipulates, *inter alia*, the following:

> "The use of measures of restraint must be considered as a last resort in cases when it is necessary for the protection of the patient, other patients, the patient's surroundings and staff of psychiatric facilities. They may be used only after all other possibilities have been exhausted. Any decision to restrain the patient must be sufficiently grounded. Restraint cannot be used to facilitate treatment or to deal with a restless patient. Potential causes of problematic behaviour, for example, pain, discomfort, side effects of medicinal products, stress, interpersonal problems between the caregivers and the patient, or other illnesses must always be identified. The use of measures of restraint is justified only if a removable cause of the patient's behaviour cannot be found or in situations when the risk arising from the patient's behaviour is unacceptably high. The benefit of the use of restraining means must outweigh the risks ...
>
> 2. Measures of restraint can be used only exceptionally and only when the patient behaves in a way which endangers himself and his surroundings, and not on an educational or corrective basis. In the case of each individual patient it is necessary to use the most gentle and appropriate means of restraint ...
>
> 5. A patient restrained by these means shall be checked on on a regular basis, intervals between the checks shall be specified, provisions shall be put in place to

prevent the patient hurting himself or suffering from dehydration, malnutrition, hypothermia and pressure ulcers, and to allow for personal hygiene. Measures of restraint should be used for the shortest time possible, and during checks the need for the measures and the possibility of using less restraint should be reassessed ...

6. The doctor shall decide on the use of measures of restraint, and make a record that shall always include: the name of the person who ordered the measure of restraint, the type of restraint used, the reason for using it, the time when restraint was employed and the time when it ended, the frequency of checks by the medical staff and the doctor, a description of the person's physical and mental condition ... A member of the medical staff shall inform the doctor of any change in the patient's symptoms. The record on the use of restraint shall be subsequently signed by the head doctor during the ward round."

E. Psychiatrie, Guidelines for psychiatric treatment issued by the Czech Psychiatric Society, December 2006

52. In its section on the use of restraints the Guidelines contain similar principles as the above-mentioned Guideline no. 1/2005 of the Journal of the Ministry of Health. In particular they state that mechanical restraints should be used only as a matter of last resort. Strapping to a bed should be applied only in cases of serious manifestations of distress endangering surroundings, auto-aggressive manifestations with immediate risk of self-harm or suicide or conditions that will with the highest probability result in these manifestations.

They also state that all circumstances connected with the use of restraints must be transparently and clearly documented. Every use of restraints must be recorded in a concrete way, including, *inter alia*, the time when the restraints were applied and removed and checks on the patient.

F. Opinion of the Civil Law and Commercial Division of the Supreme Court, no. Cpjn 29/2006, as regards proceedings to determine the lawfulness of admission to and detention in a health-care facility

53. On 14 January 2009 the Supreme Court adopted an opinion on this matter, because the courts had not been dealing with cases concerning proceedings to decide on the lawfulness of admission to a health-care facility (Article 191b of the Code of Civil Procedure) and continuing confinement therein (Article 191d of the Code of Civil Procedure) in a uniform manner.

It held, *inter alia*, that if the detained person is released there are no more reasons for continuing the proceedings either under Article 191b or 191d and both should be discontinued.

III. RELEVANT INTERNATIONAL STANDARDS

A. Articles on State Responsibility (noted by the UN General Assembly resolution no. 56/83 of 12 December 2001)

54. The Articles, drawn up by the International Law Commission of the United Nations, are largely considered to contain rules of customary international law. They stipulate, *inter alia*, the following possibilities of attribution of a conduct to a State:

Article 4. Conduct of organs of a State

"1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

Article 5. Conduct of persons or entities exercising elements of governmental authority

"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

In its commentary to Article 5, the International Law Commission explained that the rule dealt with situations when entities which were not considered organs of a State exercised functions of a public character normally exercised by State organs, and the conduct of the entity was related to the exercise of the governmental authority concerned. It gave the power of detention as an example of such a public function.

B. Recommendation Rec(2004)10 of the Committee of Ministers of the Council of Europe to member states concerning the protection of the human rights and dignity of persons with mental disorders, 22 September 2004

55. Article 27, entitled "Seclusion and restraint" stipulates:

"1. Seclusion or restraint should only be used in appropriate facilities, and in compliance with the principle of least restriction, to prevent imminent harm to the person concerned or others, and in proportion to the risks entailed.

2. Such measures should only be used under medical supervision, and should be appropriately documented.

3. In addition:

i. the person subject to seclusion or restraint should be regularly monitored;

ii. the reasons for, and duration of, such measures should be recorded in the person's medical records and in a register.

4. This Article does not apply to momentary restraint."

C. The CPT Standards (the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) concerning using restraints in psychiatric establishments (CPT/Inf/E (2002) 1- Rev. 2010)

56. The CPT standards contain the following rules on restraining patients in psychiatric establishments:

"Involuntary placement in psychiatric establishments Extract from the 8th General Report [CPT/Inf (98) 12]

47. In any psychiatric establishment, the restraint of agitated and/or violent patients may on occasion be necessary. This is an area of particular concern to the CPT, given the potential for abuse and ill-treatment.

The restraint of patients should be the subject of a clearly-defined policy. That policy should make clear that initial attempts to restrain agitated or violent patients should, as far as possible, be non-physical (e.g. verbal instruction) and that where physical restraint is necessary, it should in principle be limited to manual control.

Staff in psychiatric establishments should receive training in both non-physical and manual control techniques vis-à-vis agitated or violent patients. The possession of such skills will enable staff to choose the most appropriate response when confronted by difficult situations, thereby significantly reducing the risk of injuries to patients and staff.

48. Resort to instruments of physical restraint (straps, strait-jackets, etc.) shall only very rarely be justified and must always be either expressly ordered by a doctor or immediately brought to the attention of a doctor with a view to seeking his approval. If, exceptionally, recourse is had to instruments of physical restraint, they should be removed at the earliest opportunity; they should never be applied, or their application prolonged, as a punishment ...

50. Every instance of the physical restraint of a patient (manual control, use of instruments of physical restraint, seclusion) should be recorded in a specific register established for this purpose (as well as in the patient's file). The entry should include the times at which the measure began and ended, the circumstances of the case, the reasons for resorting to the measure, the name of the doctor who ordered or approved it, and an account of any injuries sustained by patients or staff.

This will greatly facilitate both the management of such incidents and the oversight of the extent of their occurrence."

"Means of restraint in psychiatric establishments for adults Extract from the 16th General Report [CPT/Inf (2006) 35]

43. As a general rule, a patient should only be restrained as a measure of last resort; an extreme action applied in order to prevent imminent injury or to reduce acute agitation and/or violence ...

52. Experience has shown that detailed and accurate recording of instances of restraint can provide hospital management with an oversight of the extent of their occurrence and enable measures to be taken, where appropriate, to reduce their incidence.

Preferably, a specific register should be established to record all instances of recourse to means of restraint. This would be in addition to the records contained within the patient's personal medical file. The entries in the register should include the time at which the measure began and ended; the circumstances of the case; the reasons for resorting to the measure; the name of the doctor who ordered or approved it; and an account of any injuries sustained by patients or staff. Patients should be entitled to attach comments to the register, and should be informed of this; at their request, they should receive a copy of the full entry."

D. Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 7 April 2006 and from 21 to 24 June 2006 (CPT/Inf (2007)32)

57. The CPT visited also Brno-Černovice Psychiatric Hospital and stated, *inter alia*, as follows:

"118. At Brno Psychiatric Hospital ... [t]he restraints would be applied either on the patient's own bed or in a separate room close to the nurses' office. A protocol on the use of immobilisation was in force, but the protocol does not mention the surveillance intervals; it appears that the hospital staff had adopted a practice to monitoring an immobilised patient every twenty minutes.

The delegation was pleased to note that registers recording the use of restraints had been introduced on the wards of Brno Psychiatric Hospital, thus meeting a long-standing CPT recommendation. However, the delegation found that the entries were not always meticulously kept; the release time and, on occasion, the moment of application of the immobilisation were not recorded.

As indicated above (cf. paragraph 114), in the CPT's view, patients who are immobilised should always be subject to continuous, direct personal supervision by a member of staff. However, the delegation was told that a pilot project on ward 12 to have patients accompanied by a member of staff for the full duration of the immobilisation had failed due to a lack of staff. Nevertheless the CPT considers that hospital management should ensure the permanent presence of a staff member whenever a patient is immobilised.

The CPT recommends that in Brno Psychiatric Hospital:

- the register on restraints clearly records the duration of the measure, as well as all other events that occur during the period of restraint;

- the protocol on restraints be amended in order to include a paragraph on supervision of an immobilised patient.

Further, the CPT recommends that all patients who are immobilised are always subject to continuous, direct personal supervision by a member of staff."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN ITS SUBSTANTIVE ASPECT

58. The applicant complained that he had been ill-treated in the sobering-up centre in violation of Article 3 of the Convention, which reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

59. The Government contested that argument.

A. Admissibility

60. The Government maintained that the applicant had failed to exhaust domestic remedies in that the civil proceedings against the hospital were pending and they constituted a sufficient remedy for the alleged wrongs. They referred to a number of cases of medical malpractice where the Court had required exhaustion of civil remedies.

61. The applicant disagreed, maintaining that he had been wilfully restrained in detention and that in those circumstances a civil claim for compensation was not an adequate remedy.

62. The Court considers that the issue of effectiveness of a civil remedy is closely linked to the substance of the present complaint and should be joined to the merits.

63. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

64. The applicant complained that his strapping down for ten hours, with no medical justification and no regular checks, had caused him severe mental and physical suffering with long-lasting effects and had constituted inhuman treatment. Moreover, the use of restraints was not adequately and comprehensively recorded.

65. He maintained that under the applicable international and national legal and medical standards physical restraints could be used only as a matter of last resort and must be fully justified. Yet, as stated in the official reports, he had been calm when he had been transferred to the psychiatric hospital and had no history of aggressiveness. He had not needed to be strapped upon his arrival at the sobering-up centre. Moreover, his alleged restlessness could not justify such treatment, the purpose of which had rather been to ease the hospital staff's workload due to a staff shortage.

66. According to the applicant, the treatment had reached the minimum level of severity required for Article 3 of the Convention to come into play. The straps had been applied to his wrists, knees and ankles and had been so tight that he could not move, resulting in great pain and suffering. At times he had even thought that he would suffocate. The treatment had had a long-term negative effect on his health and he had been unable to finish his studies and pursue his career as a violoncello player.

67. The Government maintained that the acts of the medical staff in the sobering-up centre, who were not state agents, could not be attributed to the State. In any event, according to them, the restraining of the applicant had not reached the minimum threshold of severity required for application of Article 3 of the Convention. They considered that it was more appropriate to examine the complaint under Article 8 of the Convention. Actually, the strapping of the applicant had been necessary for the protection of his own health, it not having been possible to use a less severe measure, such as tranquilisation with medicines, because the applicant had refused to give a blood sample in order for the doctors to be able to identify the substance the influence of which he had been under.

2. The Court's assessment

(a) The relevant facts

68. Before examining the case, the Court will address the factual dispute between the parties concerning the duration of the applicant's strapping.

69. It observes that the police did not ascertain the actual duration of the strapping, referring to the applicant's version of the facts (see paragraph 34 above). However, the Brno Municipal Prosecutor established that the applicant was restrained from 8.10 p.m. to 10 p.m. on 9 February 2007, then on 10 February 2007 from 4.30 a.m. to 5 a.m. and again from 6.30 a.m. until his release from the sobering up-centre. Yet the prosecutor did not mention on what she had based her conclusions or give any reasons why the applicant's version of facts was not credible (see paragraph 36 above).

70. The Court observes that the applicant supported his description of events mainly by the sobering-up centre's record, which does not say that he was released at 10 p.m. but includes two illegible letters instead. Nevertheless, the Court considers plausible the Government's explanation

that this was a typing mistake which was remedied in the later edition of the document. The Court further observes that the document submitted by the applicant does not fully support his version of the facts either, as it states that restraints were applied at 4.30 a.m. In fact, if he had been restrained for the whole night it would not have been necessary to apply the restraints again at 4.30 a.m.

71. The Court notes, on the other hand, that the Government's version of facts is also open to doubt, being considerably undermined by the testimony of nurse P., who remembered that while taking over duty from Ms K. at 6 a.m. on 10 February, the applicant had been strapped to the bed by his arms and legs. This is precisely the time when, according to the Government, the applicant was not restrained.

72. Accordingly, even though the Court has some doubts about the exact duration of the applicant's strapping, and given that his version of the facts was not fully supported by any evidence, it will proceed to the examination of the case on the basis of the Government's description of the duration of the applicant's strapping.

(b) Negative or positive obligations

73. The Court must next consider the objection of the Government that the actions of the medical staff could not be attributed to the State.

74. The events complained of occurred during the applicant's detention in a sobering-up centre, which amounts to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention, which is not disputed by the parties (see *Witold Litwa v. Poland*, no. 26629/95, § 46, ECHR 2000-III). A person in a sobering-up centre is within the complete control of its staff.

75. The Court has considered the treatment of persons, including the application of restraints to detainees in sobering-up centres, from the point of view of the negative obligations of the State (see *Wiktorko v. Poland*, no. 14612/02, 31 March 2009, and *Mojsiejew v. Poland*, no. 11818/02, 24 March 2009).

76. Under Czech law, sobering-up centres are public bodies established by regional self-governing units that are entitled by law to hold persons under the influence of alcohol or another drug who cannot control their behaviour, thereby directly endangering themselves or other persons, public order or property, or whose condition causes a public disturbance.

77. Even accepting the Government's contention that the medical staff in the sobering up-centre are not State agents, they nevertheless perform governmental authority of detention (compare § 54 above). The State is responsible for the well-being of detainees (*Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI, and *Moisejevs v. Latvia*, no. 64846/01, § 78, 15 June 2006) and cannot evade its responsibility by delegating its power to other entities.

78. The Court further considers crucial in the present case that what is at stake is not the applicant's injury as an unintended negative consequence of medical treatment, as submitted by the Government, but the use of the restraints itself. The applicant's injury was only incidental to the intentional treatment, which is the issue from the point of view of Article 3 of the Convention. The present case significantly differs from cases where voluntary medical treatment had negative consequences on the health of patients. The Court thus does not consider the string of case-law concerning medical negligence referred to by the Government relevant to the present case. More pertinent to the present case are cases concerning the use of restraints on persons in detention, which the Court has always considered from the point of view of negative obligations (see, for example, *Herczegfalvy*, cited above, § 83; *Istratii and Others v. Moldova*, nos. 8721/05, 8705/05 and 8742/05, 27 March 2007, § 57; and *Kashavelov v. Bulgaria*, no. 891/05, § 40, 20 January 2011).

79. Consequently, the Court considers that the State must be held directly responsible for the use of restraints on the applicant in the sobering-up centre and the Court will consider that treatment in the light of the negative obligations of the State.

80. It further follows from the above that the cases of medical malpractice referred to by the Government are neither relevant to the present case in the context of exhaustion of civil remedies. The application of restraints was not medical treatment that the detainee could refuse. The issue is thus not that the applicant objected to his medical treatment, but that restraints and force were applied to him that would only be allowed by Article 3 of the Convention if made strictly necessary by his own conduct (see *Ribitsch v. Austria*, 4 December 1995, § 38, Series A no. 336).

81. The Court reiterates that in cases where an individual has an arguable claim under Article 3 of the Convention, the notion of an effective remedy entails, on the part of the State, a thorough and effective investigation capable of leading to the identification and punishment of those responsible (see *Selmouni v. France* [GC], no. 25803/94, § 79, ECHR 1999-V, and in the context of a treatment in a psychiatric hospital including application of restraints, *Filip v. Romania* (dec.), no. 41124/02, 8 December 2005). Wilful ill-treatment of persons who are within the control of agents of the State cannot be remedied exclusively through an award of compensation to the victim (see *Krastanov v. Bulgaria*, no. 50222/99, § 60, 30 September 2004, and *Kopylov v. Russia*, no. 3933/04, § 130, 29 July 2010).

82. Accordingly, a criminal complaint was an adequate remedy in the present case for the applicant's complaint that he had been ill-treated in detention (see, *mutatis mutandis*, *Mojsiejew v. Poland*, no. 11818/02, § 41, 24 March 2009, where the Court reached the same conclusion regarding death in a sobering-up centre). Once the criminal proceedings had been

terminated, the applicant was not required under Article 35 § 1 of the Convention to pursue and await the outcome of the civil proceedings instituted by him. The Government's objection of non-exhaustion of domestic remedies must therefore be rejected.

(c) General principles

83. The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances or the victim's behaviour (see, for example, *Labita v. Italy* [GC], no 26772/95, § 119, ECHR 2000-IV). Where allegations are made under Article 3 of the Convention, like in the present case, the Court must apply a particularly thorough scrutiny (see *Wiktorko*, cited above, § 48).

84. To fall under Article 3 of the Convention, ill-treatment must attain a minimum level of severity. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the gender, age and state of health of the victim. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it, as well as its context, such as an atmosphere of heightened tension and emotions (see *Gäfgen v. Germany* [GC], no. 22978/05, § 88, ECHR 2010).

85. The Court has recognised the special vulnerability of mentally ill persons in its case-law and the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in particular, to take into consideration this vulnerability (see *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III, *Rohde v. Denmark*, no. 69332/01, § 99, 21 July 2005 and *Renolde v. France*, no. 5608/05, § 120, ECHR 2008 (extracts)).

86. In respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention (see *Krastanov v. Bulgaria*, no. 50222/99, § 53, 30 September 2004). In the context of detention in a sobering-up centre, it is up to the Government to justify the use of restraints on a detained person. Regarding the use of restraining belts, the Court accepted that aggressive behaviour on the part of an intoxicated individual may require recourse to the use of restraining belts, provided of course that checks are periodically carried out on the welfare of the immobilised individual. The application of such restraints must, however, be necessary under the circumstances and its length must not be excessive (see *Wiktorko*, cited above, § 55).

87. The position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. Nevertheless, it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible. The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244).

(d) Application in the present case of the above-mentioned principles

(i) The severity of the treatment

88. The Court notes that the applicant was a young man of a fragile build, suffering from a mental illness. He was brought to the sobering-up centre in a state of intoxication, as a result of overdosing on medicine that was part of his treatment. He was thus in a particularly vulnerable position. Even though the applicant was calm during transport and admission to the hospital, he was immediately attached by restraining belts to his bed in the sobering-up centre due to his alleged restlessness. He was left in restraints for almost two hours. He was again restrained in the same way for half an hour at night on account of an alleged attack on a male nurse, and lastly for forty-five minutes the next morning for allegedly being destructive to his surroundings.

89. The Court must also take into account the serious consequences the treatment had on the applicant in evaluating whether it reached the minimum level of severity required for application of Article 3 of the Convention. It notes that an expert report commissioned by the police ten months after the treatment concluded that the applicant had suffered very severe bilateral paresis of the elbow nerves caused by the compression of nerves and blood vessels, that this injury still limited his ability to play the violoncello and that it would have a long-lasting effect which was unlikely to be permanent.

90. Accordingly, the Court considers that the strapping of the applicant must have caused him great distress and physical suffering and that Article 3 of the Convention is in principle applicable to the present case (see also the practice of the CPT, which considers the use of physical restraints an area of particular concern given the potential for abuse and ill-treatment).

(ii) The justification of the treatment

91. The Court will turn now to the examination of whether such treatment was justified in the present case and whether periodic checks were carried out.

92. According to the Government, the applicant's restriction was necessary for the protection of his own health although they did not indicate in what way the applicant's health was endangered. The Court notes that the record from the sobering up centre and the testimonies of the medical staff do not specify the extent or indeed existence of the danger the applicant posed to himself. They show that the reason for the applicant's restriction for two hours in the evening of 9 February 2007 was his restlessness. His restraint at night and in the morning was justified by his allegedly aggressive behaviour towards the medical staff.

93. The Court must determine whether the mere restlessness of a patient justifies his or her being restrained by straps to a bed for almost two hours, taking into account the current legal and medical standards on the issue (see *Herczegfalvy*, cited above, § 83).

94. The applicant was detained in a sobering-up centre, a health care facility that was part of a psychiatric hospital, the purpose of which is to treat persons under the influence of drugs. The fact that the applicant was a person suffering from a mental illness was or should have been known to the staff of the centre, as it was already stated in the record drawn up by the ambulance staff who had brought the applicant to the psychiatric hospital. Therefore the Court considers that the rules and standards on using restraints on patients with mental disabilities in psychiatric hospitals are relevant for the interpretation and application of Article 3 of the Convention to the facts of the present case.

95. The Court notes that both the European and national standards (see "Relevant domestic law" and "Relevant international standards" above) are unanimous in declaring that physical restraints can be used only exceptionally, as a matter of last resort and when their application is the only means available to prevent immediate or imminent harm to the patient or others. The Czech Guideline expressly states that restraints cannot be used when the patient is merely restless (see paragraph 51 above).

96. In line with these standards, the Court considers that using restraints is a serious measure which must always be justified by preventing imminent harm to the patient or the surroundings and must be proportionate to such an aim. Mere restlessness cannot therefore justify strapping a person to a bed for almost two hours.

97. The Court further observes that even though restraints should be used as a matter of last resort, no alternatives were tried in the applicant's case. He was restrained immediately on arrival at the sobering-up centre on account of his alleged restlessness, without any methods of calming him

down having been tried. Strapping was applied as a matter of routine. It thus cannot even be said that the domestic guideline was complied with.

98. Regarding the use of restraints as a result of the applicant's alleged aggressiveness at night and in the morning the Court agrees that attacking medical staff can be a sufficient reason for applying restraints. Nevertheless, it is not satisfied that it was conclusively established that the use of restraints was to prevent further attacks and that other means of trying to calm the applicant down, or less restrictive restraints, had been unsuccessfully tried. In this context the Court considers that it is unacceptable to use restraints as a punishment.

99. The Court observes that the two male nurses did not mention the alleged attack by the applicant at 4.30 a.m. to the police and there are no details about the nature of the attack anywhere in the case file. Ms K. only told the police that she did not remember which nurse had been attacked. The only details about any physical force used by the applicant were submitted by nurse P., who went on duty at 6 a.m. on 10 February and who reported that when any of the applicant's limbs had been unstrapped he had immediately started to defend himself and resist being strapped again. The Court, however, considers that using restraints can be hardly justified by the fact that a person resists their application.

100. The Court thus concludes that even though it is up to the Government to justify the use of restraints on a detained person (see *Wiktorko*, cited above, § 55) it has failed to show that the use of restraints on the applicant was necessary and proportionate in the circumstances.

101. In addition to this finding, the Court notes that the CPT recommended to Brno-Černovice Psychiatric Hospital that "patients who are immobilised should always be subject to continuous, direct personal supervision by a member of staff" after it found in its visit in 2005 that this was not the case (see paragraph 57 above).

102. The Court also notes that the domestic police investigation found that checks were not performed at regular intervals. The Court reiterates that restrained patients must be under close supervision. This obviously was not the case, which must have been one of the reasons for the damage to the applicant's health with long-lasting effect. The domestic authorities thus failed in their obligation to protect the health of persons deprived of their liberty (see *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III, and *Jasinskis v. Latvia*, no. 45744/08, § 60, 21 December 2010).

103. The Court further takes into account the European and national standards requiring proper recording of every use of restraints, which, among other things, facilitates any subsequent review of whether their use was justified. The Court has stressed the need for keeping proper medical notes in its case-law as well (see *Keenan*, cited above, § 114).

104. In the present case the Court finds the record kept about the use of restraints against the applicant very rudimentary. It does not contain any

information on when the restraints were first applied, merely stating that the applicant was released at 10 p.m., and that the restraints were again applied at 4.30 a.m., but not when they were removed. The record only states that the restraints were lastly applied at 6.30 a.m. and finished at 7.15 a.m. The record contains no explicit reasons for applying the restraints, save for the alleged attack on a male nurse at 4.30 a.m., yet even that is not clear from the record. Otherwise, there are only general notes about the applicant being restless, and at 6.30 a.m. as being aggressive towards his surroundings. There is no information about when checks were carried out.

105. In these circumstances the Court cannot but conclude that the records were far from satisfactory and it is evident that they undermined the proper establishment of the facts and hampered the domestic criminal investigation in the case.

106. Having regard to all the circumstances of the present case, the Court is of the view that the applicant has been subjected to inhuman and degrading treatment contrary to Article 3. There has accordingly been a substantive violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION IN ITS PROCEDURAL ASPECT

107. The applicant maintained that his complaints about his ill-treatment in the sobering-up centre had not been effectively investigated in violation of Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

108. The Government contested that argument.

A. Admissibility

109. The Government maintained that the applicant had failed to exhaust domestic remedies regarding some of his complaints concerning the alleged procedural violation of Article 3 of the Convention. In particular, in his complaint against the police authority's decision on the termination of the investigation, he had failed to mention that the proceedings had failed to satisfy the requirement of promptness and independence and had not been public because he was not allowed to be present during the questioning of witnesses and put questions to them (see paragraph 35 above).

110. The applicant disagreed.

111. The Court notes that the applicant challenged the effectiveness of the investigation before the prosecutor and the Constitutional Court (see paragraphs 35 and 37 above). It further notes that the alleged lack of independence lies not only in the conduct of the police but of the

prosecuting authorities as a whole. Therefore the applicant could not have complained of it in his appeal to the prosecutor; that is, before the alleged deficiency had materialised.

112. Regarding the complaint of lack of promptness, the Court in turn, does not consider that mentioning it in the appeal to the prosecutor could have had any effect. The police had already terminated the investigation and thus the prosecutor could not have remedied any alleged delays in the conduct of the investigation by the police.

113. Lastly, regarding the complaint that the proceedings were not public, the Court notes that in his appeal the applicant requested that the medical staff be questioned again. It also notes that he complained of the lack of their public nature in his subsequent constitutional appeal.

114. Consequently, the Government's plea of non-exhaustion of domestic remedies must be rejected.

115. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

116. The applicant complained that the investigation had not been initiated on the authorities' own motion. He had complained to the hospital authorities but they had not forwarded his complaint to the prosecuting authorities. Furthermore, it had not been effective either in law or in practice as the prosecuting authorities had not made a serious attempt to find out what happened and base their decision on established facts. The investigation had concerned only the crime of causing bodily harm and not inhuman treatment, and the investigating authorities had failed to establish the person responsible for his injuries even though the police had found out that the restraints had been used unlawfully. He had been unable to be present when the witnesses had been questioned or to suggest gathering additional evidence. The investigation had not been independent or speedy, as the investigating authorities had heavily relied on the explanations of the hospital staff, the police had taken twenty-two days to question the applicant and it had commissioned a forensic report only three months and nineteen days after the receipt of the criminal complaint.

117. The Government maintained that the investigation had been effective in that the factual circumstances of the case had been clarified to the maximum extent possible and all possible investigative steps had been taken. It was only logical that the complaint had been investigated as the criminal offence of causing bodily harm and not inhuman treatment because

there had been no intentional offence and the offender, if any, could only have been someone from the medical staff and not a State authority, local self-governing authority or a court.

118. They noted that the investigation had been instituted immediately after the police had received the criminal complaint and had proceeded with promptness.

119. In the Government's opinion the observance of the principle of the public nature and transparency of the investigation had been sufficiently secured by the fact that the applicant was able to request to be allowed to inspect the investigation file and lodge a complaint against the police authority's decision on the setting aside of the case. They also noted that in that complaint he had not challenged the content of the depositions of the medical staff at all, nor had he claimed that he should have been able to put questions to them. The Government believed that given the context, this opportunity to participate in the investigation had been sufficient to secure the applicant's rights and that transparency of the investigation and the applicant's legitimate interests had not required that the applicant be present at the questioning of the medical staff.

120. Lastly, they opined that there was no hierarchical, institutional or close working relationship between the medical staff and the police authority that could raise any doubt about the independence and impartiality of the investigation.

2. The Court's assessment

(a) General principles

121. The Court reiterates that Article 3 of the Convention requires States to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. The domestic legal system, and in particular the criminal law applicable in the circumstances of the case, must provide practical and effective protection of the rights guaranteed by Article 3 (*Đurđević v. Croatia*, no. 52442/09, § 51, 19 July 2011).

122. Where an individual makes a credible assertion that he has suffered treatment infringing Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV). Even though the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals, the requirements as to an official

investigation are similar (see *Denis Vasilyev v. Russia*, no. 32704/04, § 100, 17 December 2009).

123. In its case-law the Court has established that for an investigation to be considered effective it must be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (see *Mikheyev v. Russia*, no. 77617/01, § 108, 26 January 2006). The investigation must be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (*Denis Vasilyev v. Russia*, no. 32704/04, § 100, 17 December 2009). But the obligation on the States is not to elucidate all facts of the case but only those important for establishing the circumstances of the use of force and to determine whether official responsibility is engaged (see *Anusca v. Moldova*, no. 24034/07, § 40, 18 May 2010).

124. The investigation must further be independent, in that it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (see *Đurđević*, cited above, § 85).

125. There must be also a sufficient element of public scrutiny of the investigation. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, § 212-213, 24 February 2005). However, that does not mean that the victim's right to access to investigation in all its stages arises from the Convention, because the interests of other persons or the risk of jeopardising the achievement of the aim of the investigation can prevail over his interest (see, for example, *McKerr v. the United Kingdom*, no. 28883/95, 4 May 2001, § 129).

126. The investigation must also start promptly once the matter has come to the attention of responsible authorities and conducted with reasonable expedition.

127. Lastly, the authorities must act of their own motion once the matter has come to their attention (see *Isayeva and Others*, cited above, § 209).

(b) Application in the present case of the above-mentioned principles

128. The Court firstly observes that the police started the investigation promptly after the applicant had lodged his criminal complaint and it did not suffer from any unnecessary delays. The applicant was interviewed about two weeks after the police had received his criminal complaint. The interviews of other persons, collection of documents and drawing up of an expert report were carried out in the following months. The police closed the investigation within six months. Such length is not unreasonable to an extent that it would make the investigation ineffective. The Court adds that for the purpose of fulfilling the requirement of promptness, the investigation could not have been started when the applicant complained to the hospital staff, because they are not a state authority that could have instituted a criminal investigation.

129. Regarding the alleged lack of independence the Court does not consider that the present case can be compared to the situation in *Ergi v. Turkey* (28 July 1998, § 83, *Reports* 1998-IV) as suggested by the applicant, where the Court criticised the heavy reliance of the prosecuting authorities on a report by the gendarmerie, given that the gendarmes themselves were suspected of shooting the applicant's sister. However, in the present case, the prosecuting authorities based their conclusions on several witness testimonies, documents and an independent expert report.

130. Regarding the level of public scrutiny of the investigation, the Court observes that the applicant had access to the investigation file and could have lodged an appeal against the decision of the police to terminate the investigation. In his appeal, or indeed at any time, he was free to dispute the veracity of any evidence collected by the police or to suggest the taking of further evidence. The Court therefore finds that the applicant was involved in the procedure to the extent necessary to safeguard his legitimate interests and that it was not indispensable that he be present when the police took statements from the witnesses.

131. The Court further reiterates that it is not its task to interpret the domestic law, including the Criminal Code. Therefore, it will not express a view on whether the applicant's ill-treatment should have been investigated as the crime of torture and other inhuman or cruel treatment. It must concentrate on the purpose of the obligation of effective investigation, which is to secure an effective implementation of the domestic laws which protect the right not to be tortured and, in those cases involving State agents or bodies, to ensure their accountability (see *Kelly and Others v. the United Kingdom*, no. 30054/96, § 94, 4 May 2001) and to enable the facts to become known to the public (see *Siemińska v. Poland* (dec.), no. 37602/97, 29 March 2001).

132. It appears from the decision of the police that the main reason for the termination of the investigation was that they considered that no crime had been committed. This is explicitly stated in the decision of the

prosecutor, who considered the treatment of the applicant to have been in compliance with the law. Such conclusions are, however, hardly reconcilable with the obligation of States that the domestic legal system must provide practical and effective protection of the rights guaranteed by Article 3. The Court must take into account that the application of restraining belts on the applicant was a wilful act constituting inhuman and degrading treatment, as it has found above.

133. The Court is further struck by the resolute conclusion of the prosecutor that the applicant was aggressive at the time of his admission to the sobering-up centre and therefore he was restrained. It is not clear on what this statement is based, especially given that there is no single piece of evidence in the case file that would support such a conclusion. The written evidence and the statements mention only that the applicant was restless at the time of his admission, but not that he was aggressive. Furthermore, the prosecutor's conclusion that the applicant was checked on every twenty minutes also lacks any reasoning, which is particularly striking given that the police, on the basis of the same evidence, reached a different conclusion. Both these conclusions were crucial for the legal assessment of the events and had a direct bearing on the effectiveness of the investigation. In consequence, it cannot be said that it was thorough.

134. In view of these considerations, the Court concludes that the investigation in the present case did not provide the applicant with practical and effective protection of his rights guaranteed by Article 3. Consequently, there has been a procedural violation of Article 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

135. The applicant complained that his involuntary admission and detention in Brno-Černovice Psychiatric Hospital violated his right to liberty. He relied on Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants ..."

136. The Government contested that argument. They argued that the applicant had failed to exhaust domestic remedies and that he had been detained for two unrelated reasons, which had to be considered separately.

137. First, he had been detained in the sobering-up centre overnight from 9 to 10 February 2007. Detention in sobering-up centres involved deprivation of liberty for several hours maximum, and therefore the law did

not envisage any approval by a court. The appropriate legal tool was a subsequent reparatory remedy, namely, an action for the protection of personality rights under the Civil Code against the health care facility concerned, which the applicant had failed to lodge.

138. Secondly, the applicant had been detained in a psychiatric hospital, in which case court proceedings under Article 191b of the Code of Civil Procedure had been automatically instituted. The applicant, however, had failed to lodge a constitutional appeal in compliance with the procedural requirements. They remarked that in the months prior to the lodging of the applicant's constitutional appeal all the chambers of the Constitutional Court had adopted the approach of requiring previous recourse to an action for nullity. That approach had been subsequently confirmed by a decision of the plenary session of the Constitutional Court of 16 December 2008, no. 79/2009.

139. The applicant disagreed. First, he contested the division of his detention into two phases, holding that since 9 February 2007 he had been detained in the same psychiatric hospital, and that he had not been released from the sobering-up centre but transferred to a different unit of the hospital.

140. He then maintained that an action for nullity was not an effective remedy within the meaning of Article 35 of the Convention. Actually, such an action could not remedy the deficiencies alleged by him under Article 5 § 1 of the Convention. Moreover, lodging it would have no chance of success in view of the Opinion of the Supreme Court no. Cpjn 29/2006 (see paragraph 53 above).

141. The Court reiterates that Article 35 § 1 of the Convention requires not merely the use of the requisite remedies but that the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements laid down in domestic law (see *Sabeh El Leil v. France* [GC], no. 34869/05, § 32, 29 June 2011).

142. The Court finds, and this is not in dispute between the parties, that a constitutional appeal as such was an effective remedy within the meaning of Article 35 § 1 of the Convention. It observes that the applicant's constitutional appeal was dismissed for non-exhaustion of remedies, namely, for failing to lodge an action for nullity, without a decision on its merits.

143. The Court reiterates that it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that the Court will not substitute its own interpretation for theirs in the absence of arbitrariness. This applies in particular to the interpretation by domestic courts of rules of a procedural nature. Although procedural rules governing appeals must be adhered to as part of the concept of a fair procedure, in principle it is for the national courts to police the conduct of their own

proceedings (see *Tejedor García v. Spain*, 16 December 1997, § 31, *Reports* 1997-VIII, and *Matoušek v. the Czech Republic* (dec.), no. 32384/05, 7 September 2010).

144. On the other hand, the Court notes that on numerous occasions it has found a violation of Article 6 of the Convention because of lack of access to court, when a procedural rule was construed in a way that was unpredictable and in variance with the principle of legal certainty (see *Zvolský and Zvolská v. the Czech Republic*, no. 46129/99, §§ 53-54, ECHR 2002-IX), or the domestic court showed excessive formalism (see *Bulena v. the Czech Republic*, no. 57567/00, § 35, 20 April 2004). In these instances, it then dismissed the Government's objection to the admissibility of other complaints (see *Běleš and Others v. the Czech Republic* (dec.), no. 47273/99, 11 December 2001 and *Zvolský and Zvolská v. the Czech Republic* (dec.), no. 46129/99, 11 December 2001).

145. The Court, however, does not consider that such a situation arose in the present case. It notes that the Government extensively referred to the Constitutional Court's case-law, built up before the applicant lodged his constitutional appeal, where it had consistently required the lodging of an action for nullity before lodging a constitutional appeal. Therefore it cannot be said that its decision could not have been foreseen by the applicant (see, *a contrario*, *Faltejsek v. the Czech Republic*, no. 24021/03, § 32, 15 May 2008).

146. The Court also notes that the Opinion of the Supreme Court no. Cpjn 29/2006, relied on by the applicant, was adopted only on 14 January 2009 and thus could not have any relevance to the decision of the Constitutional Court given before.

147. In conclusion, the applicant failed to lodge a constitutional appeal in compliance with the procedural requirements, which were not applied arbitrarily, unforeseeably, or with excessive formalism.

148. Consequently, this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

149. The applicant complained that he did not have access to a proper judicial review of his detention. He relied on Article 5 § 4 of the Convention, which reads as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

150. The Government considered that the case-law on the applicability of Article 5 § 4 of the Convention was inconsistent and asked the Court to

clarify to which proceedings in the context of involuntary hospitalizations in the Czech Republic Article 5 § 4 applied. They maintained, however, that Article 5 § 4 ceased to apply once a person was released and this part of the application was therefore incompatible *ratione materiae* with the Convention.

151. The Government further raised the same inadmissibility plea on the grounds of non-exhaustion of domestic remedies, submitting the same arguments as in the context of Article 5 § 1 of the Convention.

152. The applicant disagreed and maintained that Article 5 § 4 continued to apply even after a detainee's release.

153. Regarding the objection of non-exhaustion of domestic remedies, the applicant referred to his submissions under Article 5 § 1.

154. The Court does not consider it appropriate in the context of the present case to examine the question of applicability of Article 5 § 4 to the appeal proceedings brought by the applicant after his release as the applicant's complaint about deficiencies in the judicial review of the lawfulness of his detention is in any event inadmissible for the following reason.

155. The Court held in *Knebl v. the Czech Republic* (no. 20157/05, § 77, 28 October 2010) that a constitutional appeal was an effective remedy that had to be exhausted for complaints that a procedure under Article 5 § 4 of the Convention did not provide guarantees appropriate to the kind of deprivation of liberty in question. The Court has no reason to hold otherwise in the present case.

156. In view of the conclusions above under Article 5 § 1 of the Convention, the Court concludes that the complaint under Article 5 § 4 must be also rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies since the applicant failed to lodge a constitutional appeal in compliance with the procedural requirements.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

157. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

158. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

159. The Government considered that amount excessive.

160. The Court is of the view that as a result of the circumstances of the case the applicant must have experienced considerable anguish and distress which cannot be made good by a mere finding of a violation of the Convention. Having regard to the circumstances of the case seen as a whole

and deciding on an equitable basis, the Court awards the applicant EUR 20,000 for non-pecuniary damage.

161. The applicant did not claim reimbursement of any costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on that account.

162. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join to the merits the Government's objection as to the exhaustion of domestic remedies and rejects it;

2. *Declares* the complaints concerning Article 3 of the Convention admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 3 of the Convention under its substantive limb;

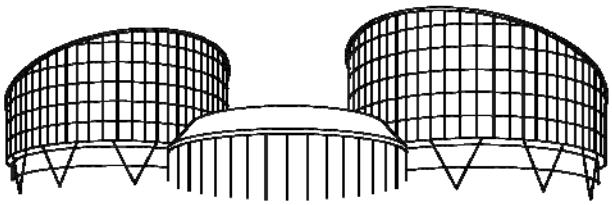
4. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Czech korunas at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 18 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Dean Spielmann
Registrar	President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF D.D. v. LITHUANIA

(Application no. 13469/06)

JUDGMENT

STRASBOURG

14 February 2012

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of D.D. v. Lithuania,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Françoise Tulkens, *President,*
Danutė Jočienė,
Dragoljub Popović,
Işıl Karakaş,
Guido Raimondi,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 24 January 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 13469/06) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Ms D.D. ("the applicant"), on 28 March 2006. The President of the Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court, as in force at the material time).

2. On 8 January 2008 the applicant, who had been granted legal aid, signed a power of attorney in favour of Mr H. Mickevičius, a lawyer practising in Vilnius, giving him authority to represent her before the Court. The Lithuanian Government ("the Government") were represented by their Agent, Ms E. Baltutytė.

3. The applicant complained that her involuntary admission to a psychiatric institution was in breach of Article 5 §§ 1 and 4 of the Convention. She further alleged that she had been deprived of the right to a fair hearing, in breach of Article 6 § 1.

4. On 20 November 2007 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Written submissions were received from the European Group of National Human Rights Institutions and from the Harvard Project on Disability, which had been granted leave by the President to intervene as third parties (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court, as in force at the material time).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1963 and currently lives in the Kėdainiai Social Care Home (hereinafter "the Kėdainiai Home") for individuals with general learning disabilities.

A. The circumstances of the case

7. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The applicant's psychiatric treatment, guardianship and care

8. The applicant has had a history of mental disorder since 1979, when she experienced shock having discovered that she was an adopted child. She is classed as Category 2 disabled.

9. In 1980, the applicant was diagnosed with schizophrenia simplex. In 1984 she was diagnosed with circular schizophrenia. In 1999, the applicant was diagnosed with paranoid schizophrenia with a predictable course. She has been treated in psychiatric hospitals more than twenty times. During her most recent hospitalisation at Kaunas Psychiatric Hospital in 2004, she was diagnosed with continuous paranoid schizophrenia (*paranoidinė šizofrenija*, *nepertraukiama eiga*). The diagnosis of the applicant remains unchanged.

10. In 2000 the applicant's adoptive father applied to the Kaunas City District Court to have the applicant declared legally incapacitated. The court ordered a forensic examination of the applicant's mental status.

11. In their report (no. 185/2000 of 19 July 2000), the forensic experts concluded that the applicant was suffering from "episodic paranoid schizophrenia with a predictable course" (*šizofrenija/paranoidinė forma, epizodinė liga su prognozuojančiu defektu*) and that she was not able "to understand the nature of her actions or to control them". The experts noted that the applicant knew of her adoptive father's application to the court for her incapacitation and wrote that she "did not oppose it". The experts also wrote that the applicant's participation in the court hearing for incapacitation was "unnecessary".

12. On 15 September 2000 the Kaunas City District Court granted the request by the applicant's adoptive father and declared the applicant legally incapacitated. In a one-page ruling, the court relied on medical expert report no. 185/2000. Neither the applicant nor her adoptive father was present at the hearing. The Social Services Department of the Kaunas City Council was represented before the court.

13. On 17 May 2001 the applicant's adoptive father requested her admission to the Kėdainiai Home for individuals with general learning disabilities. The applicant's name was put on a waiting list.

14. On 13 August 2002 the Kaunas City District Court appointed D.G., the applicant's psychiatrist at the Kaunas out-patient health centre (*Kauno Centro Poliklinika*), as her legal guardian. The applicant was present at the hearing. Her adoptive father submitted that "he himself did not agree with being appointed her guardian because he was in disagreement with his daughter (*jis pats nepageidauja būti globėju, nes su dukra nesutaria*)". Nonetheless, he promised to take care of her in future and to help her financially.

15. By a decision of 24 March 2003, the director of the health care centre dismissed D.G. from her work for a serious violation of her working duties. The decision was based on numerous reports submitted by D.G.'s colleagues and superiors.

16. On 16 July 2003 D.G. wrote to the Kaunas City District Court asking that she be relieved of her duties as the applicant's guardian. She mentioned that she had only agreed to become the applicant's guardian because she had observed a strained relationship between the applicant and her adoptive father. However, D.G. claimed that the applicant's adoptive father had asked her to hand over the applicant's pension to him, even though the applicant had been receiving her pension and had been using the money perfectly well on her own for many years. D.G. also contended that the applicant's adoptive father had attempted to unlawfully appropriate the applicant's property.

17. On 1 October 2003 the Kaunas City District Court relieved D.G. of her duties as the applicant's guardian at her own request. In court D.G. had argued that as she was litigating for unlawful dismissal she could not take proper care of the applicant.

18. By letter of 9 December 2003, the Kaunas City Social Services Department suggested to the district court that the applicant's adoptive father be appointed her guardian, although the Department noted that relations between the two of them were tense.

19. On 21 January 2004 the Kaunas City District Court appointed the applicant's adoptive father as her legal guardian. The court relied on the request by the Kaunas City Council Department of Health, which was represented at the hearing. The applicant's adoptive father did not object to the appointment. The applicant was not present at the hearing.

20. Upon the initiative and consent of the applicant's adoptive father, on 30 June 2004 the applicant was taken to the Kaunas Psychiatric Hospital for treatment. The applicant complained that she had been treated against her will. A letter by the hospital indicates that the applicant's adoptive father had asked the hospital staff to ensure that her contacts with D.G. were limited on the ground that the latter had had a negative influence on the

applicant. However, on 3 September 2004 the prosecutor for the Kaunas City District dismissed the applicant's allegations, finding that she had been hospitalised due to deterioration in her mental state upon the order of her psychiatrist. The applicant had also expressed her consent to being treated.

21. On 8 July 2004 a panel designated by Kaunas City Council to examine cases of admission to residential psychiatric care (*Kauno miesto savivaldybės asmenų su proto negalia siuntimo į stacionarias globos įstaigas komisija*) adopted a unanimous decision to admit the applicant to the Kėdainiai Home.

22. On 20 July 2004 a medical panel of the Kaunas Psychiatric Hospital concluded that the applicant was suffering from "continuous paranoid schizophrenia" (*paranoidinė šizofrenija nepertraukiama eiga*). The commission also stated that it would be appropriate for the applicant to "live in a social care institution for the mentally handicapped".

23. On 28 July 2004 a social worker examined the conditions in which the applicant lived in her apartment in Kaunas city. The report reads that "the applicant is not able to take care of herself, does not understand the value of money, does not clean her apartment, is not able to cook on her own and wanders in the city hungry. Sometimes the applicant gets angry at people and shouts at them without a reason; her behaviour is unpredictable. The applicant does not have bad habits and likes to be in other persons' company". The social worker recommended that the applicant be placed in a social care institution because her adoptive father could not "manage" her.

24. On 2 August 2004 an agreement was concluded between the Kėdainiai Home, the Guardianship Department of Kaunas City Council and the Social Services Department of the Kaunas Regional Administration. On the basis of that agreement, the applicant was transferred from the Kaunas Psychiatric Hospital to the Kėdainiai Home, where she continued her treatment.

25. On 6 October 2004 the applicant signed a document stating that she agreed to be examined by the doctors in the Kėdainiai Home and to be treated there.

26. On 10 August 2004 the applicant's adoptive father wrote to the director of the Kėdainiai Home with a request that during the applicant's settling into the Kėdainiai Home she should be temporarily restricted from receiving visits by other people. The director granted the request. Subsequently, the Kaunas District Administration upheld the director's decision on the ground that the latter was responsible for the safety of patients in the Kėdainiai Home and thus was in a better position to determine what steps were necessary.

27. On 18 August 2004, upon the decision of the Kėdainiai Home director, D.G. was not allowed to visit the applicant. The applicant's medical record, which a treating psychiatrist signed the following day, states that "[the applicant] is acclimatising at the institution with difficulties, as

her former guardian and former doctor [D.G.] keeps calling constantly and telling painful matters from the past (...) [the applicant] is crying and blaming herself for being not good, for not preserving her mother, for having lived improperly. Verbal correction is not effective".

28. According to a document signed by Margarita Buržinskienė on 23 February 2005, she had called the Kėdainiai Home to speak to the applicant but the employees had told her that, on the director's orders, the applicant was not allowed to answer the phone (*vykdant direktorės nurodymą Daivos prie telefono nekviečia*).

29. On 15 June 2006 the applicant's adoptive father removed her from institutional care and taken her to his flat. On 15 July 2006 the applicant left his home on her own. A police investigation was started following a report by the applicant's adoptive father of the allegedly unlawful deprivation of the applicant's liberty. She was eventually found and apprehended by the police on 31 October 2006, and was taken back to the Kėdainiai Home.

30. On 6 September 2007 the applicant left the Kėdainiai Home without informing its management. She was found by the police and taken back to the institution on 9 October 2007.

31. As can be seen from a copy of the record of the Kėdainiai Home's visitors submitted by the Government, between 2 August 2004 and 25 December 2006 the applicant received one or more visitors on forty-two separate occasions. In particular, her adoptive father saw her thirteen times, her friends and other relatives visited her twenty-six times and she was visited by D.G. on twelve occasions.

2. Proceedings regarding the change of the applicant's guardianship

32. On 15 July 2004 the applicant asked the Kaunas Psychiatric Hospital to initiate a change of guardianship from her adoptive father to D.G. The applicant wrote that her adoptive father had had her admitted to the psychiatric hospital by force and deception, thus depriving her of her liberty. The hospital refused her request as it did not have competence in guardianship matters.

33. The applicant states that a similar request was rejected by the Kėdainiai Home.

34. On 2 September 2005, assisted by her former guardian and then friend, D.G., the applicant brought an application before the courts, requesting that the guardianship proceedings be reopened and a new guardian appointed. She submitted that she had been unable to state her opinion as to her guardianship, because she had not been informed of and summoned to the court hearing during which her adoptive father had been appointed her guardian. The applicant relied on Article 507 § 3 of the Code of Civil Procedure and stated that her state of health in the previous year could not have been an obstacle to her expressing her opinion as to the appropriateness of the guardian proposed at the court hearing. She claimed

that in 2004 she had used to visit her friend in a village for a couple of weeks at a time. The applicant also noted that when she returned to Kaunas, her adoptive father had often threatened to have her committed to a mental asylum.

35. The applicant also argued that by appointing her adoptive father to be her guardian without informing her and without her being able to state her opinion as to his prospective appointment, in contravention of Article 3.242 of the Civil Code and Article 507 § 4 of the Code of Civil Procedure, the court had disregarded the strained relationship between the two of them. The applicant drew the court's attention to the ruling of the Kaunas City District Court of 13 August 2002, in which the applicant's adoptive father had himself stated that their relationship had been tense. The applicant drew the court's attention to Article 491 § 2 of the Code of Civil Procedure, stipulating that the court had to take all necessary measures to avoid a possible conflict between the incapacitated person and her potential guardian.

Lastly, she stated that she had only learned of her adoptive father's appointment in April 2004.

36. By a ruling of 29 September 2005 the Kaunas City District Court decided to accept the applicant's request for examination.

37. On 27 October 2005 the applicant wrote to the Chairman of the Kaunas City District Court. She complained of her incapacitation on her adoptive father's devious initiative without having being informed of the incapacitation proceedings. The applicant also pleaded that she had been unlawfully deprived of her liberty and involuntarily admitted to the Kėdainiai Home for an indefinite time and where she had been unable to obtain legal aid.

38. On 7 November 2005 judge R.A. of the Kaunas City District Court held a closed hearing in which the applicant, her guardian (her adoptive father) and his lawyer, and D.G. took part. The relevant State institutions were also represented at the hearing: the Kėdainiai Home, the Kaunas Psychiatric Hospital, the prosecutor and the Social Services Department of Kaunas City Council. The applicant's doctor did not take part in the hearing. The court noted that the doctor had been informed of it and had asked the court to proceed without him.

39. In her application form to the Court, the applicant alleged that at the beginning of the hearing the judge had ordered her to leave her place next to D.G. and to sit next to the judge. The judge had also ordered D.G. "to keep her eyes off the applicant". Given that this was not reflected in the transcript of the hearing, on 19 November 2005 D.G. had written to the court asking that the transcript be rectified accordingly.

40. According to the transcript of the hearing, at the beginning thereof D.G. requested that an audio recording be made. The judge refused the request. The applicant asked to be assisted by a lawyer. The judge refused

her request, deeming that her guardian was assisted by a lawyer before the court. Without the agreement of her guardian, a separate lawyer could not be appointed. The lawyer hired by the applicant's guardian was held to represent both the interests of the applicant and her guardian.

41. As the transcript of the hearing shows, the applicant went on to unequivocally state that she stood by her request that the guardianship proceedings be reopened. She argued that she had neither been informed of the proceedings as to her incapacitation, nor those pursuant to which her guardian had been appointed. The decisions had been taken while she had been in hospital. During the hearing, the applicant expressed her willingness to leave the Kėdainiai Home and stated that she was being kept and treated there by force. She submitted that she would prefer to live at her adoptive father's home and to attend a day centre (*lankys dienos užimtumo centrą*). The applicant also argued that D.G. had been forced to surrender her duties as her guardian and to allow the applicant's adoptive father to become her guardian because of pressure from him with the aim of transferring the applicant's flat to him. The applicant also noted that in the Kėdainiai Home she was cut off from society and had been deprived of the opportunity to make telephone calls. Her friends could not visit her and she was not allowed to go to the cinema. In the Kėdainiai Home "she was isolated and saw only a fence". The other parties to the proceedings opposed the applicant's wish that the guardianship proceedings be reopened.

42. In her application to the Court, the applicant alleged that during a break in the hearing she had been ordered to follow the judge to her private office. When the applicant had refused, she had been threatened with restraint by psychiatric personnel. In private, the judge had instructed her not to say anything negative about her adoptive father and that, should she not comply, her friend D.G. would also be declared legally incapacitated. As stated in D.G.'s letter seeking rectification of the transcript (paragraph 39 above), after the break was announced the applicant had wished to stay in the hearing room. However, she had been taken away and had returned very depressed (*prislėgta*). Responding to a question by the judge as to her guardianship, the applicant replied: "I agree that [my adoptive father] should be my guardian, because God asks that people be forgiving. I just wish that he [would] take me [away] from [the Kėdainiai Home] to Kaunas, to his place... and let me see D.G. and my friends".

43. It appears from the transcript of the hearing that after the break, when giving her submissions to the court, the applicant agreed to keep her adoptive father as guardian, but insisted on being released from institutional care in order to live with her adoptive father. The relevant State institutions – the Kėdainiai Home, the Kaunas Psychiatric Hospital, the prosecutor, the Social Services Department of Kaunas City Council – and the applicant's guardian's lawyer each argued that the applicant's request for reopening was clearly unfounded and should be dismissed.

44. On 17 November 2005 the Kaunas City District Court refused to reopen the guardianship proceedings on the basis of Article 366 § 1 (6) of the Code of Civil Procedure, ruling that there were no grounds to change the guardian (see Relevant domestic law part below). The court noted that before appointing the applicant's adoptive father as her guardian, the Kaunas City Council Department of Health had prepared a report on the proposed appointment of the applicant's guardian and had questioned the applicant, who had not been able to provide an objective opinion about that appointment. The court confirmed that the applicant had not been summoned to the hearing of 21 January 2004, when her guardian was appointed, as the court had taken into consideration the applicant's mental state and, on the basis of the findings of the relevant health care officials, had not considered her involvement in the hearing necessary. The court further noted that the findings had disclosed tense relations between the applicant and her adoptive father. Even so, the applicant's adoptive father had been duly performing his duties. The court also referred to statements of the representatives of the Kaunas Psychiatric Hospital and the director of the Kėdainiai Home to the effect that the applicant's contact with D.G. had had a negative influence on her mental health.

45. The Kaunas City District Court proceeded to fine D.G. 1,000 Lithuanian litai (LTL) (approximately 290 euros (EUR)) for abuse of process. It noted that D.G. had filed numerous complaints before various State institutions and the courts of alleged violations of the applicant's rights. Those complaints had prompted several inquiries which had revealed a lack of substantiation. The court noted:

> "... by such an abuse of rights, [D.G.] caused damage to the State, namely the waste of time and money of the court and the participants in the proceedings. The court concludes that [D.G.] has abused her rights ... and the vulnerability of the incapacitated person".

46. D.G. appealed against the above decision. She noted, *inter alia*, that the 21 January 2004 ruling to appoint the applicant's adoptive father as her guardian had been adopted by judge R.A. The same judge had dismissed the applicant's request that the court proceedings be reopened, although this was explicitly prohibited by Article 370 § 5 of the Code of Civil Procedure.

The applicant also submitted a brief in support of D.G.'s appeal, arguing that persons admitted to psychiatric institutions should have a right to know the reasons for their admission. Moreover, they should be able to contact a lawyer who is independent from the institution to which they have been admitted.

47. The appeal by D.G. was dismissed by the Kaunas Regional Court on 7 February 2006 in written proceedings. The court did not rule on the plea that the district court judge R.A. had been partial.

48. On 11 May 2006 the Supreme Court declared D.G.'s subsequent appeal on points of law inadmissible, as it had not been submitted by a lawyer and raised no important legal issues.

49. By a ruling of 7 February 2007 the Kaunas City District Court, following a public hearing attended by social services representatives and the applicant's legal guardian, granted the guardian's request to be relieved from the duties of guardian and property administrator. The applicant's adoptive father had argued that he was no longer fit to be her guardian because of his old age (seventy-seven years at that time) and state of health. The Kėdainiai Home was appointed temporary guardian and property administrator. The applicant was not present at the hearing.

50. On 25 April 2007, the Kaunas City District Court held a public hearing and appointed the Kėdainiai Home as the applicant's permanent guardian and administrator of her property rights. The applicant was not present at that hearing; the court did not give reasons for her absence.

3. Criminal inquiry

51. On 1 February 2006 a criminal inquiry was opened on the initiative of some of the applicant's acquaintances, who alleged that the applicant had been the victim of Soviet-style classification of illnesses which was designed to repress those who fall foul of the regime. The complainants submitted that, as a result of the persistent diagnoses of schizophrenia, the applicant had been unlawfully deprived of her liberty, had been ill-treated and had been overmedicated in the Kėdainiai Home, and that her property rights had been violated by her guardian.

52. On 31 July 2006 the investigation was discontinued, no evidence having been found of an abuse of the applicant's interests, either pecuniary or personal. It was established that the immovable property belonging to the applicant had been let to a third person, with the proceeds used to satisfy the applicant's needs. The applicant had had a bank account opened in her name on 6 October 2005, and the deposit made on that date had since been left untouched. Moreover, the applicant's guardian had transferred to her account the sum received from the sale of their common property. There was thus no indication that the applicant's adoptive father had abused his position as guardian.

53. As regards the deprivation of the applicant's liberty, the prosecutor noted that the applicant had been admitted to an institutional care facility in accordance with the applicable legislation. The prosecutor acknowledged that the freedom of the applicant "to choose her place of residence [was] restricted (*laisvė pasirinkti buvimo vietą yra ribojama*)", but further noted that she was:

> "... constrained to an extent no greater than necessary in order to take due care of her as a legally incapacitated person. The guardian of [the applicant] can change her place of residence without first obtaining a separate official decision; she is not unlawfully

hospitalised. Therefore, her placement in the Kėdainiai Home cannot be classified as an unlawful deprivation of liberty, punishable under Article 146 § 2 (3) of the Criminal Code".

54. The prosecutor had also conducted an inquiry into an incident which had occurred at the Kėdainiai Home on 25 January 2005. After questioning the personnel of the Home, it was established that on that day the applicant had been placed in the intensive supervision ward (*intensyvaus stebėjimo kambarys*), had been given an additional dose of tranquilisers (2 mg of Haloperidol) and had been tied down (*fiksuota*) for fifteen to thirty minutes by social care staff.

55. The prosecutor noted the explanation of the psychiatrist at the Home, who admitted that the applicant's restraint had been carried out in breach of the applicable rules, without the approval of medical personnel. However, after having read written reports on the incident produced by the social care personnel, he considered the tying down to have been undertaken in order to save the applicant's life and not in breach of her rights.

56. Questioned by the prosecution as witnesses, social workers at the Kėdainiai Home testified that 25 January 2005 had been the only occasion on which the applicant had been physically restrained and placed in isolation. The measures had only been taken because at that particular time the applicant had shown suicidal tendencies.

57. The prosecutor concluded that the submissions made by the complainants were insufficient to find that the applicant's right to liberty had been violated by unnecessary restraint or that she had suffered degrading treatment.

58. On 30 August 2006 the higher prosecutor upheld that decision.

4. Complaints to other authorities

59. With the assistance of D.G., the applicant addressed a number of complaints to various State authorities.

60. On 30 July 2004, in reply to a police inquiry into the applicant's complaint of unlawful detention in the Kėdainiai Home, the Kaunas City Council Social Services department wrote that "[in] the last couple of years, relations between the applicant and her adoptive father have been tense. Therefore, on the wish of both of them, until 21 January 2004 [the applicant's] legal guardian was D.G. and not her adoptive father".

61. The Ministry of Social Affairs also commissioned an inquiry, including conducting an examination of the applicant's living conditions at the Kėdainiai Home and interviews with the applicant and the management of the Home. The commission established that the applicant's living conditions were not exemplary (*nėra labai geros*), but it was promised that the inhabitants would soon move to new premises with better conditions. However, it was noted that the applicant received adequate care. The commission opined that it was advisable not to disturb the applicant, given

her vulnerability and instability. It was also emphasised that the State authorities were under an obligation to be diligent as regards supervision of how the guardians use their rights.

62. On 6 January 2005 D.G. filed a complaint with the police, alleging that the applicant had been unlawfully deprived of her liberty and of contact with people from outside the Kėdainiai Home. By letter of 28 February 2005, the police replied that no violation of the applicant's rights had been found. They explained that, in accordance with the internal rules of the Kėdainiai Home, residents could be visited by their relatives and guardians, but other people required the approval of the management. At the request of the applicant's guardian, the management had prohibited other people from visiting her.

63. On 17 May 2005 upon the inspection performed by food safety authorities out-of-date frozen meat (best before 12 May 2005) was found in the Kėdainiai Home. However, there was no indication that that meat would have been used for cooking. On 20 February 2006 the Kaunas City Governor's office inspected the applicant's living conditions in Kėdainiai and found no evidence that she could have been receiving food of bad quality.

64. On 28 April 2006 the applicant complained to the Ministry of Health about her admission to long-term care. By letter of 12 May 2006, the Ministry noted that no court decision to hospitalise the applicant had been issued, and that she had been admitted to the Kėdainiai Home after her adoptive father had entrusted that institution with her care.

65. On 6 October 2006, the Ministry of Health and Social Services, in response to the applicant's complaints of alleged violations of her rights, wrote to the applicant stating that it was not possible to investigate her complaints because she had left the Kėdainiai Home and her place of living was unknown. Prosecutors were in the middle of a pre-trial investigation into the circumstances of the applicant's disappearance from where she had previously been living.

66. By a decision of 18 December 2006, the Kaunas City District prosecutor discontinued a pre-trial investigation into alleged unlawful deprivation of the applicant's liberty.

II. RELEVANT DOMESTIC LAW AND PRACTICE

67. Article 21 of the Lithuanian Constitution prohibits torture or degrading treatment of persons. Article 22 thereof states that private life is inviolable.

68. The Law on Mental Heath Care provides:

Article 1

"1. Main Definitions

...

5. "Mental health facility" means a health care institution (public or private), which is accredited for mental health care. If only a certain part (a "unit") of a health care institution has been accredited to engage in mental health care, the term shall only apply to the unit. In this Law, the term is also applicable to psychoneurological facilities..."

Article 13

"The parameters of a patient's health care shall be determined by a psychiatrist, seeking to ensure that the terms of their treatment and nursing offer the least restrictive environment possible.

The actions of a mentally ill person may be subject to restrictions only provided that the circumstances specified in section 27 of this Law are manifest. A note to that effect must be promptly made in the [patient's] clinical record."

Article 19

"In emergency cases, in seeking to save a person's life when the person himself is unable to express his will and his life is seriously endangered, necessary medical care may be taken without the patient's consent.

Where instead of a patient's consent, the consent of his representative is required, the necessary medical care may be provided without the consent of such person provided that there is insufficient time to obtain it in cases where immediate action is needed to save the life of the patient.

In those cases when urgent action must be taken in order to save a patient's life, and the consent of the patient's representative must be obtained in lieu of the patient's consent, immediate medical aid may be provided without the said consent, if there is not enough time to obtain it."

69. Article 24 of the Law on Mental Health Care stipulated that if a patient applied with a request to be hospitalised, he or she could be hospitalised only provided that: 1) at least one psychiatrist, upon examining the patient, recommended that he or she had to be treated as an inpatient at a mental health facility; 2) he or she had been informed about his or her rights at a mental health facility, the purpose of hospitalisation, the right to leave the psychiatric facility and restrictions on the right, as specified in Article 27 of the law. The latter provision read that a person who was ill with a severe mental illness and refused hospitalisation could be admitted involuntarily to the custody of the hospital only if there was real danger that

by his or her actions he or she was likely to commit serious harm to his or her health or life or to the health or life of others. When the circumstances specified in Article 27 of that law did exist, the patient could be involuntarily hospitalised and given treatment in a mental health facility for a period not exceeding 48 hours without court authorisation. If the court did not grant the authorisation within 48 hours, involuntary hospitalisation and involuntary treatment had to be terminated (Article 28).

70. As concerns legal incapacity and guardianship, the Civil Code provides:

Article 2.10. Declaration of incapacity of a natural person

"1. A natural person who, as a result of mental illness or imbecility, is not able to understand the meaning of his actions or control them may be declared incapacitated. The incapacitated person shall be placed under guardianship.

2. Contracts on behalf and in the name of a person declared incapacitated shall be concluded by his guardian...

3. Where a person who was declared incapacitated gets over his illness or the state of his health improves considerably, the court shall reinstate his capacity. After the court judgement becomes *res judicta,* guardianship of the said person shall be revoked.

4. The spouse of the person, parents, adult children, a care institution or a public prosecutor shall have the right to request the declaration of a person's incapacity by filing a declaration to the given effect. They shall also have the right to apply to the courts requesting the declaration of a person's capacity."

Article 3.238. Guardianship

"1. Guardianship shall be established with the aim of exercising, protecting and defending the rights and interests of a legally incapacitated person.

2. Guardianship of a person subsumes guardianship of the person's property, but if necessary, an administrator may be designated to manage the person's property."

Article 3.240. Legal position of a guardian or curator

"1. Guardians and curators shall represent their wards under law and shall defend the rights and interests of legally incapacitated persons or persons of limited active capacity without any special authorisation.

2. The guardian shall be entitled to enter into all necessary transactions in the interests and on behalf of the represented legally incapacitated ward..."

Article 3.241. Guardianship and curatorship authorities

"1. Guardianship and curatorship authorities are the municipal or regional [government] departments concerned with the supervision and control of the actions of guardians and curators.

2. The functions of guardianship and curatorship in respect of the residents of a medical or educational institution or [an institution run by a] guardianship (curator) authority who have been declared legally incapacitated or of limited active capacity by a court shall be performed by the respective medical or educational establishment or guardianship (curator) authority until a permanent guardian or curator is appointed..."

Article 3.242. Appointment of a guardian or a curator

"1. Having declared a person legally incapacitated or of limited active capacity, the court shall appoint the person's guardian or curator without delay.

...

3. Only a natural person with legal capacity may be appointed a guardian or a curator, [and] provided he or she gives written consent to that effect. When appointing a guardian or curator, account must be taken of the person's moral and other qualities, his or her capability of performing the functions of a guardian or curator, relations with the ward, the guardian's or curator's preferences and other relevant circumstances..."

Article 3.243. Performance of the duties of a guardian or a curator

"...

6. After the circumstances responsible for the declaration of the ward's legal incapacity or limited active capacity [are no longer in existence], the guardian or curator shall apply to the courts for the cancellation of guardianship or curatorship. Guardianship and curatorship authorities, as well as prosecutors, shall also have a right to apply to the courts for the cancellation of guardianship or curatorship."

Article 3.277. Placing under guardianship or curatorship

"1. An adult person declared legally incapacitated by the courts shall be placed under guardianship by a court judgment."

Article 3.278. Monitoring of the guardian's or the curator's activities

"1. Guardianship and curatorship authorities shall be obliged to monitor whether the guardian/curator is fulfilling his or her duties properly."

71. The Code of Civil Procedure stipulates that rights and interests of [disqualified] natural persons protected by law shall be defended in court by their representatives (parents, foster-parents, guardians) (Article 38 § 2). A

prosecutor has the right to submit a claim to protect the public interest (Article 49).

72. Article 366 § 1 (6) of the Code of Civil Procedure provides that proceedings may be reopened if one of the parties to them was incapacitated and did not have a representative.

Article 370 § 5 stipulates that when deciding upon a request that proceedings be reopened, the judge who took the decision against which the request has been lodged may not participate.

73. An application to declare a person legally incapacitated may be submitted by a spouse of that person, his or her parents or full-age children, a guardianship/care authority or a public prosecutor (Article 463). The parties to the proceedings for incapacitation consist, besides the applicant, of the person whose legal capacity is at issue, as well as the guardianship (care) authority. If it is impossible, due to the state of health, confirmed by an expert opinion, of the natural person whom it has been requested to declare incapacitated, to call and question him or her in court or to serve him or her with court documents, the court shall hear the case in the absence of the person concerned (Article 464 §§ 1 and 2).

74. Article 491 § 2 of the Code of Civil procedure stipulates that the courts are obliged to take all measures necessary to ensure that the rights and interests of persons who need guardianship are protected.

75. Pursuant to Article 507 § 3 of the Code of Civil Procedure, a case concerning the establishment of guardianship and the appointment of a guardian shall be heard by means of oral proceedings. The guardianship authority, the person declared incapacitated, the person recommended to be appointed as guardian and any parties interested in the outcome of the case must be notified of the hearing.

The case is to be heard with the attendance of a representative of the guardianship authority, who is to submit the authority's opinion to the court. The person to be appointed the guardian must also attend.

The person declared incapacitated is entitled to give his or her opinion at the hearing, if his or her health allows, as regards the prospective appointment of the guardian. The court may hold that it is necessary that the person declared incapacitated attend the hearing.

Article 507 § 4 provides that in appointing a guardian his moral and other qualities, his capability to perform the functions of a guardian, his relationship with the person who requires guardianship, and, if possible, the wishes of the person who requires guardianship or care shall be taken into consideration.

76. The Law on Prosecutor's Office provides that prosecutors have the right to protect the public interest, either on their own initiative or if the matter has been brought to their attention by a third party. In so doing, prosecutors may institute civil or criminal proceedings.

77. In a ruling of 9 June 2003 the Supreme Court stated that a public prosecutor could submit an application for reopening of proceedings, if the court's decision had been unlawful and had infringed the rights of a legally incapacitated person having limited opportunity to defend his or her rights or lawful interests.

78. The Law on Social Services provides that the basic goal of social services is to satisfy the vital needs of an individual and, when an individual himself is incapable of establishing such conditions, to create living conditions for him that do not debase his dignity (Article 2 (2)).

79. The Requirements for residential social care institutions and the Procedure for admission of persons thereto, approved by Order No. 97 of the Minister of Social Security and Labour on 9 July 2002 and published in State Gazette (*Valstybės žinios*) on 31 July 2002, regulate the methods of admission to a social care institution. The rules provide that an individual is considered to be eligible for admission to such an institution, *inter alia*, if he or she suffers from mental health problems and therefore is not able to live on his or her own. The need for care is decided by the municipal council of the place of his or her residence in cooperation with the founder of the residential care institution (the county governor). Individuals are admitted to care institutions in the event that the provision of social services at their home or at a non-statutory care establishment is not possible. A guardian who wishes to have a person admitted to a residential care institution must submit a request in writing to the social services department of the relevant municipal council. The reasons for and motives behind admission must be indicated. An administrative panel of the municipal council, comprising at least three persons, is empowered to decide on the proposed admission. Representatives of the institution to which the person is to be admitted as well as the founder (the governor) must participate.

80. The Government submitted to the Court an application by the Kėdainiai Home of 6 October 2009 to the Kaunas City District Court for the restoration of capacity (*dėl neveiksnumo panaikinimo*) of an individual, G.P. The Kėdainiai Home had been G.P.'s guardian. The director of the Kėdainiai Home had noted that after G.P.'s condition had become better and he had become more independent, it had accordingly become necessary for the court to order a fresh psychiatric examination and make an order restoring G.P.'s legal capacity.

81. The Bylaws of the Kėdainiai Home (*Kėdainių pensionato gyventojų vidaus tvarkos taisyklės*), as approved by an order of the director dated 17 March 2003, provide that the institution shall admit adults who suffer from mental health problems and are in need of care and medical treatment. A patient may leave the institution for up to ninety days per year, but only to visit his or her court-appointed guardian. The duration and conditions of such leave must be confirmed in writing. The rules also stipulate that a patient is not allowed to leave the grounds of the facility without informing

a social worker. If a patient decides to leave the Kėdainiai Home on his or her own, the management must immediately inform the police and facilitate finding him or her. A patient may be visited by relatives and guardians. Other visitors are allowed only upon the management's approval. The patients may have personal mobile phones. They may follow a religion, attend church services and receive magazines.

82. In a ruling of 11 September 2007 in civil case No. 3K-3-328/2007, the Supreme Court noted that the person whom it is asked to declare incapacitated is also a party to the proceedings (Article 464 § 1 of the Code of Civil Procedure). As a result, he or she enjoys the rights of an interested party, including the right to be duly informed of the place and time of any hearing. The fact that the case had been heard in the absence of D.L. – the person whom the court had been asked to declare incapacitated – was assessed by the Supreme Court as a violation of her right to be duly informed of the place and time of court hearings, as well as of other substantive procedural rights safeguarding her right to a fair trial. The Supreme Court also found that by failing to hear the person concerned and without making sure that she had been aware of the proceedings, the first-instance court had breached the principle of equality of arms, as well as D.L.'s right to appeal against the decision to declare her incapacitated, because the decision had not been delivered to her. The Supreme Court also referred to Principle no. 13 of Recommendation No. R (99) 4 by the Committee of Ministers of the Council of Europe (see paragraph 85 below), stating that the person concerned should have the right to be heard in any proceedings which could affect his or her legal capacity. This procedural guarantee should be applicable to the fullest extent possible, at the same time bearing in mind the requirements of Article 6 of the European Convention on Human Rights. In this regard, the Supreme Court also referred to the Court's case-law to the effect that a mental illness could result in appropriate restrictions of a person's right to a fair hearing. However, such measures should not affect the very essence of that right (*Golder*, *Winterwerp*, both cited below, and *Lacárcel Menéndez v. Spain*, no. 41745/02, 15 June 2006).

83. In the same ruling, the Supreme Court also emphasised that determining whether the person can understand his or her actions was not only a scientific conclusion, namely that of forensic psychiatry. It was also a question of fact which should be established by the court upon assessing all other evidence and, if necessary, upon hearing expert evidence. Taking into consideration the fact that the declaration of a person's incapacity is a very serious interference into his or her right to private life, one can only be declared incapacitated in exceptional cases.

III. RELEVANT INTERNATIONAL DOCUMENTS

A. Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006 (Resolution A/RES/61/106)

84. This Convention entered into force on 3 May 2008. It was signed by Lithuania on 30 March 2007 and ratified on 18 August 2010. The relevant parts of the Convention provide:

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.

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 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."

B. Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults (adopted on 23 February 1999)

85. The relevant parts of this Recommendation read as follows:

Principle 2 – Flexibility in legal response

"1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable suitable legal response to be made to different degrees of incapacity and various situations.

...

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned."

Principle 3 – Maximum reservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ..."

Principle 13 – Right to be heard in person

"The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity."

Principle 14 – Duration review and appeal

"1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews.

...

3. There should be adequate rights of appeal."

C. The 25 June 2009 report on visit to Lithuania by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), visit from 28 to 30 April 2008

86. This report outlines the situation of persons placed by the public authorities in social care homes for people with mental disorders or mental deficiency. Part C of the report (paragraphs 120, 125-132) analyses situation in the Skemai Residential Care Home.

87. The CPT noted that Lithuanian legislation does not provide for an involuntary placement procedure in social welfare establishments. At Skemai Residential Care Home, residents were admitted on their own application or that of their guardian through the competent district authority (Panevėžys District Administration). The decision on the placement was taken by the social affairs unit of Panevėžys District Administration on the basis of a report drawn up by a social worker and a medical certificate issued by a psychiatrist stating that the applicant's mental health permitted his/her placement in a social welfare institution of this type. An agreement was then signed between the applicant and the authorised representative of the local government for an indefinite period.

That said, it appeared that even legally competent residents admitted on the basis of their own application were not always allowed to leave the home when they so wished. The delegation was informed that their discharge could only take place by decision of the social affairs unit of the Panevėžys District Administration. This was apparently due to the need to ascertain that discharged residents had a place and means for them to live in the community; nevertheless, this meant that such residents were *de facto* deprived of their liberty (on occasion for a prolonged period).

88. Specific reference was made to the situation of residents deprived of their legal capacity. Such persons could be admitted to the Skemai Home solely on the basis of the application of their guardian. However, they were

considered to be voluntary residents, even when they opposed such a placement. In the CPT's view, placing incapacitated persons in a social welfare establishment which they cannot leave at will, based solely on the consent of the guardian, entailed a risk that such persons will be deprived of essential safeguards.

89. It was also a matter of concern that all 69 residents who were deprived of their legal capacity were placed under the guardianship of the Home. In this connection, the delegation was surprised to learn that in the majority of these cases, the existing guardianship arrangements had been terminated by a court decision upon admission to the establishment and guardianship of the person concerned entrusted to the Home.

The CPT stressed that one aspect of the role of a guardian is to defend the rights of incapacitated persons *vis-à-vis* the hosting social welfare institution. Obviously, granting guardianship to the very same institution could easily lead to a conflict of interest and compromise the independence and impartiality of the guardian. The CPT reiterated its recommendation that the Lithuanian authorities strive to find alternative solutions which would better guarantee the independence and impartiality of guardians.

90. In the context of discharge from psychiatric institution procedures, the CPT recommended that the Lithuanian authorities took steps to ensure that forensic patients were heard in person by the judge in the context of judicial review procedures. For that purpose, consideration may be given to the holding of hearings at psychiatric institutions

91. Lastly, the CPT found that at the establishment visited the existing arrangements for contact with the outside world were generally satisfactory. Patients/residents were able to send and receive correspondence, have access to a telephone, and receive visits.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. The parties' submissions

92. The Government argued, first, that the present application had been entirely based on knowingly untrue facts and therefore should be declared inadmissible for "abuse of the right of individual petition", pursuant to Article 35 § 3 of the Convention. For the Government, the content of the present application was contrary to the purpose of the right of individual application, as the information provided therein was untrue or insidious. An

appropriate and carefully selected form of social care for the applicant had been portrayed as detention. Appropriate medical care and striving to save her life had been presented as her torture. The facts concerning the reopening of the guardianship proceedings were also untrue, as well as those related to the applicant's complaints of the alleged refusal of the Kėdainiai Home's management to allow the applicant to have personal visits and of the censorship of her communications.

93. Alternatively, the Government submitted that the application had been prepared in its entirety and lodged by D.G. and not by the applicant. They held highly critical views of D.G., claiming that she had been "not only deceiving the Court but also harming a vulnerable, mentally-ill person". The Government contended in the present case that the term "applicant" referred to D.D. only in a formal sense, as in reality the person whose will the application reflected had been D.G., and, moreover, that will had clearly contradicted the interests of D.D., who had been misled and manipulated by D.G. It followed that the application as a whole was incompatible *ratione personae* with the provisions of the Convention.

94. The applicant's lawyer considered that the Government's allegation of factual inaccuracy was best understood by reference to the fact that the parties to this application held diametrically opposed perspectives in relation to the facts presented. Both the applicant and the Government saw the same facts in a totally different light and held incompatible views on the way in which the rights of persons with psychosocial disabilities should be respected under the Convention.

95. As to the Government's second argument, the applicant's lawyer submitted that the application had been lodged with D.D.'s fully-informed consent. D.D. had been keenly aware of the proceedings and had spoken of them frequently. Attention had to be drawn to the vulnerability and isolation of persons in the applicant's position, as well as the fact that domestic legislation had denied her legal standing to initiate any legal proceedings whatsoever. Consequently, it was ironic that the Government had not recognised D.D.'s ability to represent herself in domestic proceedings, requiring by law that she did so via another person, but that before the Court the Government seemed to insist that the applicant should act alone.

Lastly, the applicant's lawyer pointed out that D.G. was the applicant's closest friend, former psychotherapist and her first guardian. Moreover, since 8 January 2008 the applicant had been represented before the Court by a legal team.

B. The Court's assessment

96. The Court first turns to the Government's objection as to the applicant's victim status, and, in particular, their allegation that the application does not express the true will of D.D. In this connection, it

recalls that the existence of a victim of a violation, that is to say, an individual who is personally affected by an alleged violation of a Convention right, is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid, mechanical and inflexible way throughout the proceedings (see *Poznanski and Others v. Germany*, (dec.), no. 25101/05, 3 July 2007).

97. Having regard to the documents presented, the Court notes that the original application form bears D.D.'s signature, without any indication that that signature could be forged (see, by converse implication, *Poznanski*, cited above). In paragraph 13 of the application, D.D. wrote that back in 2000, on her adoptive father's initiative, she had been unlawfully declared incapacitated and in 2004 admitted to the Kėdainiai Home "for an indefinite duration". She asked that, for the purposes of the proceedings before this Court, her adoptive father not be considered her legal representative, requesting that D.G. take on that role. After the application was communicated to the Government, the applicant was reminded that, in accordance with paragraph 4 (a) of Rule 36 of the Rules of Court, she had to designate a legal representative, which she did by appointing a lawyer, Mr H. Mickevičius. In his observations in reply to those of the Government, the applicant's lawyer followed the initial complaints as presented by D.D. In the light of the above, the Court holds that D.D. has validly lodged an application in her own name and thus has the status of "victim" in respect of the complaints listed in her application. The Government's objection as to incompatibility *ratione personae* should therefore be dismissed.

98. The Court further considers that the Government's objection as to the applicant's alleged abuse of the right to petition, on account of allegedly incorrect information provided in her application form, is closely linked to the merits of her complaints under Articles 3, 5, 6, 8 and 9 of the Convention. The Court thus prefers to join the Government's objection to the merits of the case and to examine them together.

99. Lastly, the Court observes that the applicant submitted several complaints under different Convention provisions. Those complaints relate to the proceedings concerning her involuntary admission to a psychiatric institution, the appointment of her guardian, her inability to receive personal visits, interference with her correspondence, involuntary medical treatment, and so forth. Whilst noting that the complaint as to the initial appointment of a guardian has been raised outside the six months time-limit (see paragraph 19 above), the Court sees fit to start with the complaint related to the court proceedings for a change of her legal guardian and then to examine the applicant's admission to the Kėdainiai Home and the complaints stemming from it.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION AS REGARDS THE PROCEEDINGS FOR A CHANGE OF LEGAL GUARDIAN

100. The applicant complained that she had not been afforded a fair hearing in respect of her application for reopening of her guardianship proceedings and had not been able to have her legal guardian changed. In support of her complaints, the applicant cited Articles 6 § 1 and 8 of the Convention. In addition, relying upon Article 13 of the Convention, the applicant argued that she had not been afforded an effective remedy to complain of the alleged violations.

The Court considers that the applicant's complaints fall to be examined under of Article 6 § 1 of the Convention, which, in so far as relevant, provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

A. Submissions by the parties

1. The applicant

101. The applicant submitted that the blanket ban on her right of access to court went to the heart of her right to a fair hearing and had been in breach of Article 6 § 1 of the Convention. She pointed out that on 15 September 2000 she had been declared incapacitated during proceedings that had been initiated by her adoptive father. Solely on the basis of the medical report of 19 July 2000, the Kaunas City District Court had deemed that the applicant was not to be summoned. As a result she had not taken part in those proceedings. The local authority, whose presence had been obligatory, had not made a significant contribution during the hearing and had endorsed the conclusions of the medical report. The Kaunas District Court had not provided any reasons for its decision, other than reiterating the conclusions of the forensic experts. The district court had chosen not to assess other evidence which could have potentially shed light on the applicant's circumstances, such as that which could have arisen by summoning the applicant or other witnesses, or by questioning the authors of the psychiatric report in person. The judge had not found it necessary to examine whether any ulterior reasons had underlain the incapacitation request.

102. The applicant argued, further, that she had not been given the opportunity to participate in any of the guardianship proceedings. She had never been notified of or summoned to any of the four sets of proceedings concerning the appointment or discharge of her guardian/property

administrator. For the applicant, there had been no medical or other reasons relating to her health that would have precluded her from participating. Nonetheless, the courts had invariably based their decisions on the views of the local authority without examining the personal circumstances of the applicant. The proceedings had been very summary in nature, the hearings had been brief and the rationale underpinning judgments had been almost non-existent. On 15 September 2000 the Kaunas City District Court had appointed her adoptive father as her guardian without any involvement on her part. As a result, not only had she been unable to object to his appointment, but she had also been barred from appealing against that decision.

103. The applicant emphasised that the review proceedings in 2005 initiated by her with the assistance of D.G. had been the only opportunity that she had ever had to put her point of view across before a court of law. On this occasion, she had personally addressed the Kaunas City District Court on a number of issues of the utmost importance to her, such as her incapacitation, the identity of her guardian and her admission to an institution. However, the district court had chosen to dismiss her action on narrow procedural grounds.

104. The applicant's main objection with regard to the review proceedings lay in the district court's decision to turn down her express request to be provided with independent legal aid. The explanation that the applicant was already represented by her guardian's lawyer had misunderstood the competing interests of the two parties. The effect had been to severely prejudice the ability of the applicant to engage with the procedural aspects of the hearing on which the district court's decision had turned.

105. Lastly, the applicant argued that she had been financially able to afford to employ a lawyer to represent her at that or any other of the hearings. However, she had been denied access to her own money, and at many of the hearings her interests and those of the person with control over her funds had been divergent. She concluded that in view of her vulnerable position, the procedural complexity of the proceedings and the high stakes thereof, Article 6 § 1 of the Convention had required that she be provided with free legal aid.

2. The Government

106. As to the applicant's complaint that she had not been afforded a fair hearing in relation to her request that the proceedings by which her guardian was appointed be reopened, the Government referred to the Court's case-law to the effect that the right of access to court is not absolute and that the States have a certain margin of appreciation in assessing what might be the best policy in this field (*Golder v. the United Kingdom*, 21 February 1975, § 38, Series A no. 18). That was especially true as regards persons of

unsound mind, and the Convention organs had acknowledged that such restrictions were not in principle contrary to Article 6 § 1 of the Convention, where the aim pursued was legitimate and the means employed to achieve that aim were proportionate (*G.M. v. the United Kingdom*, no. 12040/86, Commission decision of 4 May 1987, Decisions and Reports (DR) 52, p. 269).

107. Turning to the particular situation of the applicant, the Government noted that domestic law did not allow a legally incapacitated person to lodge a petition seeking that his or her guardianship be changed. As the applicant had deemed that her adoptive father was not a suitable person to be her guardian, the authorities responsible for oversight of guardians (the Social Services Department of Kaunas City Council) or a public prosecutor could have submitted an application for reopening of the proceedings. Nevertheless, the Kaunas City District Court had accepted the applicant's request for reopening for examination and on 7 November 2005 had reviewed her case with a high degree of care.

108. The hearing of 7 November 2005 at the Kaunas City District Court had taken place in the presence of the applicant, her guardian (her adoptive father) and his lawyer, and D.G., as well as in the presence of the representatives of the relevant State authorities. Whilst admitting that at that hearing the applicant had asked to be assisted by a separate lawyer, the Government submitted that the court had not been able to grant the applicant's request because of the decision of 15 September 2000 declaring her legally incapacitated. Even so, the applicant's interests had been defended by the representative of the Kėdainiai Home, the representative of the Social Services Department and the public prosecutor.

109. The Government contended that during the hearing of 7 November 2005 the applicant had not sustained her request that D.G. be appointed as her new guardian. Contrary to what the applicant had stated to the European Court, in her submissions at the hearing at issue she had agreed to keep her adoptive father as her guardian, saying that she loved him, but had expressed her wish to be released from the Kėdainiai Home. For the Government, it appeared from the transcript of the hearing that this statement had been made by the applicant before the break, but not after, contrary to her allegation of being "threatened with restraint" for disobedience.

110. The Government pointed out that, pursuant to Article 507 § 3 of the Code of Civil Procedure, the appointment of a guardian required to be heard in the presence of a representative of the authority overseeing guardians, who was required to submit the authority's conclusions to the court, and the person to be appointed as guardian. Given that both of these persons had taken part in the hearing of 21 January 2004, the Kaunas City District Court in its decision of 17 November 2005 had reasonably found that the applicant had been properly represented at the hearing of 21 January 2004, and thus

the provision on which the applicant had based her request to reopen the proceedings had not been breached.

111. Lastly, in their observations of 15 September 2008 the Government noted that as regards incapacitation proceedings the ministries had prepared legislative amendments to the Civil Code and the Code of Civil Procedure, which would be submitted to Parliament. The proposed amendments provide for compulsory representation of a person facing incapacitation proceedings before a court by a lawyer.

In the light of the preceding arguments, the Government considered that the applicant's complaint was manifestly ill-founded.

3. The intervening parties

112. The representatives of Harvard Law School submitted that in all cases a court or other judicial authority must ensure that a representative acts solely in the interests of the incapacitated person. In any case in which it is objectively apparent that the person being represented does not accept or assent to the steps taken by a representative, those matters must be explored by the judicial authorities. The judicial authorities must exercise thorough, additional supervision in all cases in which there is a filter between a person and a court, such as when a person is represented by another individual. This remains true even where the representative was appointed by a court.

113. The European Group of National Human Rights Institutions noted that the European Convention on Human Rights guaranteed rights and freedoms that must be protected regardless of an individual's level of capacity. They also saw it important to mention the Court's judgment in *Winterwerp v. the Netherlands* (24 October 1979, Series A no. 33), where the Court concluded that although mental illness may render legitimate certain limitations upon the exercise of the "right to access to court", it could not warrant the total absence of that right as embodied in Article 6 § 1.

B. The Court's assessment

1. Admisibility

114. The parties did not dispute the applicability of Article 6, under its "civil" head, to the proceedings at issue, and the Court does not see any reason to hold otherwise (see *Winterwerp*, cited above, § 73, and *Matter v. Slovakia*, no. 31534/96, § 51, 5 July 1999).

115. The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It

further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

2. Merits

(a) General principles

116. In most of the previous cases before the Court involving "persons of unsound mind", the domestic proceedings concerned their detention and were thus examined under Article 5 of the Convention. However, the Court has consistently held that the "procedural" guarantees under Article 5 §§ 1 and 4 are broadly similar to those under Article 6 § 1 of the Convention (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 232, 17 January 2012 and the case-law cited therein). Therefore, in deciding whether the proceedings in the present case for the reopening of the guardianship appointment were "fair", the Court will have regard, *mutatis mutandis*, to its case-law under Article 5 § 1 (e) and Article 5 § 4 of the Convention.

117. In the context of Article 6 § 1 of the Convention, the Court accepts that in cases involving a mentally-ill person the domestic courts should also enjoy a certain margin of appreciation. Thus, for example, they can make appropriate procedural arrangements in order to secure the good administration of justice, protection of the health of the person concerned, and so forth (see *Shtukaturov v. Russia*, no. 44009/05, § 68, ECHR 2008).

118. The Court accepts that there may be situations where a person deprived of legal capacity is entirely unable to express a coherent view or give proper instructions to a lawyer. It considers, however, that in many cases the fact that an individual has to be placed under guardianship because he lacks the ability to administer his affairs does not mean that he is incapable of expressing a view on his situation and thus of coming into conflict with the guardian. In such cases, when the conflict potential has a major impact on the person's legal situation, such as when there is a proposed change of guardian, it is essential that the person concerned should have access to court and the opportunity to be heard either in person or, where necessary, through some form of representation. Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right, except in very exceptional circumstances such as those mentioned above. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental health issues, are not fully capable of acting for themselves (see, *mutatis mutandis*, *Winterwerp*, cited above, § 60).

119. The Court reiterates that the key principle governing the application of Article 6 is fairness. Even in cases where an applicant appears in court notwithstanding lack of assistance by a lawyer and manages to conduct his or her case in the face of all consequent difficulties, the question may

nonetheless arise as to whether this procedure was fair (see, *mutatis mutandis*, *McVicar v. the United Kingdom*, no. 46311/99, §§ 50-51, ECHR 2002-III). The Court also recalls that there is the importance of ensuring the appearance of the fair administration of justice and a party to civil proceedings must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims. Here, as with other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures (see *P., C. and S. v. the United Kingdom*, no. 56547/00, § 91, ECHR 2002-VI).

(b) Application to the present case

120. Turning to the circumstances of the instant case, the Court again notes that it cannot examine the applicant's initial placement under guardianship (see paragraph 99 above). Even so, the Court cannot overlook the fact that back in 2000 the applicant did not participate in the court proceedings for her incapacitation. In particular, nothing suggests that the court notified the applicant of its own accord of the hearing at which her personal autonomy in almost all areas of life was at issue, including the eventual limitation of her liberty (see paragraph 12 above). Furthermore, as transpires from the decision of the Kaunas City District Court of 15 September 2000, it ruled exclusively on the basis of the medical panel's report, without having summoned the medical experts who authored the report for questioning. Neither did the court call to testify any other witnesses who could have shed some light as to the personality of the applicant. Accordingly, the applicant was unable to participate in the proceedings before the Kaunas City District Court in any form. Given that the potential finding of the applicant being of unsound mind was, by its very nature, largely based on the applicant's personality, her statements would have been an important part of the applicant's presentation of her case, and virtually the only way to ensure adversarial proceedings (see, *mutatis mutandis*, *Kovalev v. Russia*, no. 78145/01, §§ 35-37, 10 May 2007; also see Principle 13 of the Recommendation No. R (99) 4 by the Council of Europe).

121. The Court also notes that on 21 January 2004 the Kaunas City District Court appointed the applicant's adoptive father as her legal guardian. The applicant was again not summoned because the court apparently considered her attendance to be unnecessary.

122. Next, the Court turns to the proceedings regarding the change of the applicant's guardianship in 2005. The Court notes that there is no indication that at that moment in time the applicant was suffering from an incapacity of such a degree that her personal participation in the proceedings would have been meaningless. Although health care officials had considered that her involvement in the proceedings relating to her initial placement under

guardianship in 2000 was unnecessary, as she had apparently been unable to provide them with an objective opinion (see paragraph 11 above), she did in fact participate in the hearing relating to the change of guardian on 7 November 2005. Indeed, she not only stated unequivocally that she maintained her request that the guardianship proceedings be reopened and asked to be assisted by a lawyer but also made a number of other submissions about the proceedings and expressed a clear view on various matters. In particular, the applicant emphasised that she had not been summoned to the hearing during which her adoptive father had been appointed her guardian. She also expressed her desire to leave the Kėdainiai Home. Taking into account the fact that the applicant was an individual with a history of psychiatric troubles, and the complexity of the legal issues at stake, the Court considers that it was necessary to provide the applicant with a lawyer.

123. The Government argued that the Kaunas City District Court's finding that the applicant, who lacked legal capacity, had been properly represented by her adoptive father's lawyer had been correct and in compliance with domestic law. However, the crux of the complaint is not the legality of the decision under domestic law but the "fairness" of the proceedings from the standpoint of the Convention and the Court's case-law.

124. As emerges from the materials before the Court, the relationship between the applicant and her adoptive father has not always been positive. Quite the contrary, on numerous occasions the applicant had contacted State authorities claiming that there was a dispute between the two of them, which culminated in her being deprived of legal capacity and her liberty (see paragraphs 32, 33 and 60 above). What is more, the social services had also noted disagreement between the applicant and her adoptive father (see paragraph 18 above). Lastly, on at least one occasion the applicant's adoptive father had himself acknowledged their strained relationship (see paragraph 14 above). Accordingly, the Court finds merit in the applicant's argument that, because of the conflicting interests of her and her legal guardian, her guardian's lawyer could in no way have represented her interests properly. In the view of the Court, the interests of a fair hearing required that the applicant be granted her own lawyer.

125. The Government suggested that a representative of the social services and the district prosecutor attended the hearing on the merits, thus protecting the applicant's interests. However, in the Court's opinion, their presence did not make the proceedings truly adversarial. As the transcript of the hearing of 7 November 2005 shows, the representatives of the social services, the prosecutor, the doctors from the Kėdainiai Home and the Kaunas Psychiatric Hospital clearly supported the position of the applicant's adoptive father – that he should remain D.D.'s legal guardian.

126. Finally, the Court recalls that it must always assess the proceedings as a whole (see *C.G. v. the United Kingdom*, no. 43373/98, § 35, 19 December 2001). In particular, and turning to the spirit in which the hearing of 7 November 2005 was held, the Court notes that the judge refused a request by D.G. that an audio recording be made. Be that as it may, the Court is not able to overlook the applicant's complaint, although denied by the Government, that the judge did not allow her to sit near D.G., the only person whom the applicant trusted. Neither can the Court ignore the allegation that during the break the applicant was forced to leave the hearing room and to go to the judge's office, after which measure the applicant declared herself content (see paragraphs 41 and 42 above). Against this background, the Court considers that the general spirit of the hearing further compounded the applicant's feelings of isolation and inferiority, taking a significantly greater emotional toll on her than would have been the case if she would have had her own legal representation.

127. In the light of the above considerations and taking into account the events that preceded the examination of the applicant's request for reopening of her guardianship proceedings, the Court concludes that the proceedings before the Kaunas City District Court on 7 November 2005 were not fair. Accordingly, the Government's preliminary objection of abuse of application must be dismissed. The Court holds that there has been a violation of Article 6 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

128. Under Article 5 § 1 of the Convention the applicant complained that her involuntary admission to the Kėdainiai Home had been unlawful. Article 5, in so far as relevant, provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (e) the lawful detention of persons ... of unsound mind..."

A. Submissions by the parties

1. The applicant

129. The applicant maintained her claims. She alleged that her involuntary admission to the Kėdainiai Home after 2 August 2004 had

amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention.

130. With regard to the objective element of her complaint, the applicant argued that her liberty had been restricted on account of her complete confinement and the extreme degree of control over her daily life. The applicant, like other residents, had not been able to leave the grounds of the Kėdainiai Home. If a resident left without permission, the director was bound to inform the police immediately. The applicant had tried to abscond twice, in 2006 and 2007, only to be brought back by the police. Furthermore, the applicant had been entirely under the control of staff at the institution, who had been able to medicate her by force or coercion, place her in isolation or tie her down, as exemplified by the incident of 25 January 2005. According to the findings of the Prosecutor's Office, on that day the applicant had been tied down to a bed in the isolation room and forcibly medicated, in contravention of the internal rules of the institution. It would be plain upon visiting the Kėdainiai Home that the vast majority of residents are heavily medicated.

131. Further, the applicant complained that all aspects of her life are controlled by the staff. Although in theory she is allowed to receive visits from people outside the institution, this right is subject to approval from the director. Upon her admission to the Kėdainiai Home in 2004, all visits other than those from her guardian had been restricted for a lengthy period of time.

The applicant submitted that she cannot decide whether or when to stay in bed, there is a limited range of activities for her to take part in, she is not free to make routine choices like other adults – for example, about her diet, daily activities and social contacts. She is subject to constant supervision.

132. With respect to the subjective element of her complaint, the applicant noted that her case was diametrically opposite to that of *H.M. v. Switzerland* (no. 39187/98, § 47, ECHR 2002-II), where the applicant had agreed to her admission to a nursing home. In the present case, the applicant's views had not been sought, either at the time of her admission or during her continued involuntary placement in the Kėdainiai Home. However, under Lithuanian law it had, in fact, been irrelevant whether she had consented or not to her detention, because an individual lacking legal capacity and placed under guardianship becomes a non-entity under the law and loses the capacity to take any decisions. Even so, whilst she had been incapable *de jure*, she had still, in fact, been capable of expressing her consent. She had expressed strong objections about her continued involuntary admission to the institution, most emphatically by running away twice, in her arguments before the domestic court, in her correspondence with various State authorities and, finally, by submitting a complaint to the Court.

133. In sum, the applicant's involuntary admission to and continued residence in the Kėdainiai Home after 2 August 2004 constituted a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention.

134. Lastly, the applicant submitted that her admission to the Kėdainiai institution was not lawful. The authorities involved in placing her in a psychiatric institution or those supervising the guardian's activities failed to consider whether other less restrictive community-based arrangements would have been more suitable to address the applicant's mental health problems. Instead they simply acquiesced in the guardian's request to have the applicant placed in an institution. Most importantly, the applicant was excluded from this decision-making process altogether. Consequently, the applicant saw her detention as arbitrary, in contradiction with Article 5 § 1 (e) of the Convention.

2. The Government

135. The Government argued, first, that Article 5 of the Convention was not applicable to the instant case. They submitted that the Kėdainiai Home was an institution for providing social services and not forced treatment under a regime corresponding to that of a psychiatric institution. Whilst admitting that certain medical services continued to be provided in the Kėdainiai Home, the institution at issue was not primarily used for the purposes of hospitalisation or medical treatment. Having regard to the fact that the Kėdainiai Home had to take care of adults suffering from mental health problems, it followed that the limited restrictions on the applicant had corresponded to the nature of the facility and had been no more than normal requirements (*Nielsen v. Denmark*, 28 November 1988, § 72, Series A no. 144).

136. Turning to the particular situation of the applicant, the Government submitted that until September 2007 the applicant had lived in a part of the Kėdainiai Home called "Apytalaukis", which had been an open facility. Although its grounds had been fenced, the gates had not been locked and residents had been able to leave the territory as they wished. The doors of the building had stayed unlocked. The same conditions had remained after the applicant's resettlement, except that the grounds had not even been fenced. According to the personnel of the Kėdainiai Home, the applicant had not always adhered to the internal rules of the institution and had failed to inform the staff before leaving the grounds and going for a walk. Even so, this had neither been considered as absconding, nor had the applicant been sanctioned in any way. Also, similarly to the facts in *H.M. v. Switzerland* (cited above), and with the exception of the incident of 25 January 2005, the applicant had never been placed in a secure ward. Moreover, she had been free to maintain personal contacts, to write and receive letters, to practise her religion and to make phone calls.

137. As to the medical treatment the applicant had received in the Kėdainiai Home, the Government submitted that, except for the incident of 25 January 2005, she had not been forcefully medicated. Each time she had been required to take medicine a psychiatrist had talked to her and had explained the need for treatment. There had been periods when the applicant had refused to take medicine; those periods had always been followed by the deterioration of her mental health. However, after some time the applicant had usually accepted the doctors' arguments and had agreed to continue treatment. The social and medical care she had received in the Kėdainiai Home had had a positive effect on the applicant, because her mental state had stabilised. Since her admission to the Kėdainiai Home she had never been hospitalised, whereas prior to that she had used to be hospitalised at least once a year.

In sum, the limited restrictions to which the applicant had been subjected in the Kėdainiai Home had all been necessary due to the severity of her mental illness, had been in her interests and had been no more than the normal requirements associated with the responsibilities of a social care institution taking care of inhabitants suffering from mental health problems.

138. The Government also noted that the admission of the applicant to the Kėdainiai Home had stemmed from her guardian's decision and not from a decision of the State or the municipal authorities. The applicant's adoptive father, as her guardian, had been empowered to act on her behalf and with the aim of exercising and protecting her rights and interests. In addition, the involvement of the municipal and State authorities in examining the applicant's situation and state of mind had played an important role in verifying the best interests of the applicant and had provided necessary safeguards against any arbitrariness in the guardian's decisions.

139. Turning to the subjective element of the applicant's case, the Government submitted that the applicant was legally incapacitated and had thus lacked the decision-making capacity to consent or object to her admission. Her guardian and not the authorities had been able to decide on her place of residence.

140. In the light of the above considerations, the Government argued that this part of the application was incompatible *ratione materiae* with Article 5 § 1 of the Convention.

141. Alternatively, should the Court find that Article 5 § 1 was applicable to the applicant's complaints, the Government contended that they were not founded. The applicant's admission to the Kėdainiai Home had been lawful, given that it had been carried out in accordance with the procedure established by domestic law. Under the law, a person can be admitted to an institution at the request of the guardian, provided that the person is suffering from a mental disorder. The applicant was admitted to the hospital at the request of her official guardian in relation to a worsening

of her mental condition. Furthermore, in the view of the Government, the involvement of the authorities in the procedure for the applicant's admission had provided safeguards against any possible abuses.

142. In the further alternative, the Government submitted that even if the restrictions on the applicant's movement could be considered as falling within Article 2 of Protocol No. 4 to the Convention, those restrictions had been lawful and necessary.

B. The Court's assessment

1. Admissibility

143. The Government argued that the conditions in which the applicant is institutionalised in the Kėdainiai Home are not so restrictive as to fall within the meaning of "deprivation of liberty" as established by Article 5 of the Convention. However, the Court cannot subscribe to this thesis.

144. It reiterates that in order to determine whether there has been a deprivation of liberty, the starting point must be the concrete situation of the individual concerned. Account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39; and *Ashingdane v. the United Kingdom*, 28 May 1985, § 41, Series A no. 93).

145. The Court further recalls that the notion of deprivation of liberty within the meaning of Article 5 § 1 does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question (see, *mutatis mutandis*, *H.M. v. Switzerland*, cited above, § 46).

146. In the instant case the Court observes that the applicant's factual situation in the Kėdainiai Home is disputed. Be that as it may, the fact whether she is physically locked in the Kėdainiai facility is not determinative of the issue. In this regard, the Court notes its case-law to the effect that a person could be considered to have been "detained" for the purposes of Article 5 § 1 even during a period when he or she was in an open ward with regular unescorted access to unsecured hospital grounds and the possibility of unescorted leave outside the hospital (see *H.L. v. the United Kingdom*, no. 45508/99, § 92, ECHR 2004-IX). As concerns the circumstances of the present case, the Court considers that the key factor in determining whether Article 5 § 1 applies to the applicant's situation is that the Kėdainiai Home's management has exercised complete and effective control by medication and supervision over her assessment, treatment, care, residence and movement from 2 August 2004, when she was admitted to

that institution, to this day (ibid., § 91). As transpires from the rules of the Kėdainiai Home, a patient therein is not free to leave the institution without the management's permission. In particular, and as the Government have themselves admitted in their observations on the admissibility and merits, on at least one occasion the applicant left the institution without informing its management, only to be brought back by the police (see paragraph 29 above). Moreover, the director of the Kėdainiai Home has full control over whom the applicant may see and from whom she may receive telephone calls (see paragraph 81 above). Accordingly, the specific situation in the present case is that the applicant is under continuous supervision and control and is not free to leave (see *Storck v. Germany*, no. 61603/00, § 73, ECHR 2005-V). Any suggestion to the contrary would be stretching credulity to breaking point.

147. Considerable reliance was placed by the Government on the Court's judgment in *H.M.* (cited above), in which it was held that the placing of an elderly applicant in a foster home in order to ensure necessary medical care as well as satisfactory living conditions and hygiene did not amount to a deprivation of liberty within the meaning of Article 5 of the Convention. However, each case has to be decided on its own particular "range of factors" and, while there may be similarities between the present case and *H.M.*, there are also distinguishing features. In particular, it was not established that H.M. was legally incapable of expressing a view on her position. She had often stated that she was willing to enter the nursing home and, within weeks of being there, she had agreed to stay, in plain contrast to the applicant in the instant case. Further, a number of safeguards – including judicial scrutiny – were in place in order to ensure that the placement in the nursing home was justified under domestic and international law. This led to the conclusion that the facts in *H.M.* were not of a "degree" or "intensity" sufficiently serious to justify a finding that H.M. was detained (see *Guzzardi*, cited above, § 93). By contrast, in the present case the applicant was admitted to the institution upon the request of her guardian without any involvement of the courts.

148. As to the facts in *Nielsen*, the other case relied on by the Government, the applicant in that case was a child, hospitalised for a strictly limited period of time of only five and a half months, on his mother's request and for therapeutic purposes. The applicant in the present case is a functional adult who has already spent more than seven years in the Kėdainiai Home, with negligible prospects of leaving it. Furthermore, in contrast to this case, the therapy in *Nielsen* consisted of regular talks and environmental therapy and did not involve medication. Lastly, as the Court found in *Nielsen*, the assistance rendered by the authorities when deciding to hospitalise the applicant was "of a limited and subsidiary nature" (§ 63), whereas in the instant case the authorities contributed substantially to the applicant's admission to and continued residence in the Kėdainiai Home.

149. Assessing further, the Court draws attention to the incident of 25 January 2005, when the applicant was restrained by the Kėdainiai Home staff. Although the applicant was placed in a secure ward, given drugs and tied down for a period of only fifteen to thirty minutes, the Court notes the particularly serious nature of the measure of restraint and observes that where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of the detention does not affect this conclusion (see *X v. Germany*, no. 8819/79, Commission decision of 19 March 1981, DR 24, pp. 158, 161; and *Novotka v. Slovakia* (dec.), no. 47244/99, 4 November 2003).

150. The Court next turns to the "subjective" element, which was also disputed between the parties. The Government argued that the applicant lacked *de jure* legal capacity to decide matters for herself. However, this does not necessarily mean that the applicant was *de facto* unable to understand her situation (see *Shtukaturov v. Russia*, no. 44009/05, § 108, ECHR 2008). Whilst accepting that in certain circumstances, due to severity of his or her incapacity, an individual may be wholly incapable of expressing consent or objection to being confined in an institution for the mentally handicapped or other secure environment, the Court finds that that was not the applicant's case. As transpires from the documents presented to the Court, the applicant subjectively perceived her compulsory admission to the Kėdainiai Home as a deprivation of liberty. Contrary to what the Government suggested, she has never regarded her admission to the facility as consensual and has unequivocally objected to it throughout the entire duration of her stay in the institution. On a number of occasions the applicant requested her discharge from the Kėdainiai Home by submitting numerous pleas to State authorities and, once she was given the only possibility to address a judicial institution, to the Kaunas City District Court (see paragraphs 34 and 37 above). She even twice attempted to escape from the Kėdainiai facility (see, *a fortiori*, *Storck*, cited above, § 73). In sum, even though the applicant had been deprived of her legal capacity, she was still able to express an opinion on her situation, and in the present circumstances the Court finds that the applicant had never agreed to her continued residence at the Kėdainiai Home.

151. Lastly, the Court notes that although the applicant's admission was requested by the applicant's guardian, a private individual, it was implemented by a State-run institution – the Kėdainiai Home. Therefore, the responsibility of the authorities for the situation complained of was engaged (see *Shtukaturov*, cited above, § 110).

152. In the light of the foregoing the Court concludes that the applicant was "deprived of her liberty" within the meaning of Article 5 § 1 of the Convention from 2 August 2004 and remains so to this day.

153. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

154. The Government argued that the applicant had been admitted to the Kėdainiai Home lawfully. The Court accepts that the applicant's involuntary admission was "lawful", if this term is construed narrowly, in the sense of the formal compatibility of the applicant's involuntary admission with the procedural and material requirements of domestic law (see paragraph 79 above). It appears that the only condition necessary for the applicant's admission was the consent of her official guardian, her adoptive father, who was also the person who had initially sought the applicant's admission to the Kėdainiai Home.

155. However, the Court reiterates that the notion of "lawfulness" in the context of Article 5 § 1 (e) has also a broader meaning. The notion underlying the term "procedure prescribed by law" is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary (see *Winterwerp*, cited above, § 45).

156. The Court also recalls that in *Winterwerp* (paragraph 39) it set out three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 § 1 (e): except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder.

157. Turning to the present case, the Court notes that just a few weeks before her placement in the Kėdainiai Home on 2 August 2004, the applicant had been admitted to and examined at the Kaunas Psychiatric Hospital (see, by converse implication, *Stanev*, cited above, § 156). A medical panel of that hospital concluded that at that time the applicant suffered from "continuous paranoid schizophrenia". The doctors' commission deemed it appropriate for the applicant to live in a "social care institution for the mentally handicapped". The Court further observes that soon thereafter a social worker concluded that the applicant was not able to live on her own, as she could not take care of herself, did not understand the value of money, did not clean her apartment and wandered in the city hungry. The Court also notes the social worker's testimony as to the unpredictability of the applicant's behaviour, given that sometimes she would get angry at people and shout at them without a reason (see

paragraphs 22 and 23 above). That being so and recalling the fact that the applicant had a history of serious mental health problems since 1979, the Court is ready to find that the applicant has been reliably shown to have been suffering from a mental disorder of a kind and degree warranting compulsory confinement and the conditions as defined in *Wintertwerp* had thus been met in her case. Furthermore, the Court also considers that no other measures were available in the circumstances. As noted by the social worker, the applicant's adoptive father, who was her legal guardian, could not "manage" her (see paragraph 23 above). On this point the Court also takes notice of the fact that even being removed from institutional care and taken to her adoptive father's apartment, the applicant escaped and was found by the police only three months later (see paragraph 29 above). In these circumstances the Court concludes that the applicant's compulsory confinement was necessary (see *Stanev*, cited above, § 143) and no alternative measures had been appropriate in the circumstances of the case. The Court lastly observes, and it has not been disputed by the applicant, that in situations such as hers the domestic law did not provide that placement in a social care institution would be decided by a court (see, by converse implication, *Gorobet v. Moldova*, no. 30951/10, § 40, 11 October 2011).

158. In the light of the above, the Court cannot but conclude that the applicant's confinement to the Kėdainiai Home on 2 August 2004 was "lawful" within the meaning of Article 5 § 1 (e) of the Convention. Accordingly, there has been no violation of Article 5 § 1.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

159. The applicant complained that she is unable to obtain her release from the Kėdainiai Home. Article 5 § 4, relied on by the applicant, provides as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Submissions by the parties

160. The applicant submitted that she had been admitted to the Kėdainiai Home upon her guardian's request and with the authorisation of an administrative panel. The lawfulness of her involuntary hospitalisation had not been reviewed by a court, either upon her admission or at any other subsequent time. Being deprived of her legal capacity, the applicant submitted that she is prevented from independently pursuing any judicial legal remedy to challenge her continued involuntary hospitalisation. In

relation to the possibility supposedly at the applicant's disposal of asking for a prosecutorial inquiry, this remedy could not be regarded *per se* as judicial review satisfying the requirements of Article 5 § 4. As for the possibilities identified by the Government, namely to ask social services or a prosecutor to initiate a review of the applicant's medical condition, these procedures were discretionary. In any event, the applicant had filed a number of complaints with the prosecutor's office and other authorities, which had unanimously concluded that her hospitalisation in the Kėdainiai Home had been carried out in accordance with the domestic law, thus being disinclined to take any action to override the will of her adoptive father, acting as her legal guardian. Once the Kėdainiai Home had become her guardian, it had been clear that that facility clearly had an interest in stifling any of the applicant's complaints and in keeping her in the institution. The applicant therefore submitted that her rights under Article 5 § 4 of the Convention had been breached.

161. The Government maintained that the applicant had had an effective remedy to challenge her hospitalisation at the Kėdainiai facility. Thus, she had been able to apply for release or complain about the actions of the medical staff through her guardians, who had represented her in dealings with third parties, including the courts. Further, the applicant had been able to ask the social services authorities or a prosecutor to initiate a review of her situation. For the Government, the applicant's complaint was unfounded.

B. The Court's assessment

1. Admissibility

162. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

163. Among the principles emerging from the Court's case-law on Article 5 § 4 concerning "persons of unsound mind" are the following:

(a) a person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;

(b) Article 5 § 4 requires that the procedure followed have a judicial character and give to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place;

(c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. Special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A; also see *Stanev*, cited above, § 171).

164. This is so in cases where the original detention was initially authorised by a judicial authority (see *X v. the United Kingdom*, 5 November 1981, § 52, Series A no. 46), and it is all the more true in the circumstances of the present case, where the applicant's placement in the Kėdainiai Home was initiated by a private individual, namely the applicant's guardian, and decided upon by the municipal and social care authorities without any involvement on the part of the courts.

165. The Court accepts that the forms of judicial review may vary from one domain to another and may depend on the type of the deprivation of liberty at issue. It is not within the province of the Court to inquire into what would be the best or most appropriate system of judicial review in this sphere. However, in the present case the courts were not involved in deciding on the applicant's placement in the Kėdainiai Home at any moment or in any form. It appears that, in situations such as the applicant's, Lithuanian law does not provide for automatic judicial review of the lawfulness of admitting a person to and keeping him in an institution like the Kėdainiai Home. In addition, a review cannot be initiated by the person concerned if that person has been deprived of his legal capacity. In sum, the applicant was prevented from independently pursuing any legal remedy of a judicial character to challenge her continued involuntary institutionalisation.

166. The Government claimed that the applicant could have initiated legal proceedings through her guardians. However, that remedy was not directly accessible to her: the applicant fully depended on her legal guardian, her adoptive father, who had requested her placement in the Kėdainiai Home in the first place. The Court also observes that the applicant's current legal guardian is the Kėdainiai Home – the same social care institution which is responsible for her treatment and, furthermore, the same institution which the applicant had complained against on many occasions, including in court proceedings. In this context the Court considers that where a person capable of expressing a view, despite having

been deprived of legal capacity, is deprived of his liberty at the request of his guardian, he must be accorded an opportunity of contesting that confinement before a court, with separate legal representation. Lastly, as to the prospect of an inquiry carried out by the prosecuting authorities, the Court shares the applicant's observation that a prosecutorial inquiry cannot as such be regarded as judicial review satisfying the requirements of Article 5 § 4 of the Convention (see *Shtukaturov*, cited above, § 124).

167. In the light of the above, the Court dismisses the Government's preliminary objection of abuse of application and holds that there has also been a violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

168. Relying on Articles 3 and 8 of the Convention, the applicant complained of having been physically restrained on 25 January 2005, when she had been tied to a bed in an isolation room, and of the overall standard of medical treatment in the Kėdainiai Home. She also argued that she had been given poor quality food.

The Court considers that in the particular circumstances of the present case these complaints fall to be examined under Article 3 of the Convention, which reads, in so far as relevant as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

169. The applicant submitted that she had been forced to take medication provided by the Kėdainiai Home with little or no information about its use. On occasions she had refused medication, but had generally acquiesced to its administration because of persistent pressure from the staff. The incident of 25 January 2005 had exemplified that pressure at its worst, though the coercion is generally less dramatic and persistent.

170. The applicant also complained that at the Kėdainiai institution she had been given out-of-date products to eat.

171. The Government argued that the measures used in respect of the applicant had been therapeutic and necessary. Turning to the events of 25 January 2005, they submitted that the social workers had decided on their own to tie down the applicant as they had been afraid for her life. Although the exact length of time that the applicant had been tied up for was not clear, it could have lasted for only fifteen to thirty minutes and had not continued any longer than necessary. During the incident the applicant had been forcibly injected with 10 mg of Haloperidol, whilst the average

therapeutic dosage of the said medication is 12 mg. Haloperidol is a common antipsychotic medicament prescribed for individuals suffering from schizophrenia in order to eliminate the symptoms of psychosis. According to the generally accepted principles of psychiatry, medical necessity had fully justified the treatment in issue. The Government also drew the Court's attention to the prosecutor's decision of 31 July 2006 to discontinue the pre-trial investigation in connection with the applicant's forced restraint. They also noted the absence of any other similar incidents at the Kėdainiai Home in respect of the applicant. The Government summed up that even if the treatment of the applicant on 25 January 2005 had had unpleasant effects, it had not reached the minimum level of severity required under Article 3 of the Convention.

172. As to the applicant's complaint that she had been provided poor quality food, the Government submitted that although the authorities had found out-of-date meat in the Kėdainiai Home, the meat had been frozen and had never been used for cooking. A follow-up report of 20 February 2006 did not contain any evidence that the applicant had complained of failure to provide any medical assistance to her in respect of alleged food poisoning. For the Government, the applicant's accusations towards the care institution were unsubstantiated and hence manifestly ill-founded.

B. The Court's assessment

173. Referring to its settled case-law the Court reiterates that the position of inferiority and powerlessness which is typical of patients admitted on an involuntary basis to psychiatric hospitals calls for increased vigilance in reviewing whether the Convention has been complied with. While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are therefore responsible, such patients nevertheless remain under the protection of Article 3, whose requirements permit of derogation.

The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist (see *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244).

174. In this case it is above all the applicant's restraint on 25 January 2005 which appears worrying. However, the evidence before the Court is not sufficient to disprove the Government's suggestion that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue. Moreover, the applicant's allegations that the

use of restraint measures had been unlawful were dismissed by the prosecutors and the Court sees no valid reason to dispute their findings (see paragraphs 54-58 above). The Court also notes the Government's affirmation that there were no more similar incidents in the Kėdainiai Home in which physical restraint and supplementary medication had been used in respect of the applicant.

175. Turning to the applicant's submission of allegedly poor quality food and food poisoning, the Court notes with concern that out-of-date meat was found at the Kėdainiai Home (see paragraph 63 above). However, that fact alone is not sufficient to substantiate the applicant's accusations of inhuman or degrading treatment, as directed towards the Kėdainiai institution, to such an extent that an issue under Article 3 of the Convention would arise.

176. The Court accordingly finds that the above complaints must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

A. Censorship of correspondence

177. The applicant alleged that the Kėdainiai Home had censored her correspondence, in breach of Article 8 of the Convention, which reads insofar as relevant as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. The parties' submissions

178. The applicant argued that her correspondence, including that with the Court, and her telephone conversations, as illustrated by the incident of 18 January 2005, had been censored by the Kėdainiai Home. She also submitted that she had been denied books and newspapers.

179. The Government disputed the applicant's submissions and argued that the residents of the Kėdainiai Home were guaranteed the right to receive periodicals and personal correspondence. There were no requirements that the residents should send or receive their correspondence through the personnel of the facility.

180. As to the particular situation of the applicant, the Government underlined that there had been neither stopping nor censorship of any of her communications, such as telephone conversations or letters, including those with the Court. Such allegations were totally unsubstantiated and there was no proof that any acts of interception of communications had occurred. As regards the only specified incident involving the telephone call from Ms M. Buržinskienė on 18 January 2005, which the applicant had not been invited to answer, the Government noted that in the context of a more intensified deterioration of the applicant's health, the Kėdainiai Home personnel might have decided not to have the applicant temporarily disturbed. Nonetheless, since 2005 the applicant had possessed several of her own mobile phones and had used them at her own convenience and without hindrance. Furthermore, the applicant had not indicated either the addressees of her supposedly intercepted correspondence, or, at least, the approximate dates of such letters. Lastly, the Government submitted that the Kėdainiai Home had a room with newspapers, periodicals and books, to which all the residents, including the applicant, had unrestricted access.

Relying on the above considerations, the Government argued that the applicant's complaint was manifestly ill-founded.

2. The Court's assessment

181. The Court recalls its case-law to the effect that telephone calls made from business premises, as well as from the home, may be covered by the notions of "private life" and "correspondence" within the meaning of Article 8 § 1 (see *Halford v. the United Kingdom*, 25 June 1997, § 44, *Reports of Judgments and Decisions* 1997-III). Turning to the applicant's situation, it observes that on 18 January 2005 the applicant was indeed prevented from receiving a telephone call from Ms Buržinskienė. However, taking into account the applicant's medical diagnosis and the explanations provided by the Government, the Court is not ready to hold that on that occasion the applicant's rights under Article 8 were limited more than was strictly necessary. The Court also notes that this part of the complaint has been raised out of time, as required by Article 35 § 1 of the Convention.

182. Furthermore, having examined the materials submitted by the parties, the Court finds the applicant's other complaints in this part of the application not sufficiently substantiated and therefore rejects them as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

B. Visits

1. The parties' submissions

183. The applicant further argued that her ability to build and sustain relationships had also been limited due to restrictions placed on her capacity to receive visitors and telephone calls. The applicant has had very little contact with members of the community outside the facility. Outsiders' visits are generally limited and most visitors may not be received in private. The director of the Kėdainiai Home had in the past restricted visits from outsiders after the applicant's institutionalisation, upon a request from her guardian. The list of visitors maintained by the Kėdainiai Home showed that between 2 August 2004 and 25 December 2006 only the applicant's adoptive father had visited her, with few exceptions. Before the applicant got her own mobile phone, she had had to use the facilities provided by the institution. At that time, she had only been able to receive calls through the Kėdainiai Home's switchboard. She relied upon the right to respect for private and family life under the above-cited Article 8 of the Convention.

184. The Government pointed out that the applicant, as with the other residents of the Kėdainiai Home, was entitled to unrestricted visits by her relatives and her court-appointed guardians. As to other visitors, such individuals could visit residents upon having obtained the management's permission, which was required in order to protect the interests and the safety of the residents of the institution.

185. The Government submitted that the applicant's adoptive father, as her guardian, had requested that the Kėdainiai Home prevent D.G.'s negative influence over the applicant and restrict her visits in order to avoid the applicant's destabilisation. Only once on 18 August 2004, in accordance with that request and also having the oral consent of the in-house psychiatrist, had D.G.'s permission to visit been denied. In that connection, the Government also referred to a doctor's report concerning the negative influence of D.G. over the applicant. Relying on the record of visitors to the Kėdainiai Home, the Government asserted that, contrary to what had been said by the applicant, she had received visitors. In contrast to what had been suggested by the applicant, it had not been her relatives, but rather her friends who had most often visited her.

186. In the light of the above, the Government submitted that the applicant's complaint was manifestly ill-founded.

2. The Court's assessment

187. The Court reiterates that Article 8 of the Convention is intended to protect individuals from arbitrary interference by the State in their private and family life, home and correspondence. The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of

"private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to entirely exclude therefrom the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B).

188. Turning to the applicant's case, the Court notes that, except for one occasion on which D.G. was not allowed to see her on 18 August 2004, the applicant has not substantiated her pleas of social isolation and restrictions on having people visit her. Even assuming that these matters have been raised in time, the Court is not ready to disagree with the Government's suggestion that that single restriction was aimed at the protection of the applicant's mental health and was thus in compliance with the requirements of Article 8 of the Convention.

189. The applicant complained that by her admission to the Kėdainiai Home she had been segregated from society and cut off from social networks. Whilst acknowledging that because of her involuntary stay in the institution the applicant indeed could have faced certain restrictions in contacting others, the Court nonetheless observes that between 2 August 2004 and 25 December 2006 the applicant received one or more visitors on forty-two separate occasions. Of those visits, her friends, relatives and D.G. saw the applicant thirty-eight times (see paragraph 31 above). Lastly, the applicant had herself admitted that at one point she had got a mobile phone, which helped her to maintain contact with the outside world.

190. In the light of the foregoing, the Court considers that this part of the applicant's complaint is manifestly ill-founded within the meaning of Article 35 § 3 and therefore inadmissible in accordance with Article 35 § 4 of the Convention.

VII. ALLEGED VIOLATION OF ARTICLE 9 OF THE CONVENTION

191. The applicant complained that she had been prevented from practising her religion whilst resident in the Kėdainiai Home, in breach of Article 9 of the Convention.

192. The Government submitted that the applicant's complaint was purely abstract in nature. It was not indicated in the applicant's complaint when in particular she had been barred or impeded from practising her religion. Pursuant to the Bylaws of the Kėdainiai facility, the residents thereof had the right to practise their chosen religion and to attend a place of worship.

193. The Court has examined the above complaint as submitted by the applicant. However, having regard to all the material in its possession, it finds the complaint wholly unsubstantiated and therefore rejects it as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

VIII. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

194. Relying upon Article 13 of the Convention, the applicant also complained that she had had no effective domestic remedies at her disposal to seek redress for the alleged violations of which she had complained to the Court. Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. The parties' submissions

1. The applicant

195. The applicant submitted at the outset that she is a very vulnerable individual. She is legally incapacitated with a history of mental health problems and has been admitted to a psychiatric institution against her will for an indeterminate period. The applicant's guardian, who has the power to take decisions on all her aspects of life, is the care institution itself. In the applicant's view, on account of her vulnerability, Article 13 of the Convention required that the State take supplementary measures to make sure that she could have benefited from effective remedies for the violations of her rights.

196. The applicant pointed out that she does not have independent standing to initiate any civil proceedings. Only once had she been successful in initiating court proceedings, namely those before the Kaunas District Court in 2005 concerning the change of guardianship. However, even then it had been not possible to pursue that remedy in full, given that the Kaunas District Court had decided to refuse the applicant's request for legal assistance on the grounds that she had been represented by her legal guardian, who already had a lawyer.

197. The applicant further submitted that neither could she exercise her right to an effective domestic remedy through other persons. As concerns her guardian, who was her legal representative in accordance with the law, this remedy had been purely discretionary. More importantly, it was difficult to conceive how this remedy could have worked with regard to complaints challenging decisions taken by the guardian him, her or itself on the applicant's behalf, such as the decision to hospitalise the applicant in the

institution, or the decision by the Kėdainiai Home to restrict visitors' access to the applicant.

198. The applicant also argued that she could not effectively act through the Social Services Department or the public prosecutor either. As concerns the first body, she emphasised the purely discretionary powers of the social services department and doubted the impartiality of an institution which had to a large degree been responsible for the appointment of her guardians and for her hospitalisation in the institution. As concerns the prosecutor, in the applicant's view, his decisions were not binding and, as practice had showed, the prosecutor had invariably rejected the applicant's complaints, mostly deferring to the decisions taken by the guardians or the social service authorities.

199. Lastly, the applicant submitted that decisions to remove incapacitation, although theoretically possible, were exceptional. Most importantly, the ability to bring an action to restore legal capacity did not belong to incapacitated persons themselves, but rather to their guardian. For most people, incapacitation is for life.

2. The Government

200. The Government contested the applicant's arguments. Whilst acknowledging that the applicant had no independent standing in the domestic proceedings, the Government contended that she had been able to effectively act through her guardian, who had been her legal representative. They also pointed to the Kaunas City District Court's decision of 7 November 2007 to accept the applicant's application for change of her guardian for examination. For the Government, it could be presumed that the district court had reviewed the applicant's request to reopen the proceedings with a high degree of care because of the essence of the applicant's request – appointment of a guardian. Even though the court had refused the applicant's request to have separate legal assistance, that refusal had been based on domestic law, pursuant to which a guardian is the legal representative of an incapacitated person. Furthermore, the actions of the applicant's guardian had been supervised by the social services authorities, thus protecting the interests of the applicant.

201. The Government next argued that the protection of the rights and interests of the applicant fell within the notion of public interest. Thus the applicant had been able to apply to the prosecutor, who, in turn, had been entitled to file a civil claim or an administrative complaint. In this context the Government referred to the decisions of 3 September 2004 and 31 July 2006, by which the prosecutors had discontinued the official investigation into the complaints about alleged deprivation of liberty of the applicant. However, having considered the complaints to be unfounded, the prosecutors saw no reason to apply to the domestic courts in order to protect the public interest.

202. As to an effective remedy for the applicant to complain of the alleged violations of Articles 8 and 9 of the Convention regarding her living conditions, the Government contended that, pursuant to the Law on Social Services, the applicant could have complained to social care officials, and, in the event that they dismissed her complaint, to the courts. Various complaints made by the applicant regarding her allegedly inadequate living conditions and ill-treatment in the Kėdainiai Home had been investigated by a number of municipal officials and interdepartmental panels, which had found no violations of the applicant's rights. Moreover, neither a prosecutor nor the applicant's guardian had ever applied to the courts with a claim for damages for any alleged violations of the applicant's rights.

In sum, the applicant had had domestic remedies which were effective, available in theory and in practice, and capable of providing redress in respect of the applicant's complaints and which had offered reasonable prospects of success.

203. Lastly, the Government submitted that declaration of the recovery of a person's legal capacity upon the amelioration of his or her mental health was quite common practice in Lithuania. Such requests could be submitted by a social care institution, acting as a guardian, on its own motion. Moreover, a request to annul an incapacitation decision could also be lodged by a prosecutor in the public interest. Nonetheless, as regards the applicant, the circumstances warranting her incapacitation have never disappeared as no amelioration of her mental state has ever been established that would give her guardian, be it her adoptive father or the Kėdainiai Home, or the prosecutor grounds to apply to a court for the reinstatement of her legal capacity.

B. The Court's assessment

204. The Court finds that this complaint is linked to the complaints submitted under Articles 5 and 6 of the Convention, and it should therefore be declared admissible.

205. The Court recalls its case-law to the effect that Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13 (see *Chahal v. the United Kingdom*, 15 November 1996, § 126, *Reports of Judgments and Decisions* 1996-V). It also reiterates that the requirements of Article 13 are less strict than, and are here absorbed by, those of Article 6 (see, among many authorities, *Kamasinski v. Austria*, 19 December 1989, § 110, Series A no. 168). The Court further notes that, in analysing the fairness of the civil proceedings concerning the applicant's guardianship and the lawfulness of the applicant's involuntary placement in the Kėdainiai Home, it has already taken account of the fact that the applicant is deprived of legal capacity and thus is not able to initiate any legal proceedings before the domestic courts. When analysing the above

complaints, the Court has also noted that the other remedies suggested by the Government, be it a possibility to act through her guardians or a request by the applicant to complain to a prosecutor or her complaints to the social care authorities, have not been proved to be feasible in the applicant's case. This being so, having regard to its conclusions under Articles 5 § 4 and 6 of the Convention, the Court does not consider it necessary to re-examine these aspects of the case separately through the prism of the "effective remedies" requirement of Article 13.

IX. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

206. Relying upon Article 2 of the Convention, the applicant also complained that, due to overmedication, her life is at risk. Relying on Article 10 of the Convention, the applicant alleged that one of the reasons for her involuntary psychiatric hospitalisation had been her bold poetic expression. Finally, without citing any Article of the Convention or its Protocols, the applicant complained of a violation of her property rights by her State-appointed guardian.

207. Having examined the materials submitted by the parties, the Court finds that the applicant has not provided sufficient evidence to substantiate her claims. It notes that, according to the Government, the applicant had received and had had access to newspapers and reading materials (see paragraph 180 above). It further observes that the applicant's complaints as to alleged breach of her property rights were dismissed by the prosecutors (see paragraph 52 above). The Court therefore rejects this part of the application as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

208. Relying upon Article 3 of the Convention, the applicant complained of her involuntary hospitalisation and treatment in the Kaunas Psychiatric Hospital from 30 June 2004 to 2 August 2004. The Court notes, however, that the applicant submitted this complaint on 28 March 2006. Accordingly, this part of the application has not been lodged within six months of the final effective measure or decision, as required by Article 35 § 1 of the Convention. It must therefore be rejected pursuant to Article 35 § 4.

X. APPLICATION OF ARTICLE 41 OF THE CONVENTION

209. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

210. The applicant claimed 300,000 euros (EUR) in respect of non-pecuniary damage.

211. The Government submitted that the above claim was wholly unsubstantiated.

212. The Court notes that it has found a violation of Article 5 § 4 as well as a violation of Article 6 § 1 in the present case. As regards the non-pecuniary damage already sustained, the Court finds that the violation of the Convention has indisputably caused the applicant substantial damage. In these circumstances, it considers that the applicant has experienced suffering and frustration, for which the mere finding of a violation cannot compensate. Making its assessment on an equitable basis, the Court awards the applicant EUR 8,000 in respect of non-pecuniary damage.

B. Costs and expenses

213. The applicant claimed the sum of EUR 16,609.85 for costs and expenses before the Court, broken down as follows: EUR 62 for secretarial costs; EUR 3,500 in relation to legal fees for preparation of the submissions made by the applicant's lawyer; and EUR 13,047.85 for fees for legal advice from *Interrights*.

214. The Government submitted that the sum was excessive.

215. The Court notes that the applicant was granted legal aid under the Court's legal aid scheme, under which the sum of EUR 850 has been paid to the applicant's lawyer to cover the submission of the applicant's observations and additional expenses.

216. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Ruling on an equitable basis and taking into account the sums already paid to the applicant by the Council of Europe in legal aid, the Court awards the applicant EUR 5,000.

C. Default interest

217. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's objection concerning the applicant's victim status;

2. *Joins to the merits* the Government's preliminary objection of abuse of application and *dismisses* it;

3. *Declares* the complaints under Article 5 § 1 and 4 (concerning involuntary placement in the Kėdainiai Home and the applicant's inability to obtain judicial review of her continuous placement), Article 6 § 1 (concerning the proceedings for change of guardianship), and Article 13 (concerning the absence of effective remedies) admissible, and the remainder of the application inadmissible;

4. *Holds* that there has been no violation of Article 5 § 1 of the Convention as regards the lawfulness of the applicant's involuntary placement in the Kėdainiai Home;

5. *Holds* that there has been a violation of Article 5 § 4 of the Convention as regards the applicant's inability to obtain her release from the Kėdainiai Home;

6. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account the unfairness of the guardianship proceedings;

7. *Holds* that there is no need to examine the applicant's complaint under Article 13 of the Convention;

8. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:

(i) EUR 8,000 (eight thousand euros) in respect of non-pecuniary damage;

(ii) EUR 5,000 (five thousand euros) in respect of costs and expenses;

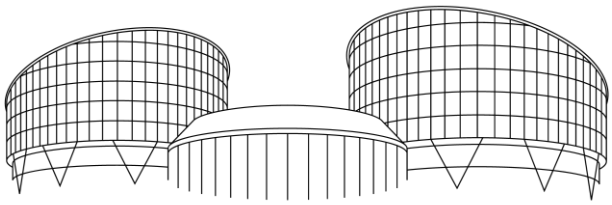
(iii) any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 February 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Registrar	Françoise Tulkens President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF STANEV v. BULGARIA

(Application no. 36760/06)

JUDGMENT

STRASBOURG

17 January 2012

This judgment is final but may be subject to editorial revision.

In the case of Stanev v. Bulgaria,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Nina Vajić,
Dean Spielmann,
Lech Garlicki,
Khanlar Hajiyev,
Egbert Myjer,
Isabelle Berro-Lefèvre,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska,
Vincent A. de Gaetano,
Angelika Nußberger,
Julia Laffranque, *judges*,

and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 9 February and 7 December 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 36760/06) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Mr Rusi Kosev Stanev ("the applicant"), on 8 September 2006.

2. The applicant, who had been granted legal aid, was represented by Ms A. Genova, a lawyer practising in Sofia, and Ms V. Lee and Ms L. Nelson, lawyers from the Mental Disability Advocacy Center, a non-governmental organisation based in Budapest. The Bulgarian Government ("the Government") were represented by their Agents, Ms N. Nikolova and Ms R. Nikolova, of the Ministry of Justice.

3. The applicant complained about his placement in a social care home for people with mental disorders and his inability to obtain permission to leave the home (Article 5 §§ 1, 4 and 5 of the Convention). Relying on Article 3, taken alone and in conjunction with Article 13, he further

complained about the living conditions in the home. He also submitted that he had no access to a court to seek release from partial guardianship (Article 6 of the Convention). Lastly, he alleged that the restrictions resulting from the guardianship regime, including his placement in the home, infringed his right to respect for his private life within the meaning of Article 8, taken alone and in conjunction with Article 13 of the Convention.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 29 June 2010, after a hearing on admissibility and the merits had been held on 10 November 2009 (Rule 54 § 3), it was declared admissible by a Chamber of that Section composed of Peer Lorenzen, President, Renate Jaeger, Karel Jungwiert, Rait Maruste, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska and Zdravka Kalaydjieva, judges, and also of Claudia Westerdiek, Section Registrar. On 14 September 2010 a Chamber of the same Section, composed of Peer Lorenzen, President, Renate Jaeger, Rait Maruste, Mark Villiger, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska and Zdravka Kalaydjieva, judges, and also of Claudia Westerdiek, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

5. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. The applicant and the Government each filed written observations on the merits.

7. In addition, third-party comments were received from the non-governmental organisation Interights, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 February 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms N. NIKOLOVA, Ministry of Justice,
Ms R. NIKOLOVA, Ministry of Justice, *Co-Agents*;

(b) *for the applicant*
Ms A. GENOVA, *Counsel*,
Ms V. LEE,
Ms L. NELSON, *Advisers*.

The Court heard addresses by them. The applicant was also present.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1956 in Ruse, where he lived until December 2002 and where his half-sister and his father's second wife, his only close relatives, also live. On 20 December 1990 a panel of occupational physicians declared him unfit to work. The panel found that as a result of having been diagnosed with schizophrenia in 1975, the applicant had a 90% degree of disablement but did not require assistance. He is in receipt of an invalidity pension on that account.

A. The applicant's placement under partial guardianship and placement in a social care home for people with mental disorders

10. On an unspecified date in 2000, at the request of the applicant's two relatives, the Ruse regional prosecutor applied to the Ruse Regional Court (*Окръжен съд*) for a declaration of total legal incapacity in respect of the applicant. In a judgment of 20 November 2000 the court declared the applicant to be partially incapacitated on the ground that he had been suffering from simple schizophrenia since 1975 and his ability to manage his own affairs and interests and to realise the consequences of his own acts had been impaired. The court found that the applicant's condition was not so serious as to warrant a declaration of total incapacity. It observed, in particular, that during the period from 1975 to 2000 he had been admitted to a psychiatric hospital on several occasions. The court took into account an expert medical report produced in the course of the proceedings and interviewed the applicant. Furthermore, according to certain other people it interviewed, the applicant had sold all his possessions, begged for a living, spent all his money on alcohol and became aggressive whenever he drank.

11. That judgment was upheld in a judgment of 12 April 2001 by the Veliko Tarnovo Court of Appeal (*Апелативен съд*) on an appeal by the applicant, and was subsequently transmitted to the Ruse Municipal Council on 7 June 2001 for the appointment of a guardian.

12. Since the applicant's family members had refused to take on any guardianship responsibilities, on 23 May 2002 the Municipal Council appointed Ms R.P., a council officer, as the applicant's guardian until 31 December 2002.

13. On 29 May 2002 R.P. asked the Ruse social services to place the applicant in a social care home for people with mental disorders. She appended to the application form a series of documents including a psychiatric diagnosis. The social services drew up a welfare report on the applicant, noting on 23 July 2002 that he was suffering from schizophrenia, that he lived alone in a small, run-down annexe to his half-sister's house

and that his half-sister and his father's second wife had stated that they did not wish to act as his guardian. The requirements for placement in a social care home were therefore deemed to be fulfilled.

14. On 10 December 2002 a welfare placement agreement was signed between R.P. and the social care home for adults with mental disorders near the village of Pastra in the municipality of Rila ("the Pastra social care home"), an institution under the responsibility of the Ministry of Labour and Social Policy. The applicant was not informed of the agreement.

15. Later that day, the applicant was taken by ambulance to the Pastra social care home, some 400 km from Ruse. Before the Court, he stated that he had not been told why he was being placed in the home or for how long; the Government did not dispute this.

16. On 14 December 2002, at the request of the director of the Pastra social care home, the applicant was registered as having his home address in the municipality of Rila. The residence certificate stated that his address had been changed for the purpose of his "permanent supervision". According to the most recent evidence submitted in February 2011, the applicant was still living in the home at that time.

17. On 9 September 2005 the applicant's lawyer requested the Rila Municipal Council to appoint a guardian for her client. In a letter dated 16 September 2005 she was informed that the Municipal Council had decided on 2 February 2005 to appoint the director of the Pastra social care home as the applicant's guardian.

B. The applicant's stay in the Pastra social care home

1. Provisions of the placement agreement

18. The agreement signed between the guardian R.P. and the Pastra social care home on 10 December 2002 (see paragraph 14 above) did not mention the applicant's name. It stated that the home was to provide food, clothing, medical services, heating and, obviously, accommodation, in return for payment of an amount determined by law. It appears that the applicant's entire invalidity pension was transferred to the home to cover that amount. The agreement stipulated that 80% of the sum was to be used as payment for the services provided and the remaining 20% put aside for personal expenses. According to the information in the case file, the applicant's invalidity pension, as updated in 2008, amounted to 130 Bulgarian levs (BGN – approximately 65 euros (EUR)). The agreement did not specify the duration of the provision of the services in question.

2. Description of the site

19. The Pastra social care home is located in an isolated area of the Rila mountains in south-western Bulgaria. It is accessible via a dirt track from the village of Pastra, the nearest locality 8 km away.

20. The home, built in the 1920s, comprises three buildings, where its residents, all male, are housed according to the state of their mental health. According to a report produced by the Social Assistance Agency in April 2009, there were seventy-three people living in the home, one was in hospital and two had absconded. Among the residents, twenty-three were entirely lacking legal capacity, two were partially lacking capacity and the others enjoyed full legal capacity. Each building has a yard surrounded by a high metal fence. The applicant was placed in block 3 of the home, reserved for residents with the least serious health problems, who were able to move around the premises and go alone to the nearest village with prior permission.

21. According to the applicant, the home was decaying, dirty and rarely heated in winter, and as a result, he and the other residents were obliged to sleep in their coats during winter. The applicant shared a room measuring 16 square metres with four other residents and the beds were practically side by side. He had only a bedside table in which to store his clothes, but he preferred to keep them in his bed at night for fear that they might be stolen and replaced with old clothes. The home's residents did not have their own items of clothing because clothes were not returned to the same people after being washed.

3. Diet and hygiene and sanitary conditions

22. The applicant asserted that the food provided at the home was insufficient and of poor quality. He had no say in the choice of meals and was not allowed to help prepare them.

23. Access to the bathroom, which was unhealthy and decrepit, was permitted once a week. The toilets in the courtyard, which were unhygienic and in a very poor state of repair, consisted of holes in the ground covered by dilapidated shelters. Each toilet was shared by at least eight people. Toiletries were available only sporadically.

4. Recent developments

24. In their memorial before the Grand Chamber the Government stated that renovation work had been carried out in late 2009 in the part of the home where the applicant lived, including the sanitary facilities. The home now had central heating. The diet was varied and regularly included fruit and vegetables as well as meat. Residents had access to television, books and games. The State provided them all with clothes. The applicant did not dispute these assertions.

5. Journeys undertaken by the applicant

25. The home's management kept hold of the applicant's identity papers, allowing him to leave the home only with special permission from the director. He regularly went to the village of Pastra. It appears that during the visits he mainly provided domestic help to villagers or carried out tasks at the village restaurant.

26. Between 2002 and 2006 the applicant returned to Ruse three times on leave of absence. Each trip was authorised for a period of about ten days. The journey cost BGN 60 (approximately EUR 30), which was paid to the applicant by the home's management.

27. Following his first two visits to Ruse, the applicant returned to Pastra before the end of his authorised period of leave. According to a statement made by the director of the home to the public prosecutor's office on an unspecified date, the applicant came back early because he was unable to manage his finances and had no accommodation.

28. The third period of leave was authorised from 15 to 25 September 2006. After the applicant failed to return on the scheduled date, the director of the home wrote to the Ruse municipal police on 13 October 2006, asking them to search for the applicant and transfer him to Sofia, where employees of the home would be able to collect him and take him back to Pastra. On 19 October 2006 the Ruse police informed the director that the applicant's whereabouts had been discovered but that the police could not transfer him because he was not the subject of a wanted notice. He was driven back to the social care home on 31 October 2006, apparently by staff of the home.

6. Opportunities for cultural and recreational activities

29. The applicant had access to a television set, several books and a chessboard in a common room at the home until 3 p.m., after which the room was kept locked. The room was not heated in winter and the residents kept their coats, hats and gloves on when inside. No other social, cultural or sports activities were available.

7. Correspondence

30. The applicant submitted that the staff at the social care home had refused to supply him with envelopes for his correspondence and that as he did not have access to his own money, he could not buy any either. The staff would ask him to give them any sheets of paper he wished to post so that they could put them in envelopes and send them off for him.

8. Medical treatment

31. It appears from a medical certificate of 15 June 2005 (see paragraph 37 below) that following his placement in the home in 2002, the

applicant was given anti-psychotic medication (carbamazepine (600mg)), under the monthly supervision of a psychiatrist.

32. In addition, at the Grand Chamber hearing the applicant's representatives stated that their client had been in stable remission since 2006 and had not undergone any psychiatric treatment in recent years.

C. Assessment of the applicant's social skills during his stay in Pastra and conclusions of the psychiatric report drawn up at his lawyer's request

33. Once a year, the director of the social care home and the home's social worker drew up evaluation reports on the applicant's behaviour and social skills. The reports indicated that the applicant was uncommunicative, preferred to stay on his own rather than join in group activities, refused to take his medication and had no close relatives to visit while on leave of absence. He was not on good terms with his half-sister and nobody was sure whether he had anywhere to live outside the social care home. The reports concluded that it was impossible for the applicant to reintegrate into society, and set the objective of ensuring that he acquired the necessary skills and knowledge for social resettlement and, in the long term, reintegration into his family. It appears that he was never offered any therapy to that end.

34. The case file indicates that in 2005 the applicant's guardian asked the Municipal Council to grant a social allowance to facilitate his reintegration into the community. Further to that request, on 30 December 2005 the municipal social assistance department carried out a "social assessment" (*социална оценка*) of the applicant, which concluded that he was incapable of working, even in a sheltered environment, and had no need for training or retraining, and that in those circumstances, he was entitled to a social allowance to cover the costs of his transport, subsistence and medication. On 7 February 2007 the municipal social assistance department granted the applicant a monthly allowance of BGN 16.50 (approximately EUR 8). On 3 February 2009 the allowance was increased to BGN 19.50 (approximately EUR 10).

35. In addition, at his lawyer's request, the applicant was examined on 31 August 2006 by Dr V.S., a different psychiatrist from the one who regularly visited the social care home, and by a psychologist, Ms I.A. The report drawn up on that occasion concluded that the diagnosis of schizophrenia given on 15 June 2005 (see paragraph 37 below) was inaccurate in that the patient did not display all the symptoms of that condition. It stated that, although the applicant had suffered from the condition in the past, he had not shown any signs of aggression at the time of the examination, but rather a suspicious attitude and a slight tendency towards "verbal aggression", that he had not undergone any treatment for the condition between 2002 and 2006 and that his health had visibly

stabilised. The report noted that no risk of deterioration of his mental health had been observed and stated that, in the opinion of the home's director, the applicant was capable of reintegrating into society.

36. According to the report, the applicant's stay in the Pastra social care home was very damaging to his health and it was desirable that he should leave the home; otherwise, he was at risk of developing "institutionalisation syndrome" the longer he stayed there. The report added that it would be more beneficial to his mental health and social development to allow him to integrate into community life with as few restrictions as possible, and that the only aspect to monitor was his tendency towards alcohol abuse, which had been apparent prior to 2002. In the view of the experts who had examined the applicant, the behaviour of an alcohol-dependent person could have similar characteristics to that of a person with schizophrenia; accordingly, vigilance was required in the applicant's case and care should be taken not to confuse the two conditions.

D. The applicant's attempts to obtain release from partial guardianship

37. On 25 November 2004 the applicant, through his lawyer, asked the public prosecutor's office to apply to the Regional Court to have his legal capacity restored. On 2 March 2005 the public prosecutor requested the Pastra social care home to send him a doctor's opinion and other medical certificates concerning the applicant's disorders in preparation for a possible application to the courts for restoration of his legal capacity. Further to that request, the applicant was admitted to a psychiatric hospital from 31 May to 15 June 2005 for a medical assessment. In a certificate issued on the latter date, the doctors attested that the applicant showed symptoms of schizophrenia. As his health had not deteriorated since he had been placed in the home in 2002, the regime to which he was subject there had remained unchanged. He had been on maintenance medication since 2002 under the monthly supervision of a psychiatrist. A psychological examination had revealed that he was agitated, tense and suspicious. His communication skills were poor and he was unaware of his illness. He had said that he wanted to leave the home at all costs. The doctors did not express an opinion either on his capacity for resettlement or on the need to keep him in the Pastra social care home.

38. On 10 August 2005 the regional prosecutor refused to bring an action for restoration of the applicant's legal capacity on the grounds that, in the opinion of the doctors, the director of the Pastra social care home and the home's social worker, the applicant was unable to cope on his own, and that the home, where he could undergo medical treatment, was the most suitable place for him to live. The applicant's lawyer challenged the refusal to bring the action, arguing that her client should have the opportunity to

assess by himself whether or not, having regard to the living conditions at the home, it was in his interests to remain there. She pointed out that the enforced continuation of his stay in the home, on the pretext of providing him with treatment in his own interests, amounted in practice to a deprivation of liberty, a situation that was unacceptable. A person could not be placed in an institution without his or her consent. In accordance with the legislation in force, anyone under partial guardianship was free to choose his or her place of residence, with the guardian's agreement. The choice of residence was therefore not a matter within the competence of the prosecution service. Despite those objections, the regional prosecutor's refusal was upheld on 11 October 2005 by the appellate prosecutor, and subsequently on 29 November 2005 by the chief public prosecutor's office at the Supreme Court of Cassation.

39. On 9 September 2005 the applicant, through his lawyer, asked the mayor of Rila to bring a court action for his release from partial guardianship. In a letter of 16 September 2005 the mayor of Rila refused his request, stating that there was no basis for such an action in view of the medical certificate of 15 June 2005, the opinions of the director and the social worker and the conclusions reached by the public prosecutor's office. On 28 September 2005 the applicant's lawyer applied to the Dupnitsa District Court for judicial review of the mayor's decision, under Article 115 of the Family Code (see paragraph 49 below). In a letter of 7 October 2005 the District Court stated that since the applicant was partially lacking legal capacity, he was required to submit a valid form of authority certifying that his lawyer was representing him, and that it should be specified whether his guardian had intervened in the procedure. On an unspecified date the applicant's lawyer submitted a copy of the form of authority signed by the applicant. She also requested that the guardian join the proceedings as an interested party or that an *ad hoc* representative be appointed. On 18 January 2006 the court held a hearing at which the representative of the mayor of Rila objected that the form of authority was invalid as it had not been countersigned by the guardian. The guardian, who was present at the hearing, stated that he was not opposed to the applicant's application, but that the latter's old-age pension was insufficient to meet his needs and that, accordingly, the Pastra social care home was the best place for him to live.

40. The Dupnitsa District Court gave judgment on 10 March 2006. As to the admissibility of the application for judicial review, it held that although the applicant had instructed his lawyer to represent him, she was not entitled to act on his behalf since the guardian had not signed the form of authority. However, it held that the guardian's endorsement of the application at the public hearing had validated all the procedural steps taken by the lawyer, and that the application was therefore admissible. As to the merits, the court dismissed the application, finding that the guardian had no legitimate interest in contesting the mayor's refusal, given that he could apply

independently and directly for the applicant to be released from partial guardianship. Since the judgment was not subject to appeal, it became final.

41. Lastly, the applicant asserted that he had made several oral requests to his guardian to apply for his release from partial guardianship and to allow him to leave the home. However, his requests had always been refused.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Legal status of persons placed under partial guardianship and their representation before the courts

42. Section 5 of the Persons and Family Act of 9 August 1949 provides that persons who are unable to look after their own interests on account of mental illness or mental deficiency must be entirely deprived of legal capacity and declared legally incapable. Adults with milder forms of such disorders are to be partially incapacitated. Persons who are entirely deprived of legal capacity are placed under full guardianship (*настойничество*), whereas those who are partially incapacitated are placed under partial guardianship (*попечителство* – literally "trusteeship"). In accordance with sections 4 and 5 of the Act, persons under partial guardianship may not perform legal transactions without their guardian's consent. They may, however, carry out ordinary acts forming part of everyday life and have access to the resources obtained in consideration for their work. Accordingly, the guardian of a partially incapacitated person cannot independently perform legal transactions that are binding on that person. This means that contracts signed only by the guardian, without the consent of the person partially lacking legal capacity, are invalid.

43. Under Article 16, paragraph 2, of the Code of Civil Procedure ("the CCP"), persons under full guardianship are represented before the courts by their guardian. Persons under partial guardianship, however, are entitled to take part in court proceedings, but require their guardian's consent. Accordingly, the guardian of a partially incapacitated person does not perform the role of a legal representative. The guardian cannot act on behalf of the person under partial guardianship, but may express agreement or disagreement with the person's individual transactions (Сталев, Ж., *Българско гражданско процесуално право*, София, 2006 г., стр. 171). In particular, a person under partial guardianship may instruct a lawyer provided that the form of authority is signed by the guardian (ibid., стр. 173).

B. Procedure for placement under partial guardianship

44. There are two stages to the procedure for placing a person under partial guardianship: the declaration of partial incapacity and the appointment of a guardian.

1. Declaration of partial incapacity by the courts

45. The first stage involves a judicial procedure which at the material time was governed by Articles 275-277 of the 1952 CCP, which have been reproduced unchanged in Articles 336-340 of the new 2007 CCP. A declaration of partial incapacity may be sought by the person's spouse or close relatives, by the public prosecutor or by any other interested party. The court reaches its decision after examining the person concerned at a public hearing – or, failing that, after forming a first-hand impression of the person's condition – and interviewing the person's close relatives. If the statements thus obtained are insufficient, the court may have recourse to other evidence, such as an expert medical assessment. According to domestic case-law, an assessment must be ordered where the court is unable to conclude from any other information in the file that the request for deprivation of legal capacity is unfounded (Решение на ВС № 1538 от 21.VIII.1961 г. по гр. д. № 5408/61 г.; Решение на ВС № 593 от 4.III.1967 г. по гр. д. № 3218/1966 г.).

2. Appointment of a guardian by the administrative authorities

46. The second stage involves an administrative procedure for the appointment of a guardian, which at the material time was governed by Chapter X (Articles 109-128) of the 1985 Family Code ("the FC"); these provisions have been reproduced, with only minor amendments, in Articles 153-174 of the new 2009 FC. The administrative stage is conducted by an authority referred to as "the guardianship authority", namely the mayor or any other municipal council officer designated by him or her.

47. The guardian should preferably be appointed from among the relatives of the person concerned who are best able to defend his or her interests.

C. Review of measures taken by the guardian and possibility of replacement

48. Measures taken by the guardian are subject to review by the guardianship authority. At the authority's request, the guardian must report on his or her activities. If any irregularities are observed, the authority may request that they be rectified or may order the suspension of the measures in question (see Article 126, paragraph 2, and Article 125 of the 1985 FC, and

Article 170 and Article 171, paragraphs 2 and 3, of the 2009 FC). It is unclear from domestic law whether persons under partial guardianship may apply to the mayor individually or through another party to suspend measures taken by the guardian.

49. Decisions by the mayor, as the guardianship authority, and any refusal by the mayor to appoint a guardian or to take other steps provided for in the FC are, for their part, amenable to judicial review. They may be challenged by interested parties or the public prosecutor before the district court, which gives a final decision on the merits (Article 115 of the 1985 FC). This procedure allows close relatives to request a change of guardian in the event of a conflict of interests (Решение на ВС № 1249 от 23.XII.1993 г. по гр. д. № 897/93 г.). According to domestic case-law, fully incapacitated persons are not among the "interested parties" entitled to initiate such proceedings (Определение № 5771 от 11.06.2003 г. на ВАС по адм. д. № 9248/2002). There is no domestic case-law showing that a partially incapacitated person is authorised to do so.

50. Furthermore, the guardianship authority may at any time replace a guardian who fails to discharge his or her duties (Article 113 of the 1985 FC). By Article 116 of the 1985 FC, a person cannot be appointed as a guardian where there is a conflict of interests between that person and the person under partial guardianship. Article 123 of the 1985 FC provides that a deputy guardian is to be appointed where the guardian is unable to discharge his or her duties or where there is a conflict of interests. In both cases, the guardianship authority may also appoint an *ad hoc* representative.

D. Procedure for restoration of legal capacity

51. By virtue of Article 277 of the 1952 CCP, this procedure is similar to the partial guardianship procedure. It is open to anyone entitled to apply for a person to be placed under partial guardianship, and also to the guardianship authority and the guardian. The above-mentioned provision has been reproduced in Article 340 of the 2007 CCP. On 13 February 1980 the Plenary Supreme Court delivered a decision (no. 5/79) aimed at clarifying certain questions concerning the procedure for deprivation of legal capacity. Paragraph 10 of the decision refers to the procedure for restoration of legal capacity and reads as follows:

> "The rules applicable in the procedure for restoration of legal capacity are the same as those governing the procedure for deprivation of capacity (Article 277 and Article 275, paragraphs 1 and 2, of the CCP). The persons who requested the measure or the close relatives are treated as respondent parties in the procedure. There is nothing to prevent the party that applied for a person to be deprived of legal capacity from requesting the termination of the measure if circumstances have changed.
>
> Persons under partial guardianship may request, either individually or with the consent of their guardian, that the measure be lifted. They may also ask the

guardianship authority or the guardianship council to bring an action under Article 277 of the CCP in the regional court which deprived them of legal capacity. In such cases, they must show that the application is in their interests by producing a medical certificate. In the context of such an action, they will be treated as the claimant. Where the guardian of a partially incapacitated person, the guardianship authority or the guardianship council (in the case of a fully incapacitated person) refuses to bring an action for restoration of legal capacity, the incapacitated person may ask the public prosecutor to do so (Постановление № 5/79 от 13.II.1980 г., Пленум на ВС)."

52. In addition, the Government cited a case in which proceedings for the review of the legal status of a person entirely deprived of legal capacity had been instituted at the guardian's request and the person had been released from guardianship (Решение № 1301 от 12.11.2008 г. на ВКС по гр. Д. № 5560/2007 г., V г.о.).

E. Validity of contracts signed by representatives of incapacitated persons

53. Section 26(2) of the Obligations and Contracts Act 1950 provides that contracts that are in breach of the law or have been entered into in the absence of consent are deemed null and void.

54. In accordance with section 27 of the same Act, contracts entered into by representatives of persons deprived of legal capacity in breach of the applicable rules are deemed voidable. A ground of incurable nullity may be raised on any occasion, whereas a ground of voidability may be raised only by means of a court action. The right to raise a ground of voidability becomes time-barred after a period of three years from the date of release from partial guardianship if a guardian is not appointed. In other cases, the period in question begins to run from the date on which a guardian is appointed (section 32(2), in conjunction with section 115(1)(e), of the above-mentioned Act; see also Решение на ВС № 668 от 14.III.1963 г. по гр. д. № 250/63 г., I г. о., Решение на Окръжен съд – Стара Загора от 2.2.2010 г. по т. д. № 381/2009 г. на I състав, Решение на Районен съд Стара Загора № 459 от 19.5.2009 г. по гр. д. № 1087/2008).

F. Place of residence of legally incapacitated persons

55. By virtue of Article 120 and Article 122, paragraph 3, of the 1985 FC, persons deprived of legal capacity are deemed to reside at the home address of their guardian, unless "exceptional reasons" require them to live elsewhere. Where the place of residence is changed without the guardian's consent, the guardian may request the district court to order the person's return to the official address. By Article 163, paragraphs 2 and 3, of the 2009 FC, before reaching a decision in such cases, the court is required to interview the person under guardianship. If it finds that there are

"exceptional reasons", it must refuse to order the person's return and must immediately inform the municipal social assistance department so that protective measures can be taken.

56. The district court's order may be appealed against to the president of the regional court, although its execution cannot be stayed.

G. Placement of legally incapacitated persons in social care homes for adults with mental disorders

57. Under the Social Assistance Act 1998, social assistance is available to people who, for medical and social reasons, are incapable of meeting their basic needs on their own through work, through their own assets or with the help of persons required by law to care for them (section 2 of the Act). Social assistance consists of the provision of various financial benefits, benefits in kind and social services, including placement in specialised institutions. Such benefits are granted on the basis of an individual assessment of the needs of the persons concerned and in accordance with their wishes and personal choices (section 16(2)).

58. By virtue of the implementing regulations for the Social Assistance Act 1998 (*Правилник за прилагане на Закона за социално подпомагане*), three categories of institutions are defined as "specialised institutions" for the provision of social services: (1) children's homes (homes for children deprived of parental care, homes for children with physical disabilities, homes for children with a mental deficiency); (2) homes for adults with disabilities (homes for adults with a mental deficiency, homes for adults with mental disorders, homes for adults with physical disabilities, homes for adults with sensory disorders, homes for adults with dementia), and (3) old people's homes (regulation 36(3)). Social services are provided in specialised institutions where it is no longer possible to receive them in the community (regulation 36(4)). Under domestic law, placement of a legally incapacitated person in a social care home is not regarded as a form of deprivation of liberty.

59. Similarly, in accordance with Decree no. 4 of 16 March 1999 on the conditions for obtaining social services, adopted on 16 March 1999 (*Наредба № 4 за условията и реда за извършване на социални услуги*), adults with mental deficiencies are placed in specialised social care homes if it is impossible to provide them with the necessary medical care in a family environment (section 12, point (4), and section 27 of the Decree). Section 33(1), point (3), of the Decree provides that when a person is placed in a social care home, a medical certificate concerning the person's state of health must be produced. By section 37(1) of the Decree, a placement agreement for the provision of social services is signed between the specialised institution and the person concerned or his or her legal representative, on the basis of a model approved by the Ministry of Labour

and Social Policy. The person may be transferred to another home or may leave the institution in which he or she has been placed: (1) at his or her request or at the request of his or her legal representative, submitted in writing to the director of the institution; (2) if there is a change in the state of his or her mental and/or physical health such that it no longer corresponds to the profile of the home; (3) in the event of failure to pay the monthly social-welfare contribution for more than one month; (4) in the event of systematic breaches of the institution's internal rules; or (5) in the event of a confirmed addiction to narcotic substances.

60. Furthermore, the system governing admission to a psychiatric hospital for compulsory medical treatment is set out in the Health Act 2005, which replaced the Public Health Act 1973.

H. Appointment of an *ad hoc* representative in the event of a conflict of interests

61. Article 16, paragraph 6, of the CCP provides that, in the event of a conflict of interests between a person being represented and the representative, the court is to appoint an *ad hoc* representative. The Bulgarian courts have applied this provision in certain situations involving a conflict of interests between minors and their legal representative. Thus, the failure to appoint an *ad hoc* representative has been found to amount to a substantial breach of the rules governing paternity proceedings (Решение на ВС № 297 от 15.04.1987 г. по гр. д. № 168/87 г., II г. о.), disputes between adoptive and biological parents (Решение на ВС № 1381 от 10.05.1982 г. по гр. д. № 954/82 г., II г. о.) or property disputes (Решение № 643 от 27.07.2000 г. на ВКС по гр. д. № 27/2000 г., II г. о.; Определение на ОС – Велико Търново от 5.11.2008 г. по в. ч. гр. д. № 963/2008).

I. State liability

62. The State and Municipalities Responsibility for Damage Act 1988 (*Закон за отговорността на държавата и общините за вреди* – title amended in 2006) provides in section 2(1) that the State is liable for damage caused to private individuals as a result of a judicial decision ordering certain types of detention where the decision has been set aside as having no legal basis.

63. Section 1(1) of the same Act provides that the State and municipalities are liable for damage caused to private individuals and other legal entities as a result of unlawful decisions, acts or omissions by their own authorities or officials while discharging their administrative duties.

64. In a number of decisions, various domestic courts have found this provision to be applicable to the damage suffered by prisoners as a result of

poor conditions or inadequate medical treatment in prison and have, where appropriate, partly or fully upheld claims for compensation brought by the persons concerned (реш. от 26.01.2004 г. по гр. д. № 959/2003, ВКС, IV г. о. and реш. № 330 от 7.08.2007 г. по гр. д. № 92/2006, ВКС, IV г. о.).

65. There are no court decisions in which the above position has been found to apply to allegations of poor living conditions in social care homes.

66. Moreover, it appears from the domestic courts' case-law that under section 1(1) of the Act in question, anyone whose health has deteriorated because bodies under the authority of the Ministry of Health have failed in their duty to provide a regular supply of medication may hold the administrative authorities liable and receive compensation (реш. № 211 от 27.05.2008 г. по гр. д. № 6087/2007, ВКС, V г. о.).

67. Lastly, the State and its authorities are subject to the ordinary rules on tortious liability for other forms of damage resulting, for example, from the death of a person under guardianship while absconding from a social care home for adults with a mental deficiency, on the ground that the staff of the home had failed to discharge their duty of permanent supervision (реш. № 693 от 26.06.2009 г. по гр. д. № 8/2009, ВКС, III г. о.).

J. Arrest by the police under the Ministry of the Interior Act 2006

68. Under this Act, the police are, *inter alia*, authorised to arrest anyone who, on account of severe mental disturbance and through his or her conduct, poses a threat to public order or puts his or her own life in manifest danger (section 63(1)-(3)). The person concerned may challenge the lawfulness of the arrest before a court, which must give an immediate ruling (section 63(4)).

69. Furthermore, the police's responsibilities include searching for missing persons (section 139(3)).

K. Information submitted by the applicant about searches for persons who have absconded from social care homes for adults with mental disorders

70. The Bulgarian Helsinki Committee conducted a survey of police stations regarding searches for people who had absconded from social care homes of this type. It appears from the survey that there is no uniform practice. Some police officers said that when they were asked by employees of a home to search for a missing person, they carried out the search and took the person to the police station, before informing the home. Other officers explained that they searched for the person but, not being empowered to perform an arrest, simply notified the staff of the home, who took the person back themselves.

L. Statistics submitted by the applicant on judicial proceedings concerning deprivation of legal capacity

71. The Bulgarian Helsinki Committee obtained statistics from eight regional courts on the outcome of proceedings for restoration of legal capacity between January 2002 and September 2009. During this period 677 persons were deprived of legal capacity. Proceedings to restore capacity were instituted in thirty-six cases: ten of them ended with the lifting of the measure; total incapacitation was changed to partial incapacitation in eight cases; the applications were rejected in four cases; the courts discontinued the proceedings in seven cases; and the other cases are still pending.

III. RELEVANT INTERNATIONAL INSTRUMENTS

A. Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006 (Resolution A/RES/61/106)

72. This Convention entered into force on 3 May 2008. It was signed by Bulgaria on 27 September 2007 but has yet to be ratified. The relevant parts of the Convention provide:

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.

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 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."

B. Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults (adopted on 23 February 1999)

73. The relevant parts of this Recommendation read as follows:

Principle 2 – Flexibility in legal response

"1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable suitable legal response to be made to different degrees of incapacity and various situations.

...

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned."

Principle 3 – Maximum reservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so. ..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention. ...”

Principle 13 – Right to be heard in person

“The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity.”

Principle 14 – Duration, review and appeal

“1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews.

...

3. There should be adequate rights of appeal.”

C. Reports on visits to Bulgaria by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

1. The CPT’s report on its visit from 16 to 22 December 2003, published on 24 June 2004

74. This report outlines the situation of persons placed by the public authorities in social care homes for people with mental disorders or mental deficiency, which are under the authority of the Ministry of Labour and Social Policy. Part II.4 of the report is devoted to the Pastra social care home.

75. The CPT noted that the home’s official capacity was 105; it had 92 registered male residents, of whom eighty-six were present at the time of the visit. Two residents had absconded and the others were on home leave. Some 90% of the residents were suffering from schizophrenia and the remainder had a mental deficiency. The majority had spent many years in the institution, discharges being quite uncommon.

76. According to the CPT’s findings, the premises of the Pastra social care home were in a deplorable state of repair and hygiene and the home was inadequately heated.

77. In particular, the buildings did not have running water. The residents washed in cold water in the yard and were often unshaven and dirty. The bathroom, to which they had access once a week, was rudimentary and dilapidated.

78. The toilets, likewise located in the yard, consisted of decrepit shelters with holes dug in the ground. They were in an execrable state and access to them was dangerous. Furthermore, basic toiletries were rarely available.

79. The report notes that the provision of food was inadequate. Residents received three meals a day, including 750 g of bread. Milk and

eggs were never on offer, and fresh fruit and vegetables were rarely available. No provision was made for special diets.

80. The only form of treatment at the home consisted of the provision of medicines. The residents, who were treated as chronic psychiatric patients in need of maintenance therapy, were registered as outpatients with a psychiatrist in Dupnitsa. The psychiatrist visited the home once every two to three months, and also on request. In addition, residents could be taken to the psychiatrist – who held weekly surgeries in the nearby town of Rila – if changes in their mental condition were observed. All residents underwent a psychiatric examination twice a year, which was an occasion for them to have their medication reviewed and, if necessary, adjusted. Nearly all residents received psychiatric medication, which was recorded on a special card and administered by the nurses.

81. Apart from the administration of medication, no therapeutic activities were organised for residents, who led passive, monotonous lives.

82. The CPT concluded that these conditions had created a situation which could be said to amount to inhuman and degrading treatment. It requested the Bulgarian authorities to replace the Pastra social care home as a matter of urgency. In their response of 13 February 2004 the Bulgarian authorities acknowledged that the home was not in conformity with European care standards. They stated that it would be closed as a priority and that the residents would be transferred to other institutions.

83. The CPT further observed, in part II.7 of its report, that in most cases, placement of people with mental disabilities in a specialised institution led to a *de facto* deprivation of liberty. The placement procedure should therefore be surrounded by appropriate safeguards, among them an objective medical, and in particular psychiatric, assessment. It was also essential that these persons should have the right to bring proceedings by which the lawfulness of their placement could be decided speedily by a court. The CPT recommended that such a right be guaranteed in Bulgaria (see paragraph 52 of the report).

2. The CPT's report on its visit from 10 to 21 September 2006, published on 28 February 2008

84. In this report the CPT again recommended that provision be made for the introduction of judicial review of the lawfulness of placement in a social care home (see paragraphs 176-177 of the report).

85. It also recommended that efforts be made to ensure that the placement of residents in homes for people with mental disorders and/or deficiency conformed fully to the letter and spirit of the law. Contracts for the provision of social services should specify the legal rights of residents, including the possibilities for lodging complaints with an outside authority. Furthermore, residents who were incapable of understanding the contracts should receive appropriate assistance (see paragraph 178 of the report).

86. Lastly, the CPT urged the Bulgarian authorities to take the necessary steps to avoid conflicts of interests arising from the appointment of an employee of a social care home as the guardian of a resident of the same institution (see paragraph 179 of the report).

87. The CPT made a further visit to the Pastra social care home during its periodic visit to Bulgaria in October 2010.

IV. COMPARATIVE LAW

A. Access to a court for restoration of legal capacity

88. A comparative study of the domestic law of twenty Council of Europe member States indicates that in the vast majority of cases (Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Luxembourg, Monaco, Poland, Portugal, Romania, Slovakia, Sweden, Switzerland and Turkey) the law entitles anyone who has been deprived of legal capacity to apply directly to the courts for discontinuation of the measure.

89. In Ukraine, people who have been partially deprived of legal capacity may themselves apply for the measure to be lifted; this does not apply to those who have been declared fully incapable, who may nevertheless challenge before a court any measures taken by their guardian.

90. Judicial proceedings for the discontinuation of an order depriving a person of legal capacity cannot be instituted directly by the person concerned in Latvia (where an application may be made by the public prosecutor or the guardianship council) or Ireland.

B. Placement of legally incapacitated persons in a specialised institution

91. A comparative-law study of the legislation of twenty States Parties to the Convention shows that there is no uniform approach in Europe to the question of placement of legally incapacitated persons in specialised institutions, particularly as regards the authority competent to order the placement and the guarantees afforded to the person concerned. It may nevertheless be observed that in some countries (Austria, Estonia, Finland, France, Germany, Greece, Poland, Portugal and Turkey) the decision to place a person in a home on a long-term basis against his or her will is taken directly or approved by a judge.

92. Other legal systems (Belgium, Denmark, Hungary, Ireland, Latvia, Luxembourg, Monaco and the United Kingdom) authorise the guardian, close relatives or the administrative authorities to decide on placement in a specialised institution without a judge’s approval being necessary. It also

appears that in all the above-mentioned countries, the placement is subject to a number of substantive requirements, relating in particular to the person's health, the existence of a danger or risk and/or the production of medical certificates. In addition, the obligation to interview or consult the person concerned on the subject of the placement, the setting of a time-limit by law or by the courts for the termination or review of the placement, and the possibility of legal assistance are among the safeguards provided in several national legal systems.

93. In certain countries (Denmark, Estonia, Germany, Greece, Hungary, Ireland, Latvia, Poland, Slovakia, Switzerland and Turkey) the possibility of challenging the initial placement order before a judicial body is available to the person concerned without requiring the guardian's consent.

94. Lastly, several States (Denmark, Estonia, Finland, Germany, Greece, Ireland, Latvia, Poland, Switzerland and Turkey) directly empower the person concerned to apply periodically for judicial review of the lawfulness of the continued placement.

95. It should also be noted that many countries' laws on legal capacity or placement in specialised institutions have recently been amended (Austria: 2007; Denmark: 2007; Estonia: 2005; Finland: 1999; France: 2007; Germany: 1992; Greece: 1992; Hungary: 2004; Latvia: 2006; Poland: 2007; Ukraine: 2000; United Kingdom: 2005) or are in the process of amendment (Ireland). These legislative reforms are designed to increase the legal protection of persons lacking legal capacity by affording them either the right of direct access to court for a review of their status or additional safeguards when they are placed in specialised institutions against their will.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

96. The applicant submitted that his placement in the Pastra social care home was in breach of Article 5 § 1 of the Convention.

Article 5 § 1 provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having

committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Preliminary remarks

97. The Grand Chamber observes that the Government maintained before it the objection they raised before the Chamber alleging failure to exhaust domestic remedies in respect of the complaint under Article 5 § 1.

98. The objection was based on the following arguments. Firstly, the applicant could at any time have applied personally to a court for restoration of his legal capacity, under Article 277 of the CCP, and release from guardianship would have allowed him to leave the home of his own accord. Secondly, his close relatives had not availed themselves of the possibility open to some of them, under Articles 113 and 115 of the FC, of asking the guardianship authority to replace his guardian. According to the Government, in the event of a refusal the applicants' relatives could have applied to a court, which would have considered the merits of the request and, if appropriate, appointed a new guardian, who would then have been able to terminate the placement agreement. The Government also submitted in substance that the applicant's close relatives could have challenged the contract signed between the guardian R.P. and the Pastra social care home. Lastly, they indicated that the applicant himself could have requested the guardianship authority to appoint an *ad hoc* representative on account of his alleged conflict of interests with his guardian, with a view to requesting to leave the institution and establish his home elsewhere (Article 123, paragraph 1, of the FC).

99. The Grand Chamber observes that in its admissibility decision of 29 June 2010 the Chamber found that this objection raised questions that were closely linked to those arising in relation to the applicant's complaint under Article 5 § 4 and therefore joined the objection to its examination of the merits under that provision.

100. In addition, finding that the question whether there had been a "deprivation of liberty" within the meaning of Article 5 § 1 in the present case was closely linked to the merits of the complaint under that provision, the Chamber likewise joined that issue to its examination of the merits. The

Grand Chamber sees no reason to call into question the Chamber's findings on these issues.

B. Whether the applicant was deprived of his liberty within the meaning of Article 5 § 1

1. The parties' submissions

(a) The applicant

101. The applicant contended that although under domestic law, placement of people with mental disorders in a social care institution was regarded as "voluntary", his transfer to the Pastra social care home constituted a deprivation of liberty. He maintained that, as in the case of *Storck v. Germany* (no. 61603/00, ECHR 2005-V), the objective and subjective elements of detention were present in his case.

102. With regard to the nature of the measure, the applicant submitted that living in a social care home in a remote mountain location amounted to physical isolation from society. He could not have chosen to leave on his own initiative since, having no identity papers or money, he would soon have faced the risk of being stopped by the police for a routine check, a widespread practice in Bulgaria.

103. Absences from the social care home were subject to permission. The distance of approximately 420 km between the institution and his home town and the fact that he had no access to his invalidity pension had made it impossible for him to travel to Ruse any more than three times. The applicant further submitted that he had been denied permission to travel on many other occasions by the home's management. He added that, in accordance with a practice with no legal basis, residents who left the premises for longer than the authorised period were treated as fugitives and were searched for by the police. He stated in that connection that on one occasion the police had arrested him in Ruse and that, although they had not taken him back to the home, the fact that the director had asked for him to be located and transferred back had amounted to a decisive restriction on his right to personal liberty. He stated that he had been arrested and detained by the police pending the arrival of staff from the home to collect him, without having been informed of the grounds for depriving him of his liberty. Since he had been transferred back under duress, it was immaterial that those involved had been employees of the home.

104. The applicant further noted that his placement in the home had already lasted more than eight years and that his hopes of leaving one day were futile, as the decision had to be approved by his guardian.

105. As to the consequences of his placement, the applicant highlighted the severity of the regime to which he was subject. His occupational activities, treatment and movements had been subject to thorough and

practical supervision by the home's employees. He had been required to follow a strict daily routine, getting up, going to bed and eating at set times. He had had no free choice as to his clothing, the preparation of his meals, participation in cultural events or the development of relations with other people, including intimate relationships as the home's residents were all men. He had been allowed to watch television in the morning only. Accordingly, his stay in the home had caused a perceptible deterioration in his well-being and the onset of institutionalisation syndrome, in other words the inability to reintegrate into the community and lead a normal life.

106. With regard to the subjective element, the applicant submitted that his situation differed from that examined in *H.M. v. Switzerland* (no. 39187/98, ECHR 2002-II), in which the applicant had consented to her placement in a nursing home. He himself had never given such consent. His guardian at the time, Ms R.P. (see paragraph 12 above), had not consulted him on the placement and, moreover, he did not even know her; nor had he been informed of the existence of the placement agreement of 10 December 2002 (see paragraph 14 above), which he had never signed. Those circumstances reflected a widespread practice in Bulgaria whereby once people were deprived of legal capacity, even partially, they were deemed incapable of expressing their wishes. In addition, it was clear from the medical documents that the applicant's desire to leave the home had been interpreted not as a freely expressed wish, but rather as a symptom of his mental illness.

107. Lastly, in the case of *H.M. v. Switzerland* (cited above) the authorities had based their decision to place the applicant in a nursing home on a thorough examination showing that the living conditions in her own home had severely deteriorated as a result of her lack of cooperation with a social welfare authority. By contrast, the applicant in the present case had never been offered and had never refused alternative social care at home.

(b) The Government

108. In their written observations before the Chamber, the Government accepted that the circumstances of the case amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention. However, at the hearing and in the proceedings before the Grand Chamber, they contended that Article 5 was not applicable. They observed in that connection that the applicant had not been compulsorily admitted to a psychiatric institution by the public authorities under the Public Health Act, but had been housed in a social care home at his guardian's request, on the basis of a civil-law agreement and in accordance with the rules on social assistance. Thus, persons in need of assistance, including those with mental disorders, could request various social and medical services, either directly or through their representatives, under the Social Assistance Act 1998 (see paragraphs 57-60 above). Homes for adults with mental disorders offered a

wide range of services of this kind and placement in such institutions could not be seen as a deprivation of liberty.

109. As to the particular circumstances of the case, the Government emphasised that the applicant had never expressly and consciously objected to his placement in the home, and it could not therefore be concluded that the measure had been involuntary. Furthermore, he had been free to leave the home at any time.

110. In addition, the applicant had been encouraged to work in the village restaurant to the best of his abilities and had been granted leave of absence on three occasions. The reason why he had twice returned from Ruse before the end of his authorised period of leave (see paragraph 27 above) was his lack of accommodation. The Government further submitted that the applicant had never been brought back to the home by the police. They acknowledged that in September 2006 the director had been obliged to ask the police to search for him because he had not come back (see paragraph 28 above). However, it was clear from the case of *Dodov v. Bulgaria* (no. 59548/00, 17 January 2008) that the State had a positive obligation to take care of people housed in social care homes. In the Government's submission, the steps taken by the director had formed part of this duty of protection.

111. The Government further observed that the applicant had lacked legal capacity and had not had the benefit of a supportive family environment, accommodation or sufficient resources to lead an independent life. Referring in that connection to the judgments in *H.M. v. Switzerland* (cited above) and *Nielsen v. Denmark* (28 November 1988, Series A no. 144), they submitted that the applicant's placement in the home was simply a protective measure taken in his interests alone and constituted an appropriate response to a social and medical emergency; such a response could not be viewed as involuntary.

(c) The third party

112. Interights made the following general observations. It stated that it had carried out a survey of practices regarding placement of people with mental disorders in specialised institutions in central and east European countries. According to the conclusions of the survey, in most cases placement in such institutions could be regarded as amounting to a *de facto* deprivation of liberty.

113. Social care homes were often located in rural or mountainous areas which were not easily accessible. Where they were situated near urban areas, they were surrounded by high walls or fences and the gates were kept locked. As a rule, residents were able to leave the premises only with the express permission of the director of the home, and for a limited period. In cases of unauthorised leave, the police had the power to search for and return the persons concerned. The same restrictive regime applied to all

residents, without any distinction according to legal status – whether they had full, partial or no legal capacity – and in the view of Interights, this was a decisive factor. No consideration at all was given to whether the placement was voluntary or involuntary.

114. Regarding the analysis of the subjective aspect of the placement, Interights submitted that the consent of the persons concerned was a matter requiring careful attention. Thorough efforts should be made to ascertain their true wishes, notwithstanding any declaration of legal incapacity that might have been made in their case. Interights contended that in reality, when faced with a choice between a precarious, homeless existence and the relative security offered by a social care home, incapable persons in central and east European countries might opt for the latter solution, simply because no alternative services were offered by the State's social welfare system. That did not mean, however, that the persons concerned could be said to have freely consented to the placement.

2. The Court's assessment

(a) General principles

115. The Court reiterates that the difference between deprivation of liberty and restrictions on liberty of movement, the latter being governed by Article 2 of Protocol No. 4, is merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends (see *Guzzardi v. Italy*, 6 November 1980, §§ 92-93, Series A no. 39). In order to determine whether someone has been deprived of his liberty, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Storck*, cited above, § 71, and *Guzzardi*, cited above, § 92).

116. In the context of deprivation of liberty on mental-health grounds, the Court has held that a person could be regarded as having been "detained" even during a period when he was in an open hospital ward with regular unescorted access to the unsecured hospital grounds and the possibility of unescorted leave outside the hospital (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 42, Series A no. 93).

117. Furthermore, in relation to the placement of mentally disordered persons in an institution, the Court has held that the notion of deprivation of liberty does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his liberty

if, as an additional subjective element, he has not validly consented to the confinement in question (see *Storck*, cited above, § 74).

118. The Court has found that there was a deprivation of liberty in circumstances such as the following: (a) where the applicant, who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, had unsuccessfully attempted to leave the hospital (see *Shtukaturov v. Russia*, no. 44009/05, § 108, 27 March 2008); (b) where the applicant had initially consented to her admission to a clinic but had subsequently attempted to escape (see *Storck*, cited above, § 76); and (c) where the applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave (see *H.L. v. the United Kingdom*, no. 45508/99, §§ 89-94, ECHR 2004-IX).

119. The Court has also held that the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention (see *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, §§ 64-65, Series A no. 12), especially when it is not disputed that that person is legally incapable of consenting to, or disagreeing with, the proposed action (see *H.L. v. the United Kingdom*, cited above, § 90).

120. In addition, the Court has had occasion to observe that the first sentence of Article 5 § 1 must be construed as laying down a positive obligation on the State to protect the liberty of those within its jurisdiction. Otherwise, there would be a sizeable gap in the protection from arbitrary detention, which would be inconsistent with the importance of personal liberty in a democratic society. The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge (see *Storck*, cited above, § 102). Thus, having regard to the particular circumstances of the cases before it, the Court has held that the national authorities' responsibility was engaged as a result of detention in a psychiatric hospital at the request of the applicant's guardian (see *Shtukaturov*, cited above) and detention in a private clinic (see *Storck*, cited above).

(b) Application of these principles in the present case

121. The Court observes at the outset that it is unnecessary in the present case to determine whether, in general terms, any placement of a legally incapacitated person in a social care institution constitutes a "deprivation of liberty" within the meaning of Article 5 § 1. In some cases, the placement is initiated by families who are also involved in the guardianship arrangements and is based on civil-law agreements signed with an appropriate social care institution. Accordingly, any restrictions on liberty in such cases are the result of actions by private individuals and the authorities' role is limited to

supervision. The Court is not called upon in the present case to rule on the obligations that may arise under the Convention for the authorities in such situations.

122. It observes that there are special circumstances in the present case. No members of the applicant's family were involved in his guardianship arrangements, and the duties of guardian were assigned to a State official (Ms R.P.), who negotiated and signed the placement agreement with the Pastra social care home without any contact with the applicant, whom she had in fact never met. The placement agreement was implemented in a State-run institution by the social services, which likewise did not interview the applicant (see paragraphs 12-15 above). The applicant was never consulted about his guardian's choices, even though he could have expressed a valid opinion and his consent was necessary in accordance with the Persons and Family Act 1949 (see paragraph 42 above). That being so, he was not transferred to the Pastra social care home at his request or on the basis of a voluntary private-law agreement on admission to an institution to receive social assistance and protection. The Court considers that the restrictions complained of by the applicant are the result of various steps taken by public authorities and institutions through their officials, from the initial request for his placement in an institution and throughout the implementation of the relevant measure, and not of acts or initiatives by private individuals. Although there is no indication that the applicant's guardian acted in bad faith, the above considerations set the present case apart from *Nielsen* (cited above), in which the applicant's mother committed her son, a minor, to a psychiatric institution in good faith, which prompted the Court to find that the measure in question entailed the exercise of exclusive custodial rights over a child who was not capable of expressing a valid opinion.

123. The applicant's placement in the social care home can therefore be said to have been attributable to the national authorities. It remains to be determined whether the restrictions resulting from that measure amounted to a "deprivation of liberty" within the meaning of Article 5.

124. With regard to the objective aspect, the Court observes that the applicant was housed in a block which he was able to leave, but emphasises that the question whether the building was locked is not decisive (see *Ashingdane*, cited above, § 42). While it is true that the applicant was able to go to the nearest village, he needed express permission to do so (see paragraph 25 above). Moreover, the time he spent away from the home and the places where he could go were always subject to controls and restrictions.

125. The Court further notes that between 2002 and 2009 the applicant was granted leave of absence for three short visits (of about ten days) to Ruse (see paragraphs 26-28 above). It cannot speculate as to whether he could have made more frequent visits had he asked to do so. Nevertheless, it

observes that such leave of absence was entirely at the discretion of the home's management, who kept the applicant's identity papers and administered his finances, including transport costs (see paragraphs 25-26 above). Furthermore, it would appear to the Court that the home's location in a mountain region far away from Ruse (some 400 km) made any journey difficult and expensive for the applicant in view of his income and his ability to make his own travel arrangements.

126. The Court considers that this system of leave of absence and the fact that the management kept the applicant's identity papers placed significant restrictions on his personal liberty.

127. Moreover, it is not disputed that when the applicant did not return from leave of absence in 2006, the home's management asked the Ruse police to search for and return him (see paragraph 28 above). The Court can accept that such steps form part of the responsibilities assumed by the management of a home for people with mental disorders towards its residents. It further notes that the police did not escort the applicant back and that he has not proved that he was arrested pending the arrival of staff from the home. Nevertheless, since his authorised period of leave had expired, the staff returned him to the home without regard for his wishes.

128. Accordingly, although the applicant was able to undertake certain journeys, the factors outlined above lead the Court to consider that, contrary to what the Government maintained, he was under constant supervision and was not free to leave the home without permission whenever he wished. With reference to the *Dodov* case (cited above), the Government maintained that the restrictions in issue had been necessary in view of the authorities' positive obligations to protect the applicant's life and health. The Court notes that in the above-mentioned case, the applicant's mother suffered from Alzheimer's disease and that, as a result, her memory and other mental capacities had progressively deteriorated, to the extent that the nursing home staff had been instructed not to leave her unattended. In the present case, however, the Government have not shown that the applicant's state of health was such as to put him at immediate risk, or to require the imposition of any special restrictions to protect his life and limb.

129. As regards the duration of the measure, the Court observes that it was not specified and was thus indefinite since the applicant was listed in the municipal registers as having his permanent address at the home, where he still remains (having lived there for more than eight years). This period is sufficiently lengthy for him to have felt the full adverse effects of the restrictions imposed on him.

130. As to the subjective aspect of the measure, it should be noted that, contrary to the requirements of domestic law (see paragraph 42 above), the applicant was not asked to give his opinion on his placement in the home and never explicitly consented to it. Instead, he was taken to Pastra by ambulance and placed in the home without being informed of the reasons

for or duration of that measure, which had been taken by his officially assigned guardian. The Court observes in this connection that there are situations where the wishes of a person with impaired mental faculties may validly be replaced by those of another person acting in the context of a protective measure and that it is sometimes difficult to ascertain the true wishes or preferences of the person concerned. However, the Court has already held that the fact that a person lacks legal capacity does not necessarily mean that he is unable to comprehend his situation (see *Shtukaturov*, cited above, § 108). In the present case, domestic law attached a certain weight to the applicant's wishes and it appears that he was well aware of his situation. The Court notes that, at least from 2004, the applicant explicitly expressed his desire to leave the Pastra social care home, both to psychiatrists and through his applications to the authorities to have his legal capacity restored and to be released from guardianship (see paragraphs 37-41 above).

131. These factors set the present case apart from *H.M. v. Switzerland* (cited above), in which the Court found that there had been no deprivation of liberty as the applicant had been placed in a nursing home purely in her own interests and, after her arrival there, had agreed to stay. In that connection the Government have not shown that in the present case, on arrival at the Pastra social care home or at any later date, the applicant agreed to stay there. That being so, the Court is not convinced that the applicant consented to the placement or accepted it tacitly at a later stage and throughout his stay.

132. Having regard to the particular circumstances of the present case, especially the involvement of the authorities in the decision to place the applicant in the home and its implementation, the rules on leave of absence, the duration of the placement and the applicant's lack of consent, the Court concludes that the situation under examination amounts to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention. Accordingly, that provision is applicable.

C. Whether the applicant's placement in the Pastra social care home was compatible with Article 5 § 1

1. The parties' submissions

(a) The applicant

133. The applicant submitted that, since he had not consented to his placement in the Pastra social care home and had not signed the agreement drawn up between his guardian and the home, the agreement was in breach of the Persons and Family Act. He added that he had not been informed of the agreement's existence at the time of his placement and that he had remained unaware of it for a long time afterwards. Nor had he had any

opportunity to challenge this step taken by his guardian. Although the guardian had been required by Article 126 of the Family Code to report on her activities to the guardianship authority (the mayor), the latter was not empowered to take any action against her. Furthermore, no report had ever been drawn up in respect of the applicant, and his guardians had never been called to account for that shortcoming.

134. The applicant further argued that his placement in a home for people with mental disorders did not fall within any of the grounds on which deprivation of liberty could be justified for the purposes of Article 5. The measure in question had not been justified by the need to ensure public safety or by the inability of the person concerned to cope outside the institution. In support of that contention, the applicant argued that the director of the home had deemed him capable of integrating into the community and that attempts had been made to bring him closer to his family, albeit to no avail. Accordingly, the authorities had based their decision to place him in the home on the simple fact that his family were not prepared to take care of him and he needed social assistance. They had not examined whether the necessary assistance could be provided through alternative measures that were less restrictive of his personal liberty. Such measures were, moreover, quite conceivable since Bulgarian legislation made provision for a wide range of social services, such as personal assistance, social rehabilitation centres and special allowances and pensions. The authorities had thus failed to strike a fair balance between the applicant's social needs and his right to liberty. It would be arbitrary, and contrary to the purpose of Article 5, for detention to be based on purely social considerations.

135. Should the Court take the view that the placement fell within the scope of Article 5 § 1 (e), by which persons of unsound mind could be deprived of their liberty, the applicant submitted that the national authorities had not satisfied the requirements of that provision. In the absence of a recent psychiatric assessment, it was clear that his placement in the home had not pursued the aim of providing him with medical treatment and had been based solely on medical documents produced in the context of the proceedings for his legal incapacitation. The documents had been issued approximately a year and a half beforehand and had not strictly concerned his placement in an institution for people with mental disorders. Relying on *Varbanov v. Bulgaria* (no. 31365/96, § 47, ECHR 2000-X), the applicant stated that he had been placed in the Pastra social care home without having undergone any assessment of his mental health at that time.

(b) The Government

136. The Government submitted that the applicant's placement in the home complied with domestic law as the guardian had signed an agreement whereby the applicant was to receive social services in his own interests.

She had therefore acted in accordance with her responsibilities and had discharged her duty to protect the person under partial guardianship.

137. Bearing in mind that the sole purpose of the placement had been to provide the applicant with social services under the Social Assistance Act and not to administer compulsory medical treatment, the Government submitted that this measure was not governed by Article 5 § 1 (e) of the Convention. In that connection, the authorities had taken into account his financial and family situation, that is to say, his lack of resources and the absence of close relatives able to assist him on a day-to-day basis.

138. The Government noted at the same time that the applicant could in any event be regarded as a "person of unsound mind" within the meaning of Article 5 § 1 (e). The medical assessment carried out during the proceedings for his legal incapacitation in 2000 showed clearly that he was suffering from mental disorders and that it was therefore legitimate for the authorities to place him in an institution for people with similar problems. Lastly, relying on the *Ashingdane* judgment (cited above, § 44), the Government submitted that there was an adequate link between the reason given for the placement, namely the applicant's state of health, and the institution in which he had been placed. Accordingly, they contended that the measure in issue had not been in breach of Article 5 § 1 (e).

(c) The third party

139. On the basis of the study referred to in paragraphs 112-114 above, Interights submitted that in central and east European countries, the placement of mentally disordered persons in a social care home was viewed solely in terms of social protection and was governed by contractual law. Since such placements were not regarded as a form of deprivation of liberty under domestic law, the procedural safeguards available in relation to involuntary psychiatric confinement were not applicable.

140. Interights contended that situations of this nature were comparable to that examined in the case of *H.L. v. the United Kingdom* (cited above), in which criticism had been levelled at the system prior to 2007 in the United Kingdom, whereby the common-law doctrine of necessity had permitted the "informal" detention of compliant incapacitated persons with mental disorders. The Court had held that the lack of any fixed procedural rules on the admission and detention of such persons was striking. In its view, the contrast between this dearth of regulation and the extensive network of safeguards applicable to formal psychiatric committals covered by mental-health legislation was significant. In the absence of a formalised admission procedure, indicating who could propose admission, for what reasons and on what basis, and given the lack of indication as to the length of the detention or the nature of treatment or care, the hospital's health-care professionals had assumed full control of the liberty and treatment of a vulnerable incapacitated person solely on the basis of their own clinical

assessments completed as and when they saw fit. While not doubting that those professionals had acted in good faith and in the applicant's best interests, the Court had observed that the very purpose of procedural safeguards was to protect individuals against any misjudgments and professional lapses (*H.L. v. the United Kingdom*, cited above, §§ 120-121).

141. Interights urged the Court to remain consistent with that approach and to find that in the present case the informal nature of admission to and continued detention in a social care home was at odds with the guarantees against arbitrariness under Article 5. The courts had not been involved at any stage of the proceedings and no other independent body had been assigned the task of monitoring the institutions in question. The lack of regulation coupled with the vulnerability of mentally disordered persons facilitated abuses of fundamental rights in a context of extremely limited supervision.

142. The third party further submitted that in most cases of this kind, placements were automatic as there were few possibilities of alternative social assistance. It contended that the authorities should be under a practical obligation to provide for appropriate measures that were less restrictive of personal liberty but were nonetheless capable of ensuring medical care and social services for mentally disordered persons. This would be a means of applying the principle that the rights guaranteed by the Convention should not be theoretical or illusory but practical and effective.

2. The Court's assessment

(a) General principles

143. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness (see *Herczegfalvy v. Austria*, 24 September 1992, § 63, Series A no. 244). Furthermore, the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III).

144. In addition, sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds of deprivation of liberty; such a measure will not be lawful unless it falls within one of those grounds (ibid.,

§ 49; see also, in particular, *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, 29 January 2008, and *Jendrowiak v. Germany*, no. 30060/04, § 31, 14 April 2011).

145. As regards the deprivation of liberty of mentally disordered persons, an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; *Shtukaturov*, cited above, § 114; and *Varbanov*, cited above, § 45).

146. As to the second of the above conditions, the detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV).

147. The Court further reiterates that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental-health patient will be "lawful" for the purposes of Article 5 § 1 (e) only if effected in a hospital, clinic or other appropriate institution authorised for that purpose (see *Ashingdane*, cited above, § 44, and *Pankiewicz v. Poland*, no. 34151/04, §§ 42-45, 12 February 2008). However, subject to the foregoing, Article 5 § 1 (e) is not in principle concerned with suitable treatment or conditions (see *Ashingdane*, cited above, § 44, and *Hutchison Reid*, cited above, § 49).

(b) Application of these principles in the present case

148. In examining whether the applicant's placement in the Pastra social care home was lawful for the purposes of Article 5 § 1, the Court must ascertain whether the measure in question complied with domestic law, whether it fell within the scope of one of the exceptions provided for in sub-paragraphs (a) to (f) of Article 5 § 1 to the rule of personal liberty, and, lastly, whether it was justified on the basis of one of those exceptions.

149. On the basis of the relevant domestic instruments (see paragraphs 57-59 above), the Court notes that Bulgarian law envisages placement in a social care institution as a protective measure taken at the request of the person concerned and not a coercive one ordered on one of the grounds listed in sub-paragraphs (a) to (f) of Article 5 § 1. However, in the particular circumstances of the instant case, the measure in question entailed significant restrictions on personal freedom giving rise to a deprivation of

liberty with no regard for the applicant's will or wishes (see paragraphs 121-132 above).

150. As to whether a procedure prescribed by law was followed, the Court notes firstly that under domestic law, the guardian of a person partially lacking legal capacity is not empowered to take legal steps on that person's behalf. Any contracts drawn up in such cases are valid only when signed together by the guardian and the person under partial guardianship (see paragraph 42 above). The Court therefore concludes that the decision by the applicant's guardian R.P. to place him in a social care home for people with mental disorders without having obtained his prior consent was invalid under Bulgarian law. This conclusion is in itself sufficient for the Court to establish that the applicant's deprivation of liberty was contrary to Article 5.

151. In any event, the Court considers that that measure was not lawful within the meaning of Article 5 § 1 of the Convention since it was not justified on the basis of any of sub-paragraphs (a) to (f).

152. The applicant accepted that the authorities had acted mainly on the basis of the arrangements governing social assistance (see paragraph 134 above). However, he argued that the restrictions imposed amounted to a deprivation of liberty which had not been warranted by any of the exceptions provided for in sub-paragraphs (a) to (f) of Article 5 § 1 to the rule of personal liberty. The Government contended that the applicant's placement in the home had been intended solely to protect his interest in receiving social care (see paragraphs 136-137 above). However, they stated that should the Court decide that Article 5 § 1 was applicable, the measure in question should be held to comply with sub-paragraph (e) in view of the applicant's mental disorder (see paragraph 138 above).

153. The Court notes that the applicant was eligible for social assistance as he had no accommodation and was unable to work as a result of his illness. It takes the view that, in certain circumstances, the welfare of a person with mental disorders might be a further factor to take into account, in addition to medical evidence, in assessing whether it is necessary to place the person in an institution. However, the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty. The Court considers that any protective measure should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will as a rule require careful scrutiny.

154. The Court is prepared to accept that the applicant's placement in the home was the direct consequence of the state of his mental health, the declaration of his partial incapacity and his placement under partial guardianship. Some six days after being appointed as the applicant's

guardian, Ms R.P., without knowing him or meeting him, decided on the strength of the file to ask the social services to place him in a home for people with mental disorders. The social services, for their part, likewise referred to the applicant's mental health in finding that the request should be granted. It seems clear to the Court that if the applicant had not been deprived of legal capacity on account of his mental disorder, he would not have been deprived of his liberty. Therefore, the present case should be examined under sub-paragraph (e) of Article 5 § 1.

155. It remains to be determined whether the applicant's placement in the home satisfied the requirements laid down in the Court's case-law concerning the detention of mentally disordered persons (see the principles outlined in paragraph 145 above). In this connection, the Court reiterates that in deciding whether an individual should be detained as a "person of unsound mind", the national authorities are to be recognised as having a certain discretion since it is in the first place for them to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities (see *Winterwerp*, cited above, § 40, and *Luberti v. Italy*, 23 February 1984, § 27, Series A no. 75).

156. In the instant case it is true that the expert medical report produced in the course of the proceedings for the applicant's legal incapacitation referred to the disorders from which he was suffering. However, the relevant examination took place before November 2000, whereas the applicant was placed in the Pastra social care home on 10 December 2002 (see paragraphs 10 and 14 above). More than two years thus elapsed between the expert psychiatric assessment relied on by the authorities and the applicant's placement in the home, during which time his guardian did not check whether there had been any change in his condition and did not meet or consult him. Unlike the Government (see paragraph 138 above), the Court considers that this period is excessive and that a medical opinion issued in 2000 cannot be regarded as a reliable reflection of the state of the applicant's mental health at the time of his placement. It should also be noted that the national authorities were not under any legal obligation to order a psychiatric report at the time of the placement. The Government explained in that connection that the applicable provisions were those of the Social Assistance Act and not those of the Health Act (see paragraphs 57-60 and 137 above). Nevertheless, in the Court's view, the lack of a recent medical assessment would be sufficient to conclude that the applicant's placement in the home was not lawful for the purposes of Article 5 § 1 (e).

157. As a subsidiary consideration, the Court observes that the other requirements of Article 5 § 1 (e) were not satisfied in the present case either. As regards the need to justify the placement by the severity of the disorder, it notes that the purpose of the 2000 medical report was not to examine whether the applicant's state of health required his placement in a home for

people with mental disorders, but solely to determine the issue of his legal protection. While it is true that Article 5 § 1 (e) authorises the confinement of a person suffering from a mental disorder even where no medical treatment is necessarily envisaged (see *Hutchison Reid*, cited above, § 52), such a measure must be properly justified by the seriousness of the person's condition in the interests of ensuring his or her own protection or that of others. In the present case, however, it has not been established that the applicant posed a danger to himself or to others, for example because of his psychiatric condition; the simple assertion by certain witnesses that he became aggressive when he drank (see paragraph 10 above) cannot suffice for this purpose. Nor have the authorities reported any acts of violence on the applicant's part during his time in the Pastra social care home.

158. The Court also notes deficiencies in the assessment of whether the disorders warranting the applicant's confinement still persisted. Although he was under the supervision of a psychiatrist (see paragraph 31 above), the aim of such supervision was not to provide an assessment at regular intervals of whether he still needed to be kept in the Pastra social care home for the purposes of Article 5 § 1 (e). Indeed, no provision was made for such an assessment under the relevant legislation.

159. Having regard to the foregoing, the Court observes that the applicant's placement in the home was not ordered "in accordance with a procedure prescribed by law" and that his deprivation of liberty was not justified by sub-paragraph (e) of Article 5 § 1. Furthermore, the Government have not indicated any of the other grounds listed in sub-paragraphs (a) to (f) which might have justified the deprivation of liberty in issue in the present case.

160. There has therefore been a violation of Article 5 § 1.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

161. The applicant complained that he had been unable to have the lawfulness of his placement in the Pastra social care home reviewed by a court.

He relied on Article 5 § 4 of the Convention, which provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' submissions

1. The applicant

162. The applicant submitted that domestic law did not provide for any specific remedies in respect of his situation, such as a periodic judicial

review of the lawfulness of his placement in a home for people with mental disorders. He added that, since he was deemed incapable of taking legal action on his own, domestic law did not afford him the possibility of applying to a court for permission to leave the Pastra social care home. He stated that he had likewise been unable to seek to have the placement agreement terminated, in view of the conflict of interests with his guardian, who at the same time was the director of the home.

163. The applicant further noted that he had not been allowed to apply to the courts to initiate the procedure provided for in Article 277 of the CCP (see paragraph 51 above) and that, moreover, such action would not have led to a review of the lawfulness of his deprivation of liberty but solely to a review of the conditions justifying partial guardianship in his case.

164. He further submitted that the procedure provided for in Articles 113 and 115 of the FC (see paragraphs 49-50 above) in theory afforded his close relatives the right to ask the mayor to replace the guardian or to compel the mayor to terminate the placement agreement. However, this had been an indirect remedy not accessible to him, since his half-sister and his father's second wife had not been willing to initiate such a procedure.

2. The Government

165. The Government submitted that, since the purpose of the applicant's placement in the home had been to provide social services, he could at any time have asked for the placement agreement to be terminated without the courts needing to be involved. In their submission, in so far as the applicant alleged a conflict of interests with his guardian, he could have relied on Article 123, paragraph 1, of the FC (see paragraph 50 above) and requested the guardianship authority to appoint an *ad hoc* representative, who could then have consented to a change of permanent residence.

166. The Government further contended that the applicant's close relatives had not availed themselves of the possibility open to some of them under Articles 113 and 115 of the FC of requesting the guardianship authority to replace his guardian or of challenging steps taken by the latter. They added that in the event of a refusal, his relatives could have appealed to a court, which would have considered the merits of the case and, if appropriate, appointed a new guardian, who could then have terminated the placement agreement. This, in the Government's submission, would have enabled them to challenge in substance the agreement signed between Ms R.P. and the Pastra social care home.

167. Lastly, the Government submitted that an action for restoration of legal capacity (under Article 277 of the CCP – see paragraph 51 above) constituted a remedy for the purposes of Article 5 § 4 since, if a sufficient improvement in the applicant's health had been observed and he had been released from guardianship, he would have been free to leave the home.

B. The Court's assessment

1. General principles

168. The Court reiterates that Article 5 § 4 entitles detained persons to institute proceedings for a review of compliance with the procedural and substantive conditions which are essential for the "lawfulness", in Convention terms, of their deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that a detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (see *E. v. Norway*, 29 August 1990, § 50, Series A no. 181-A). The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (see *Ireland v. the United Kingdom*, 18 January 1978, § 200, Series A no. 25; *Weeks v. the United Kingdom*, 2 March 1987, § 61, Series A no. 114; *Chahal v. the United Kingdom*, 15 November 1996, § 130, *Reports of Judgments and Decisions* 1996-V; and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, 19 February 2009).

169. The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue. It is not the Court's task to inquire into what would be the most appropriate system in the sphere under examination (see *Shtukaturov*, cited above, § 123).

170. Nevertheless, Article 5 § 4 guarantees a remedy that must be accessible to the person concerned and must afford the possibility of reviewing compliance with the conditions to be satisfied if the detention of a person of unsound mind is to be regarded as "lawful" for the purposes of Article 5 § 1 (e) (see *Ashingdane*, cited above, § 52). The Convention requirement for an act of deprivation of liberty to be amenable to independent judicial scrutiny is of fundamental importance in the context of the underlying purpose of Article 5 of the Convention to provide safeguards against arbitrariness. What is at stake is both the protection of the physical liberty of individuals and their personal security (see *Varbanov*, cited above, § 58). In the case of detention on the ground of mental illness, special procedural safeguards may be called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of

acting for themselves (see, among other authorities, *Winterwerp*, cited above, § 60).

171. Among the principles emerging from the Court's case-law under Article 5 § 4 concerning "persons of unsound mind" are the following:

(a) a person detained for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;

(b) Article 5 § 4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place;

(c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A).

2. Application of these principles in the present case

172. The Court observes that the Government have not indicated any domestic remedy capable of affording the applicant the direct opportunity to challenge the lawfulness of his placement in the Pastra social care home and the continued implementation of that measure. It also notes that the Bulgarian courts were not involved at any time or in any way in the placement and that the domestic legislation does not provide for automatic periodic judicial review of placement in a home for people with mental disorders. Furthermore, since the applicant's placement in the home is not recognised as a deprivation of liberty in Bulgarian law (see paragraph 58 above), there is no provision for any domestic legal remedies by which to challenge its lawfulness in terms of a deprivation of liberty. In addition, the Court notes that, according to the domestic courts' practice, the validity of the placement agreement could have been challenged on the ground of lack of consent only on the guardian's initiative (see paragraph 54 above).

173. In so far as the Government referred to the procedure for restoration of legal capacity under Article 277 of the CCP (see paragraph 167 above), the Court notes that the purpose of this procedure would not have been to examine the lawfulness of the applicant's placement *per se*, but solely to review his legal status (see paragraphs 233-246 below). The Government also referred to the procedures for reviewing steps taken by the guardian (see paragraphs 165-166 above). The Court considers it necessary

to determine whether such remedies could have given rise to a judicial review of the lawfulness of the placement as required by Article 5 § 4.

174. In this connection, it notes that the 1985 FC entitled close relatives of a person under partial guardianship to challenge decisions by the guardianship authority, which in turn was required to review steps taken by the guardian – including the placement agreement – and to replace the latter in the event of failure to discharge his or her duties (see paragraphs 48-50 above). However, the Court notes that those remedies were not directly accessible to the applicant. Moreover, none of the persons theoretically entitled to make use of them displayed any intention of acting in Mr Stanev's interests, and he himself was unable to act on his own initiative without their approval.

175. It is uncertain whether the applicant could have requested the mayor to demand explanations from the guardian or to suspend the implementation of the placement agreement on the ground that it was invalid. In any event, it appears that since he had been partially deprived of legal capacity, the law did not entitle him to apply of his own motion to the courts to challenge steps taken by the mayor (see paragraph 49 above); this was not disputed by the Government.

176. The same conclusion applies as regards the possibility for the applicant to ask the mayor to replace his guardian temporarily with an *ad hoc* representative on the basis of an alleged conflict of interests and then to apply for the termination of the placement agreement. The Court observes in this connection that the mayor has discretion to determine whether there is a conflict of interests (see paragraph 50 above). Lastly, it does not appear that the applicant could have applied of his own motion to the courts for a review on the merits in the event of the mayor's refusal to take such action.

177. The Court therefore concludes that the remedies referred to by the Government were either inaccessible to the applicant or were not judicial in nature. Furthermore, none of them can give rise to a direct review of the lawfulness of the applicant's placement in the Pastra social care home in terms of domestic law and the Convention.

178. Having regard to those considerations, the Court dismisses the Government's objection of failure to exhaust domestic remedies (see paragraphs 97-99 above) and finds that there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 5 OF THE CONVENTION

179. The applicant submitted that he had not been entitled to compensation for the alleged violations of his rights under Article 5 §§ 1 and 4 of the Convention.

He relied on Article 5 § 5, which provides:

"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. The parties' submissions

180. The applicant submitted that the circumstances in which unlawful detention could give rise to compensation were exhaustively listed in the State Responsibility for Damage Act 1988 (see paragraphs 62-67 above) and that his own situation was not covered by any of them. He further complained that there were no legal remedies by which compensation could be claimed for a violation of Article 5 § 4.

181. The Government maintained that the compensation procedure under the 1988 Act could have been initiated if the applicant's placement in the home had been found to have no legal basis. Since the placement had been found to be consistent with domestic law and with his own interests, he had not been able to initiate the procedure in question.

B. The Court's assessment

182. The Court reiterates that Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (see *Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A, and *Houtman and Meeus v. Belgium*, no. 22945/07, § 43, 17 March 2009). The right to compensation set forth in paragraph 5 therefore presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Convention institutions. In this connection, the effective enjoyment of the right to compensation guaranteed by Article 5 § 5 must be ensured with a sufficient degree of certainty (see *Ciulla v. Italy*, 22 February 1989, § 44, Series A no. 148; *Sakık and Others v. Turkey*, 26 November 1997, § 60, *Reports* 1997-VII; and *N.C. v. Italy* [GC], no. 24952/94, § 49, ECHR 2002-X).

183. Turning to the present case, the Court observes that, regard being had to its finding of a violation of paragraphs 1 and 4 of Article 5, paragraph 5 is applicable. It must therefore ascertain whether, prior to the present judgment, the applicant had an enforceable right at domestic level to compensation for damage, or whether he will have such a right following the adoption of this judgment.

184. The Court reiterates in this connection that in order to find a violation of Article 5 § 5, it has to establish that the finding of a violation of one of the other paragraphs of Article 5 could not give rise, either before or after the Court's judgment, to an enforceable claim for compensation before the domestic courts (see *Brogan and Others v. the United Kingdom*, 29 November 1988, §§ 66-67, Series A no. 145-B).

185. Having regard to the case-law cited above, the Court considers that it must first be determined whether the violation of Article 5 §§ 1 and 4 found in the present case could have given rise, before the delivery of this judgment, to an entitlement to compensation before the domestic courts.

186. As regards the violation of Article 5 § 1, the Court observes that section 2(1) of the State Responsibility for Damage Act 1988 provides for compensation for damage resulting from a judicial decision ordering certain types of detention where the decision has been set aside as having no legal basis (see paragraph 62 above). However, that was not the case in this instance. It appears from the case file that the Bulgarian judicial authorities have not at any stage found the measure to have been unlawful or otherwise in breach of Article 5 of the Convention. Moreover, the Government's line of argument has been that the applicant's placement in the home was in accordance with domestic law. The Court therefore concludes that the applicant was unable to claim any compensation under the above-mentioned provision in the absence of an acknowledgment by the national authorities that the placement was unlawful.

187. As to the possibility under section 1 of the same Act of claiming compensation for damage resulting from unlawful acts by the authorities (see paragraph 63 above), the Court observes that the Government have not produced any domestic decisions indicating that that provision is applicable to cases involving the placement of people with mental disorders in social care homes on the basis of civil-law agreements.

188. Furthermore, since no judicial remedy by which to review the lawfulness of the placement was available under Bulgarian law, the applicant could not have invoked State liability as a basis for receiving compensation for the violation of Article 5 § 4.

189. The question then arises whether the judgment in the present case, in which violations of paragraphs 1 and 4 of Article 5 have been found, will entitle the applicant to claim compensation under Bulgarian law. The Court observes that it does not appear from the relevant legislation that any such remedy exists; nor, indeed, have the Government submitted any arguments to prove the contrary.

190. It has therefore not been shown the applicant was able to avail himself prior to the Court's judgment in the present case, or will be able to do so after its delivery, of a right to compensation for the violation of Article 5 §§ 1 and 4.

191. There has therefore been a violation of Article 5 § 5.

IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION, TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 13

192. The applicant complained that the living conditions in the Pastra social care home were poor and that no effective remedy was available

under Bulgarian law in respect of that complaint. He relied on Article 3, taken alone and in conjunction with Article 13 of the Convention. These provisions are worded as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Preliminary objection of failure to exhaust domestic remedies

193. In their memorial before the Grand Chamber the Government for the first time raised an objection of failure to exhaust domestic remedies in respect of the complaint under Article 3 of the Convention. They submitted that the applicant could have obtained compensation for the living conditions in the home by bringing an action under the State Responsibility for Damage Act 1988.

194. The Court reiterates that, in accordance with Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application (see *N.C. v. Italy*, cited above, § 44). Where an objection of failure to exhaust domestic remedies is raised out of time for the purposes of Rule 55, an estoppel arises and the objection must accordingly be dismissed (see *Velikova v. Bulgaria*, no. 41488/98, § 57, ECHR 2000-VI, and *Tanrıbilir v. Turkey*, no. 21422/93, § 59, 16 November 2000).

195. In the present case the Government have not cited any circumstances justifying their failure to raise the objection in question at the time of the Chamber's examination of the admissibility of the case.

196. That being so, the Court observes that the Government are estopped from raising this objection, which must accordingly be dismissed.

B. Merits of the complaint under Article 3 of the Convention

1. The parties' submissions

197. The applicant submitted that the poor living conditions in the Pastra social care home, in particular the inadequate food, the deplorable sanitary conditions, the lack of heating, the enforced medical treatment, the overcrowded bedrooms and the absence of therapeutic and cultural activities, amounted to treatment prohibited by Article 3.

198. He observed that the Government had already acknowledged in 2004 that such living conditions did not comply with the relevant European standards and had undertaken to make improvements (see paragraph 82 above). However, the conditions had remained unchanged, at least until late 2009.

199. In their observations before the Chamber, the Government acknowledged the deficiencies in the living conditions at the home. They explained that the inadequate financial resources set aside for institutions of this kind formed the main obstacle to ensuring the requisite minimum standard of living. They also stated that, following an inspection by the Social Assistance Agency, the authorities had resolved to close the Pastra social care home and to take steps to improve living conditions for its residents. In the Government's submission, since the living conditions were the same for all the home's residents and there had been no intention to inflict ill-treatment, the applicant had not been subjected to degrading treatment.

200. Before the Grand Chamber the Government stated that renovation work had been carried out in late 2009 in the part of the home where the applicant lived (see paragraph 24 above).

2. The Court's assessment

(a) General principles

201. Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, among other authorities, *Kudła v. Poland* [GC], no. 30210/96, § 90, ECHR 2000-XI, and *Poltoratskiy v. Ukraine*, no. 38812/97, § 130, ECHR 2003-V).

202. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see *Kudła*, cited above, § 91, and *Poltoratskiy*, cited above, § 131).

203. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance or driving them to act against their will or conscience (see *Jalloh v. Germany* [GC],

no. 54810/00, § 68, ECHR 2006-IX). In this connection, the question whether such treatment was intended to humiliate or debase the victim is a factor to be taken into account, although the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (see *Peers v. Greece*, no. 28524/95, §§ 67, 68 and 74, ECHR 2001-III, and *Kalashnikov v. Russia*, no. 47095/99, § 95, ECHR 2002-VI).

204. The suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment. Measures depriving a person of his liberty may often involve such an element. Yet it cannot be said that deprivation of liberty in itself raises an issue under Article 3 of the Convention. Nevertheless, under that Article the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (see *Kudła*, cited above, §§ 92-94).

205. When assessing the conditions of a deprivation of liberty under Article 3 of the Convention, account has to be taken of their cumulative effects and the duration of the measure in question (see *Kalashnikov*, cited above, §§ 95 and 102; *Kehayov v. Bulgaria*, no. 41035/98, § 64, 18 January 2005; and *Iovchev v. Bulgaria*, no. 41211/98, § 127, 2 February 2006). In this connection, an important factor to take into account, besides the material conditions, is the detention regime. In assessing whether a restrictive regime may amount to treatment contrary to Article 3 in a given case, regard must be had to the particular conditions, the stringency of the regime, its duration, the objective pursued and its effects on the person concerned (see *Kehayov*, cited above, § 65).

(b) Application of these principles in the present case

206. In the present case the Court has found that the applicant's placement in the Pastra social care home – a situation for which the domestic authorities must be held responsible – amounts to a deprivation of liberty within the meaning of Article 5 of the Convention (see paragraph 132 above). It follows that Article 3 is applicable to the applicant's situation, seeing that it prohibits the inhuman and degrading treatment of anyone in the care of the authorities. The Court would emphasise that the prohibition of ill-treatment in Article 3 applies equally to all forms of deprivation of liberty, and in particular makes no distinction according to the purpose of the measure in issue; it is immaterial whether the measure entails detention ordered in the context of criminal proceedings or

admission to an institution with the aim of protecting the life or health of the person concerned.

207. The Court notes at the outset that, according to the Government, the building in which the applicant lives was renovated in late 2009, resulting in an improvement in his living conditions (see paragraph 200 above); the applicant did not dispute this. The Court therefore considers that the applicant's complaint should be taken to refer to the period between 2002 and 2009. The Government have not denied that during that period the applicant's living conditions corresponded to his description, and have also acknowledged that, for economic reasons, there were certain deficiencies in that regard (see paragraphs 198-199 above).

208. The Court observes that although the applicant shared a room measuring 16 square metres with four other residents, he enjoyed considerable freedom of movement both inside and outside the home, a fact likely to lessen the adverse effects of a limited sleeping area (see *Valašinas v. Lithuania*, no. 44558/98, § 103, ECHR 2001-VIII).

209. Nevertheless, other aspects of the applicant's physical living conditions are a considerable cause for concern. In particular, it appears that the food was insufficient and of poor quality. The building was inadequately heated and in winter the applicant had to sleep in his coat. He was able to have a shower once a week in an unhygienic and dilapidated bathroom. The toilets were in an execrable state and access to them was dangerous, according to the findings by the CPT (see paragraphs 21, 22, 23, 78 and 79 above). In addition, the home did not return clothes to the same people after they were washed (see paragraph 21 above), which was likely to arouse a feeling of inferiority in the residents.

210. The Court cannot overlook the fact that the applicant was exposed to all the above-mentioned conditions for a considerable period of approximately seven years. Nor can it ignore the findings of the CPT, which, after visiting the home, concluded that the living conditions there at the relevant time could be said to amount to inhuman and degrading treatment. Despite having been aware of those findings, during the period from 2002 to 2009 the Government did not act on their undertaking to close down the institution (see paragraph 82 above). The Court considers that the lack of financial resources cited by the Government is not a relevant argument to justify keeping the applicant in the living conditions described (see *Poltoratskiy*, cited above, § 148).

211. It would nevertheless emphasise that there is no suggestion that the national authorities deliberately intended to inflict degrading treatment. However, as noted above (see paragraph 203), the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3.

212. In conclusion, while noting the improvements apparently made to the Pastra social care home since late 2009, the Court considers that, taken

as a whole, the living conditions to which the applicant was exposed during a period of approximately seven years amounted to degrading treatment.

213. There has therefore been a violation of Article 3 of the Convention.

C. Merits of the complaint under Article 13 in conjunction with Article 3

1. The parties' submissions

214. The applicant submitted that no domestic remedies, including the claim for compensation envisaged in the State Responsibility for Damage Act 1988, had been accessible to him without his guardian's consent. He pointed out in that connection that he had not had a guardian for a period of more than two years, between the end of Ms R.P.'s designated term on 31 December 2002 (see paragraph 12 above) and the appointment of a new guardian on 2 February 2005 (see paragraph 17 above). Moreover, his new guardian was also the director of the social care home. There would therefore have been a conflict of interests between the applicant and his guardian in the event of any dispute concerning the living conditions at the home and the applicant could not have expected the guardian to support his allegations.

215. In the Government's submission, an action for restoration of legal capacity (see paragraphs 51-52 above) constituted a remedy by which the applicant could have secured a review of his status, and in the event of being released from partial guardianship, he could have left the social care home and ceased to endure the living conditions of which he complained.

216. The Government added that the applicant could have complained directly about the living conditions at the Pastra social care home by bringing an action under section 1 of the State Responsibility for Damage Act 1988 (see paragraphs 62-67 above).

2. The Court's assessment

217. The Court refers to its settled case-law to the effect that Article 13 guarantees the existence of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law (see *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 62, ECHR 2003-V).

218. Where, as in the present case, the Court has found a breach of Article 3, compensation for the non-pecuniary damage flowing from the

breach should in principle be part of the range of available remedies (ibid., § 63; and *Iovchev*, cited above, § 143).

219. In the instant case the Court observes that section 1(1) of the State Responsibility for Damage Act 1988 has indeed been interpreted by the domestic courts as being applicable to damage suffered by prisoners as a result of poor detention conditions (see paragraphs 63-64 above). However, according to the Government's submissions, the applicant's placement in the Pastra social care home is not regarded as detention under domestic law (see paragraphs 108-111 above). Therefore, he would not have been entitled to compensation for the poor living conditions in the home. Moreover, there are no judicial precedents in which this provision has been found to apply to allegations of poor conditions in social care homes (see paragraph 65 above), and the Government have not adduced any arguments to prove the contrary. Having regard to those considerations, the Court concludes that the remedies in question were not effective within the meaning of Article 13.

220. As to the Government's reference to the procedure for restoration of legal capacity (see paragraph 215 above), the Court considers that, even assuming that, as a result of that remedy, the applicant had been able to have his legal capacity restored and to leave the home, he would not have been awarded any compensation for his treatment during his placement there. Accordingly, the remedy in question did not afford appropriate redress.

221. There has therefore been a violation of Article 13 of the Convention, taken in conjunction with Article 3.

V. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

222. The applicant alleged that Bulgarian law had not afforded him the possibility of applying to a court for restoration of his legal capacity. He relied on Article 6 § 1 of the Convention, the relevant parts of which read:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. Preliminary remarks

223. The Grand Chamber observes that the Government have maintained before it the objection they raised before the Chamber alleging failure to exhaust domestic remedies. The objection was based on Article 277 of the CCP, which, according to the Government, entitled the applicant to apply personally to the courts for restoration of his legal capacity.

224. The Grand Chamber notes that in its admissibility decision of 29 June 2010 the Chamber observed that the applicant disputed the accessibility of the remedy which, according to the Government, would

have enabled him to obtain a review of his legal status and that that argument underpinned his complaint under Article 6 § 1. The Chamber thus joined the Government's objection to its examination of the merits of the complaint in question. The Grand Chamber sees no reason to depart from the Chamber's conclusion.

B. Merits

1. The parties' submissions

225. The applicant maintained that he had been unable personally to institute proceedings for restoration of his legal capacity under Article 277 of the CCP and that this was borne out by the Supreme Court's decision no. 5/79 (see paragraph 51 above). In support of that argument, he submitted that the Dupnitsa District Court had declined to examine his application for judicial review of the mayor's refusal to bring such proceedings, on the ground that the guardian had not countersigned the form of authority (see paragraphs 39-40 above).

226. In addition, although an action for restoration of legal capacity had not been accessible to him, the applicant had attempted to bring such an action through the public prosecutor's office, the mayor and his guardian (the director of the home). However, since no application to that end had been lodged with the courts, all his attempts had failed. Accordingly, the applicant had never had the opportunity to have his case heard by a court.

227. The Government submitted that Article 277 of the CCP had offered the applicant direct access to a court at any time to have his legal status reviewed. They pointed out that, contrary to what the applicant alleged, the Supreme Court's decision no. 5/79 had interpreted Article 277 of the CCP as meaning that persons partially deprived of legal capacity could apply directly to the courts to be released from guardianship. The only condition for making such an application was the production of evidence of an improvement in their condition. However, as was indicated by the medical assessment carried out at the public prosecutor's request (see paragraph 37 above), which had concluded that the applicant's condition still persisted and that he was incapable of looking after his own interests, it was clear that the applicant had not had any such evidence available. The Government thus concluded that the applicant had not attempted to apply to the court on his own because he had been unable to substantiate his application.

228. The Government further observed that the courts regularly considered applications for restoration of legal capacity submitted, for example, by a guardian (see paragraph 52 above).

2. The Court's assessment

(a) General principles

229. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). This "right to a court", of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his or her civil rights is unlawful and complains that no possibility was afforded to submit that claim to a court meeting the requirements of Article 6 § 1 (see, *inter alia*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X, and *Salontaji-Drobnjak v. Serbia*, no. 36500/05, § 132, 13 October 2009).

230. The right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals" (see *Ashingdane*, cited above, § 57). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field. Nonetheless, the limitations applied must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (ibid.; see also, among many other authorities, *Cordova v. Italy (no. 1)*, no. 40877/98, § 54, ECHR 2003-I, and the recapitulation of the relevant principles in *Fayed v. the United Kingdom*, 21 September 1994, § 65, Series A no. 294-B).

231. Furthermore, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly true for the guarantees enshrined in Article 6, in view of the prominent place held in a democratic society by the right to a fair trial with all the guarantees under that Article (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 45, ECHR 2001-VIII).

232. Lastly, the Court observes that in most of the cases before it involving "persons of unsound mind", the domestic proceedings have concerned their detention and were thus examined under Article 5 of the Convention. However, it has consistently held that the "procedural" guarantees under Article 5 §§ 1 and 4 of the Convention are broadly similar to those under Article 6 § 1 (see, for instance, *Winterwerp*, cited above,

§ 60; *Sanchez-Reisse v. Switzerland*, 21 October 1986, §§ 51 and 55, Series A no. 107; *Kampanis v. Greece*, 13 July 1995, § 47, Series A no. 318-B; and *Ilijkov v. Bulgaria*, no. 33977/96, § 103, 26 July 2001). In the *Shtukaturov* case (cited above, § 66), in determining whether or not the incapacitation proceedings had been fair, the Court had regard, *mutatis mutandis*, to its case-law under Article 5 §§ 1 (e) and 4 of the Convention.

(b) Application of these principles in the present case

233. The Court observes at the outset that in the present case, none of the parties disputed the applicability of Article 6 to proceedings for restoration of legal capacity. The applicant, who has been partially deprived of legal capacity, complained that Bulgarian law did not afford him direct access to a court to apply to have his capacity restored. The Court has had occasion to clarify that proceedings for restoration of legal capacity are directly decisive for the determination of "civil rights and obligations" (see *Matter v. Slovakia*, no. 31534/96, § 51, 5 July 1999). Article 6 § 1 of the Convention is therefore applicable in the instant case.

234. It remains to be determined whether the applicant's access to court was restricted and, if so, whether the restriction pursued a legitimate aim and was proportionate to it.

235. The Court notes firstly that the parties differed as to whether a legally incapacitated person had *locus standi* to apply directly to the Bulgarian courts for restoration of legal capacity; the Government argued that this was the case, whereas the applicant maintained the contrary.

236. The Court accepts the applicant's argument that, in order to make an application to a Bulgarian court, a person under partial guardianship is required to seek the support of the persons referred to in Article 277 of the 1952 CCP (which has become Article 340 of the 2007 CCP). The list of persons entitled to apply to the courts under Bulgarian law does not explicitly include the person under partial guardianship (see paragraphs 45 and 51 above).

237. With regard to the Supreme Court's 1980 decision (see paragraph 51 above), the Court observes that although the fourth sentence of paragraph 10 of the decision, read in isolation, might give the impression that a person under partial guardianship has direct access to a court, the Supreme Court explains further on that where the guardian of a partially incapacitated person and the guardianship authority refuse to institute proceedings for restoration of legal capacity, the person concerned may request the public prosecutor to do so. In the Court's view, the need to seek the intervention of the public prosecutor is scarcely reconcilable with direct access to court for persons under partial guardianship in so far as the decision to intervene is left to the prosecutor's discretion. It follows that the Supreme Court's 1980 decision cannot be said to have clearly affirmed the existence of such access in Bulgarian law.

238. The Court further notes that the Government have not produced any court decisions showing that persons under partial guardianship have been able to apply of their own motion to a court to have the measure lifted; however, they have shown that at least one application for restoration of legal capacity has been successfully brought by the guardian of a fully incapacitated person (see paragraph 52 above).

239. The Court thus considers it established that the applicant was unable to apply for restoration of his legal capacity other than through his guardian or one of the persons listed in Article 277 of the CCP.

240. The Court would also emphasise that, as far as access to court is concerned, domestic law makes no distinction between those who are entirely deprived of legal capacity and those who, like the applicant, are only partially incapacitated. Moreover, domestic legislation does not provide for any possibility of automatic periodic review of whether the grounds for placing a person under guardianship remain valid. Lastly, in the applicant's case the measure in question was not limited in time.

241. Admittedly, the right of access to the courts is not absolute and requires by its very nature that the State should enjoy a certain margin of appreciation in regulating the sphere under examination (see *Ashingdane*, cited above, § 57). In addition, the Court acknowledges that restrictions on a person's procedural rights, even where the person has been only partially deprived of legal capacity, may be justified for the person's own protection, the protection of the interests of others and the proper administration of justice. However, the importance of exercising these rights will vary according to the purpose of the action which the person concerned intends to bring before the courts. In particular, the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty (see also *Shtukaturov*, cited above, § 71). The Court therefore considers that this right is one of the fundamental procedural rights for the protection of those who have been partially deprived of legal capacity. It follows that such persons should in principle enjoy direct access to the courts in this sphere.

242. However, the State remains free to determine the procedure by which such direct access is to be realised. At the same time, the Court considers that it would not be incompatible with Article 6 for national legislation to provide for certain restrictions on access to court in this sphere, with the sole aim of ensuring that the courts are not overburdened with excessive and manifestly ill-founded applications. Nevertheless, it seems clear that this problem may be solved by other, less restrictive means than automatic denial of direct access, for example by limiting the

frequency with which applications may be made or introducing a system for prior examination of their admissibility on the basis of the file.

243. The Court further observes that eighteen of the twenty national legal systems studied in this context provide for direct access to the courts for any partially incapacitated persons wishing to have their status reviewed. In seventeen States such access is open even to those declared fully incapable (see paragraphs 88-90 above). This indicates that there is now a trend at European level towards granting legally incapacitated persons direct access to the courts to seek restoration of their capacity.

244. The Court is also obliged to note the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible. It refers in this connection to the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities and to Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults, which recommend that adequate procedural safeguards be put in place to protect legally incapacitated persons to the greatest extent possible, to ensure periodic reviews of their status and to make appropriate remedies available (see paragraphs 72-73 above).

245. In the light of the foregoing, in particular the trends emerging in national legislation and the relevant international instruments, the Court considers that Article 6 § 1 of the Convention must be interpreted as guaranteeing in principle that anyone who has been declared partially incapable, as is the applicant's case, has direct access to a court to seek restoration of his or her legal capacity.

246. In the instant case the Court has observed that direct access of this kind is not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation. That finding is sufficient for it to conclude that there has been a violation of Article 6 § 1 of the Convention in respect of the applicant.

247. The above conclusion dispenses the Court from examining whether the indirect legal remedies referred to by the Government provided the applicant with sufficient guarantees that his case would be brought before a court.

248. The Court therefore dismisses the Government's objection of failure to exhaust domestic remedies (see paragraph 223 above) and concludes that there has been a violation of Article 6 § 1 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION, TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 13

249. The applicant alleged that the restrictive guardianship regime, including his placement in the Pastra social care home and the physical

living conditions there, had amounted to unjustified interference with his right to respect for his private life and home. He submitted that Bulgarian law had not afforded him a sufficient and accessible remedy in that respect. He relied on Article 8 of the Convention, taken alone and in conjunction with Article 13.

Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

250. The applicant maintained in particular that the guardianship regime had not been geared to his individual case but had entailed restrictions automatically imposed on anyone who had been declared incapable by a judge. He added that the fact of having to live in the Pastra social care home had effectively barred him from taking part in community life and from developing relations with persons of his choosing. The authorities had not attempted to find alternative therapeutic solutions in the community or to take measures that were less restrictive of his personal liberty, with the result that he had developed "institutionalisation syndrome", that is, the loss of social skills and individual personality traits.

251. The Government contested those allegations.

252. Having regard to its conclusions under Articles 3, 5, 6 and 13 of the Convention, the Court considers that no separate issue arises under Article 8 of the Convention, taken alone and/or in conjunction with Article 13. It is therefore unnecessary to examine this complaint.

VII. ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

253. The relevant parts of Article 46 of the Convention read as follows:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. ..."

254. The Court reiterates that by Article 46 of the Convention the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach of the Convention or the Protocols thereto imposes

on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress as far as possible the effects (see *Menteş and Others v. Turkey* (Article 50), 24 July 1998, § 24, *Reports* 1998-IV; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; and *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I). The Court further notes that it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention (see *Scozzari and Giunta*, cited above; *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; and *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV).

255. However, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court may seek to indicate the type of individual and/or general measures that might be taken in order to put an end to the situation it has found to exist (see *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V, and *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 148, ECHR 2009-...).

256. In the instant case the Court considers that it is necessary, in view of its finding of a violation of Article 5, to indicate individual measures for the execution of this judgment. It observes that it has found a violation of that Article on account of the failure to comply with the requirement that any deprivation of liberty must be "in accordance with a procedure prescribed by law" and the lack of justification for the applicant's deprivation of liberty under sub-paragraph (e) or any of the other sub-paragraphs of Article 5 § 1. It has also noted deficiencies in the assessment of the presence and persistence of any disorders warranting placement in a social care home (see paragraphs 148-160 above).

257. The Court considers that in order to redress the effects of the breach of the applicant's rights, the authorities should ascertain whether he wishes to remain in the home in question. Nothing in this judgment should be seen as an obstacle to his continued placement in the Pastra social care home or any other home for people with mental disorders if it is established that he consents to the placement. However, should the applicant object to such placement, the authorities should re-examine his situation without delay in the light of the findings of this judgment.

258. The Court notes that it has also found a violation of Article 6 § 1 on account of the lack of direct access to a court for a person who has been partially deprived of legal capacity with a view to seeking its restoration (see paragraphs 233-248 above). Having regard to that finding, the Court

recommends that the respondent State envisage the necessary general measures to ensure the effective possibility of such access.

B. Article 41 of the Convention

259. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

1. Damage

260. The applicant did not submit any claims in respect of pecuniary damage but sought EUR 64,000 for non-pecuniary damage.

261. He asserted in particular that he had endured poor living conditions in the social care home and claimed a sum of EUR 14,000 on that account. In respect of his placement in the Pastra social care home, he stated that he had experienced feelings of anxiety, distress and frustration ever since that measure had begun to be implemented in December 2002. His enforced placement in the home had also had a significant impact on his life as he had been removed from his social environment and subjected to a very restrictive regime, making it harder for him to reintegrate into the community. He submitted that although there was no comparable case-law concerning unlawful detention in a social care home for people with mental disorders, regard should be had to the just satisfaction awarded by the Court in cases involving unlawful detention in psychiatric institutions. He referred, for example, to the judgments in *Gajcsi v. Hungary* (no. 34503/03, §§ 28-30, 3 October 2006) and *Kayadjieva v. Bulgaria* (no. 56272/00, § 57, 28 September 2006), while noting that he had been deprived of his liberty for a considerably longer period than the applicants in the above-mentioned cases. He submitted that a sum of EUR 30,000 would constitute an equitable award on that account. Lastly, he added that his lack of access to the courts to seek a review of his legal status had restricted the exercise of a number of freedoms in the sphere of his private life, causing additional non-pecuniary damage, for which an award of EUR 20,000 could provide redress.

262. The Government submitted that the applicant's claims were excessive and unfounded. They argued that if the Court were to make any award in respect of non-pecuniary damage, it should not exceed the amounts awarded in judgments against Bulgaria concerning compulsory psychiatric admission. The Government referred to the judgments in *Kayadjieva* (cited above, § 57), *Varbanov* (cited above, § 67), and *Kepenerov v. Bulgaria* (no. 39269/98, § 42, 31 July 2003).

263. The Court observes that it has found violations of several provisions of the Convention in the present case, namely Articles 3, 5 (paragraphs 1, 4 and 5), 6 and 13. It considers that the applicant must have endured suffering as a result of his placement in the home, which began in December 2002 and is still ongoing, his inability to secure a judicial review of that measure and his lack of access to a court to apply for release from partial guardianship. This suffering undoubtedly aroused in him a feeling of helplessness and anxiety. The Court further considers that the applicant sustained non-pecuniary damage on account of the degrading living conditions he had to endure for more than seven years.

264. Ruling on an equitable basis, as required by Article 41 of the Convention, the Court considers that the applicant should be awarded an aggregate sum of EUR 15,000 in respect of non-pecuniary damage.

2. Costs and expenses

265. The applicant did not submit any claims in respect of costs and expenses.

3. Default interest

266. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses*, unanimously, the Government's preliminary objections of failure to exhaust domestic remedies;

2. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds*, unanimously, that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds*, unanimously, that there has been a violation of Article 5 § 5 of the Convention;

5. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention, taken alone and in conjunction with Article 13;

6. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention;

7. *Holds*, by thirteen votes to four, that it is not necessary to examine whether there has been a violation of Article 8 of the Convention, taken alone and in conjunction with Article 13;

8. *Holds*, unanimously,
(a) that the respondent State is to pay the applicant, within three months, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage, to be converted into Bulgarian levs at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 17 January 2012.

Vincent Berger	Nicolas Bratza
Jurisconsult	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint partly dissenting opinion of Judges Tulkens, Spielmann and Laffranque;
(b) partly dissenting opinion of Judge Kalaydjieva.

N.B.
V.B.

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS, SPIELMANN AND LAFFRANQUE

(Translation)

We had no hesitation in voting in favour of finding a violation of Article 5 and of Article 3, taken alone and in conjunction with Article 13. We also voted in favour of finding a violation of Article 6 of the Convention, and we believe that the judgment is likely to strengthen considerably the protection of persons in a similarly vulnerable situation to the applicant. However, we do not agree with the majority's finding that no separate issue arises under Article 8 of the Convention, taken alone and/or in conjunction with Article 13, and that it is therefore unnecessary to examine this complaint (see paragraph 252 of the judgment and point 7 of the operative provisions).

We wish to point out that the applicant alleged that the restrictive guardianship regime, including his placement in the Pastra social care home and the physical living conditions there, amounted to unjustified interference with his right to respect for his private life and home (see paragraph 249 of the judgment). He submitted that Bulgarian law had not afforded him a sufficient and accessible remedy in that respect. He also maintained that the guardianship regime had not been geared to his individual case but had entailed restrictions automatically imposed on anyone who had been declared incapable by a judge. He added that the fact of having to live in the Pastra social care home had effectively barred him from taking part in community life and from developing relations with persons of his choosing. The authorities had not attempted to find alternative therapeutic solutions in the community or to take measures that were less restrictive of his personal liberty, with the result that he had developed "institutionalisation syndrome", that is, the loss of social skills and individual personality traits (see paragraph 250 of the judgment).

In our opinion, these are genuine issues that deserved to be examined separately. Admittedly, a large part of the allegations submitted under Article 8 are similar to those raised under Articles 3, 5 and 6. Nevertheless, they are not identical and the answers given in the judgment in relation to those provisions cannot entirely cover the complaints brought under Articles 8 and 13.

More specifically, an issue that would also have merited a separate examination concerns the scope of a periodic review of the applicant's situation. He submitted that domestic law did not provide for an automatic periodic assessment of the need to maintain a measure restricting legal capacity. It might have been helpful to consider whether States have a positive obligation to set up a review procedure of this kind, especially in situations where the persons concerned are unable to comprehend the

consequences of a regular review and cannot themselves initiate a procedure to that end.

PARTLY DISSENTING OPINION OF JUDGE KALAYDJIEVA

I had no hesitation in reaching the conclusions concerning Mr Stanev's complaints under Articles 5, 3 and 6 of the Convention. However, like Judges Tulkens, Spielmann and Laffranque, I regret the majority's conclusion that in view of these findings it was not necessary to examine separately his complaints under Article 8 concerning "the [partial guardianship] system, including the lack of regular reviews of the continued justification of such a measure, the appointment of the director of the Pastra social care home as his [guardian] and the alleged lack of scrutiny of the director's decisions, and also about the restrictions on his private life resulting from his admission to the home against his will, extending to the lack of contact with the outside world and the conditions attached to correspondence" (see paragraph 90 of the decision as to admissibility of 29 June 2010). In my view the applicant's complaints under Article 8 of the Convention remain the primary issue in the present case.

In its earlier case-law the Court has expressed the view that an individual's legal capacity is decisive for the exercise of all the rights and freedoms, not least in relation to any restrictions that may be placed on the person's liberty (see *Shtukaturov v.Russia*, no. 44009/05, § 71, 27 March 2008; *Salontaji-Drobniak v. Serbia*, no. 36500/05, §§ 140 et seq.; and the recent judgment in *X and Y v. Croatia*, no. 5193/09, §§ 102-104).

There is hardly any doubt that restrictions on legal capacity constitute interference with the right to private life, which will give rise to a breach of Article 8 of the Convention unless it can be shown that it was "in accordance with the law", pursued one or more legitimate aims and was "necessary" for their attainment.

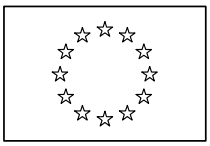
Unlike the situation of the applicants in the cases mentioned above, Mr Stanev's capacity to perform ordinary acts relating to everyday life and his ability to validly enter into legal transactions with the consent of his guardian were recognised. The national law and the domestic courts' decisions entitled him to request and obtain social care in accordance with his needs and preferences if he so wished, or to refuse such care in view of the quality of the services offered and/or any restrictions involved which he was not prepared to accept. There was nothing in the domestic law or the applicant's personal circumstances to justify any further restrictions, or to warrant the substitution of his own will with his guardian's assessment of his best interests.

However, once declared partially incapacitated, he was divested of the possibility of acting in his own interests and there were insufficient guarantees to prevent his *de facto* treatment as a fully incapacitated individual. It has not been contested that he was not consulted as to whether he wished to avail himself of placement in a social care institution and that

he was not even entitled to decide independently how to spend his time or the remaining part of his pension, and whether and when to visit his friends or relatives or other places, to send and receive letters or to otherwise communicate with the outside world. No justification was offered for the fact that Mr Stanev was stripped of the ability to act in accordance with his preferences to the extent determined by the courts and the law and that, instead of due assistance from his officially appointed guardian, the pursuit of his best interests was made completely dependent on the good will or neglect shown by the guardian. In this regard the lack of respect for the applicant's recognised personal autonomy violated Mr Stanev's right to personal life and dignity as guaranteed by Article 8 and failed to meet contemporary standards for ensuring the necessary respect for the wishes and preferences he was capable of expressing.

The applicant's situation was further aggravated by his inability to trigger any remedy for the independent protection of his rights and interests. Any attempt to avail himself of such remedies depended on the initial approval of Mr Stanev's guardian, who also acted as the director and representative of the social care institution. In this regard the majority's preference not to consider separately the applicant's complaints under Article 8 resulted in a failure to subject to separate scrutiny the absence of safeguards for the exercise of these rights in the face of a potential or even evident conflict of interests, a factor which appears to be of central importance for the requisite protection of vulnerable individuals against possible abuse and is equally pertinent to the applicant's complaints under Article 8 and Article 6.

While both parties submitted information to the effect that proceedings for the restoration of capacity were not only possible in principle, but had also been successful in a reasonable percentage of cases, Mr Stanev rightly complained that the institution of such proceedings in his case depended on his guardian's approval. It appears that the guardian's discretion to block any attempt to take proceedings in court affected not only the applicant's right of access to court for the purposes of restoration of capacity, but also prevented the institution of any proceedings in pursuit of the applicant's interests and rights, including those protected under Article 5 of the Convention. As was also submitted by his representatives before the national authorities, Mr Stanev "should have had the opportunity to assess by himself whether or not, having regard to the living conditions at the home, it was in his interests to remain there" (see paragraph 38 of the judgment).



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}

EXPLANATORY MEMORANDUM

1. CONTEXT 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 training[1].

General context

The Commission announced in its legislative and work programme adopted on 23 October 2007[2] 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 Europe'[3], and accompanies the Communication 'Non-Discrimination and Equal Opportunities: A Renewed Commitment'[4].

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[5].

Existing provisions in the area of the proposal

This proposal builds upon Directives 2000/43/EC, 2000/78/EC and 2004/113/EC[6] which prohibit discrimination on grounds of sex, racial or ethnic origin, age, disability, sexual orientation, religion or belief[7]. 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

5 [COM (2008) XXX]

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 2006[8] and a report on the implementation of Directive 2000/78/EC was adopted on 19 June 2008[9]. 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 consultation[10], a survey of the business sector[11], and a written consultation of, and meetings with, the social partners and European level NGOs active in the non-discrimination field[12]. 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) 225

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 study[13] 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 study[14] 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'[15] 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

15 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/multdis_en.pdf

Also relevant are the results of a special Eurobarometer survey [17] and a Eurobarometer flash survey in February 2008[18].

Impact assessment

The impact assessment report[19] 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.

5. 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/EC[20], 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 5.10.2002

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 applies[21].

[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 Coote[22] case.

[22] Case C-185/97 [1998] ECR I-5199

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 Justice[23] and the Community legislator in Directive 97/80/EC[24].

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/EC[25] 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 Justice[26], the text provides that 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.

---

[25] 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 5.10.2002, p.15

[26] Cases C-180/95 Draehmpaehl, ECR 1997 I p.2195 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.

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

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 Commission[27],

Having regard to the opinion of the European Parliament[28],

Having regard to the opinion of the European Economic and Social Committee[29],

Having regard to the opinion of the Committee of the Regions[30],

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 market[31].

(6) The European Parliament has called for the extension of the protection of discrimination in European Union law[32].

(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 instruments[34] 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 50.

32 Resolution of 20 May 2008 P6_TA-PROV(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 requirements[35] 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 1260/1999[36] 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 disabilities[37].

(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

---

35 Regulation (EC) No. 1107/2006 and Regulation (EC) No 1371/2007

36 OJ L 210, 31.7.2006, p.25. 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 5 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.

5. 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.

5. 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.

5. 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, organizations 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 organizations, as well as the EU Fundamental Rights Agency. In accordance with the principle of gender mainstreaming, this report shall, inter alias, 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

7.1.9.

CODE OF GOOD PRACTICE FOR THE EMPLOYMENT OF PEOPLE WITH DISABILITIES

BUREAU DECISION

OF 22 JUNE 2005

THE BUREAU of the European Parliament

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

Having regard to Article 1d of the Staff Regulations,

Having regard to the Council Directive establishing a general framework for equal treatment in employment and occupation[1],

Having regard to the existing Code of Good Practice for the Employment of People with Disabilities, adopted by the Bureau of the European Parliament in January 2000[2]

Having regard to the Commission Decision of 25 November 2003 on a Revised Code of Good Practice for the Employment of People with Disabilities,

Having regard to the opinion of the Legal Service,

Whereas:

(1) The Commission's *Consultative Document on Improving Working Arrangements and Career Perspectives for People with Disabilities*[3] provides that "a more pro-active approach should be adopted to the implementation, evaluation and monitoring of the Code of Good Practice, with greater involvement of disabled staff",

(2) 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,

(3) The Council Directive establishing a general framework for equal treatment in employment and occupation and the Employment Guidelines for 2000 do not apply to the Community Institutions, the Commission has stated in the Reform that it should "offer its staff at least the same opportunities and levels of protection in these areas as apply in Member States"

(4) The European Parliament's resolution of 9 March 2005 on budget guidelines 2006 and on the European Parliament's preliminary draft estimates[4], calls on the institutions to give an

---

1 2000/78/EC
2 PE 282.903/BUR
3 SEC (2000) 2084/4
4 A6-0043/2005, paragraph 9

overview by 1 September 2005 of measures taken to overcome obstacles to equal treatment as defined in Article 13 of the EC Treaty, taking account of the possibilities offered by the new Staff Regulations,

ADOPTS THE FOLLOWING CODE OF GOOD PRACTICE:

Article 1 - Introduction

The European Institutions are committed to providing equality of access to employment in the European Public Service. A Public Service that reflects the diversity of the community it serves is better able to deliver quality services to the European citizens. Apart from the objective merits of equality, any organisation that claims to be progressive and forward-looking must seek to optimise the potential contribution of its entire recruitment base by ensuring equal access.

European statistics show that there are too few people with disabilities in employment by comparison with the number of people with disabilities of working age. It is the European Institutions' policy to promote a diverse and skilled workforce, to improve employment access and participation by people with disabilities, to eliminate discrimination in the workplace and to promote a workplace culture based on fair workplace practices and behaviour.

In pursuing this policy, due regard should be given to the Commission Communication "Towards a Barrier Free Europe for People with Disabilities"[5]. The "Design for All" principle must also be applied. "Design for All" is a relatively new approach that consists of designing, developing and marketing mainstream products, services, systems and environments that are accessible by as broad a range of users as possible. Failure to apply the design for all principle and to take peoples' needs into account in the planning, design and adaptation of environments can force people unnecessarily into a situation of dependency and social exclusion.

The purpose of this CODE OF GOOD PRACTICE is to provide a clear statement of the European Institutions' policy in relation to the employment of people with disabilities and ensure that all staff in the European Institutions comply with their legal and statutory obligations under anti-discrimination provisions and carry out their duties in a manner which is consistent with good equal opportunities practice. To this end, adequate resources will be re-allocated, wherever necessary, by all DGs and services in order to ensure the effective implementation of this Code of Good Practice.

---

5 COM(2000) 284 final of 12.05.2000

POLICY STATEMENT[6]

The European Institutions are committed to promoting equal treatment, irrespective of gender, race, colour, ethnic or social origin, genetic features, language, religion, convictions, political opinions or any other opinions, membership of a national minority, wealth, birth, age, disability or sexual orientation, by adopting workplace rules, policies, practices and behaviour, where all workers are valued and respected and have opportunities to develop their full potential and pursue a career of their choice. They are entitled to a working environment free from discrimination and harassment and where barriers to participation are identified and removed. These principles help the European Institutions to attract and retain the best people to deliver a high-quality service to European citizens.

In pursuit of these standards, the following provisions relating to the employment of people with disabilities have been inserted into Article 1d (4) of the Staff Regulations[7]:

"… a person has a disability if he has a physical or mental impairment that is, or likely to be, permanent. The impairment shall be determined according to the procedure set out in Article 33.

A person with a disability meets the conditions laid down in Article 28(e) if he can perform the essential functions of the job when reasonable accommodation is made.

"Reasonable accommodation", in relation to the essential functions of the job, shall mean appropriate measures, where needed, to enable a person with a disability to have access to, to participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer."

Article 2 - Scope of the Code

People with disabilities are not only those whose disability is immediately apparent. While many disabilities are not obvious they may, nonetheless, require certain accommodation. It is also recognised that the same disability can vary in its severity and affect the individual to a different degree and at different times and that a disability may be temporary in nature.

This code covers those who have a disability during the recruitment process, those who have a disability at the time of initial appointment and those in whom the disability develops during employment. The European Institutions will seek to adjust to any new circumstances in a supportive and sensitive manner.

The scope of the code does not encompass topics such as the special medical allowance for people with disabilities or the special budget for officials' children who have disabilities and related school allowances.

---

6 The 'discriminatory grounds' set out in this Policy Statement are those included in the current Staff Regulations, which entered into force on 1st May 2004.

7 Cf. article 1c of the Staff Regulations: "Any reference in these Staff Regulations to a person of the male sex shall be deemed also to constitute a reference to a person of the female sex, and vice-versa, unless the context clearly indicates otherwise." In consequence, while the Code is drafted in gender-neutral terms, extracts from the Staff Regulations are not.

Article 3 - Work-related accommodation

It is the European Institutions' policy to provide reasonable accommodation in employment in order to meet the needs of people with disabilities and of the Institutions. For the purposes of the present code, it shall be for the Institution to demonstrate that providing the necessary accommodation imposes an unreasonable burden.

It is recognised that the majority of people with disabilities do not require any form of special aid or adaptation to perform their work. However, people can do the same job in different ways to achieve the same result. Enabling a member of staff to perform well in a job by making a work-related accommodation is therefore entirely consistent with the merit principle. In order to ensure and facilitate the provision of accessible accommodation, the Institutions will have to anticipate some fundamental well-known needs following the "Design for All" principles, especially when new infrastructures are being developed.

Directive 2000/78/EC, establishing a general framework for Equal Treatment in Employment and Occupation, states 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 is also the basis of the European Institutions' policy on work-related accommodation.

Accommodation applies to all areas of employment, including:

- recruitment, selection and appointment,
- career development,
- training, and
- promotion, transfers or any other employment benefit
- social relationships within the Institutions.

Accommodation is a way of changing the workplace and may include:

- job redesign,
- purchasing or modifying equipment,
- flexible working arrangements.

The accommodation required is to be determined by the particular needs of the individual and will normally be provided. If providing accommodation would impose a disproportionate burden on them, the European Institutions may decline to offer employment to a person with a disability. Stringent standards, which have to be defined, are to be applied when assessing what is a disproportionate burden for the European Institutions. This is without prejudice to the right of administrative appeal.

Article 4 - Recruitment

The European Institutions have a policy of equality of opportunity and selection on merit by means of fair and open competitions. Recruitment and selection procedures are adapted to ensure that they do not disadvantage candidates with disabilities. People with disabilities are also encouraged to apply by a positive reference to the equal opportunities policy in advertisements for posts and by the dissemination of notices about forthcoming competitions to specialist publications and organisations such as the European Disability Forum, which is representative of NGO disability groups in the Member States and the European Agency for

the Development of Special Needs Education. Positive action shall also be taken in the field of administrative 'stagiaire' recruitment as well as at the level of interim or temporary contracts.

Accordingly, recruitment procedures will include the following:

- **Press publicity** for competitions will include a statement affirming the Institutions' commitment to equality of opportunity for all candidates.

- **The Guide for Candidates** appearing in the Official Journal with the Notice of Competition will contain a paragraph specifically aimed at candidates with disabilities, mentioning the CODE OF GOOD PRACTICE.

- **Application forms** will request candidates with disabilities to detail the accommodation they require to enable them to participate in the tests on an equal basis with other candidates and every effort will be made to satisfy all reasonable requests.

- When a person with a disability is attending for **competition or interview**, the Secretary of the Selection Board, under the authority of the Chairperson, is responsible for ensuring that appropriate arrangements are made for the reception of that person and for the provision of any assistance that may be required, e.g. access to buildings, special equipment, extra time during competitions, etc.

- **Training** given to members of Selection Boards will include a module on disability awareness and the contents of this CODE OF GOOD PRACTICE. .

- A **website** will be set up in accordance with the most up-to-date accessibility standards, to enable access by the widest possible audience.

Article 5 - Careers

Once candidates with disabilities are on a reserve list, they may avail themselves of specialist advice in securing a post. DG Personnel of the European Parliament and EPSO will conduct an ongoing audit of the number of candidates with disabilities in competitions, the number who pass and the number who are subsequently recruited.

Having been recruited, officials with disabilities have the right to fully develop their potential. Care is taken at all stages during the career of an official with disabilities to ensure the avoidance of job requirements that, whether intentionally or otherwise, are not job-related and therefore discriminate against people with disabilities.

- **Initial Appointment and Probation**: The Appointing Authority uses its best endeavours, in co-operation with the Medical Services and/or the Equal Opportunities Service of DG Personnel, to ensure that candidates with disabilities placed on a competition reserve list are offered appropriate posts. In accordance with Staff Regulations, all successful candidates in a competition have their capacity to carry out their duties confirmed by a medical assessment. When appointing a person with a disability or determining their capacity to continue duty, care is taken to avoid discrimination based on disability. The aim is to ensure that the person is qualified for employment and to verify that he/she can perform the essential functions of the job, without prejudice to the obligation of providing reasonable

accommodation and having regard to the kind of disability. If, during the probationary period, it is verified that the job assigned to a successful candidate is incompatible with his/her disability, mobility will be considered.

- **Career Guidance**: The Career Guidance and Counselling Service can play an important role in counselling staff with disabilities on their career development and they should receive the appropriate training. The best approach would be to recruit a counsellor specialised in vocational and rehabilitation counselling, who would link, as appropriate, with other relevant services.

- **Career development**: Every effort is made to ensure that staff with disabilities have the same opportunities as others to increase their experience and develop their career by means of mobility within the Institutions. Providing for career development may include adjusting other posts so that members of staff with a disability can act in different or higher positions to develop new skills.

- **Training**: Staff with disabilities have the same access to training as other staff. The acquisition of new skills and knowledge is an important prerequisite for the career development of all officials. Every effort is made to enable staff with disabilities to participate in training courses and programmes organised by the particular institution. Where in-house training is unavailable or inappropriate, reasonable measures may be taken to provide training externally.

- **Staff assessment and Promotion**: disability does not constitute a reason for assessors and promotion committees to depart from the normal objective criteria used to judge the merits of officials.

- **Retention of Staff**: If a staff member acquires a disability, or an existing disability becomes more severe, the European Institutions take steps to try to enable the staff member to remain in employment. In consultation with the person, accommodation to facilitate their retention is considered, including restructuring that person's job, providing retraining or redeployment to a suitable post. Where necessary, such arrangements can be reviewed. Medical retirement procedures are undertaken in full consultation with the staff member where it is decided that adjustments cannot be made to allow the employee to remain in his/her post and a suitable, alternative, post is not available.

Article 6 - Working environment

The Institutions ensure that all reasonable measures are taken to eliminate physical or technical environmental barriers that may face some staff with disabilities:

- **Buildings**: All new buildings to be occupied by employees of the Institutions have to comply with the relevant national local legislation in respect of the access and utilisation of public buildings by people with disabilities in order to ensure seamless mobility. Buildings without suitable access, or buildings falling below a reasonable level in this respect, are progressively improved, subject to the availability of budgetary provision, or abandoned. Pending the adoption by the Institutions of revised criteria governing the adaptation of their buildings, the principles contained in the latest edition of the Commission document "Immeuble-type" will apply. The Institutions are taking all reasonable measures to ensure that officials with disabilities are allocated office accommodation compatible with their particular

needs, including the provision of designated parking, where necessary. Emergency facilities must be appropriate to all officials with disabilities. The Unit for Prevention and Well-Being at Work will continue to regularly audit buildings to determine improvements that should be made.

- **Office environment**: Care must be taken to ensure that the office environment is suited to a person with specific needs. The European Parliament will designate a specialist who will make an ergonomic appraisal of the office environment prior to newly-recruited staff members with disabilities commencing their employment and whenever a staff member with disabilities moves office.

The specialist will periodically inspect the office of all staff members with disabilities, will recommend appropriate changes, as needed, and will regularly inform the Directorate-General for Personnel, as well as the Interservice Working Party on the Accessibility of People with Disabilities, of the relevant findings.

To ensure the provision of reasonable accommodation, specific technical measures need to be taken as a precondition to an accessible environment. It is essential that information technology tools, including Intranet, applications and databases are developed following "Design for All" principles and accessibility guidelines. Electronic information and data should be available in accessible formats. The purchase of the appropriate tools and the training of personnel is an essential precondition.

Officials with disabilities are consulted about special equipment or furniture that might enhance their efficiency and effectiveness in the performance of their duties. The Institutions accept all reasonable requests for such items.

- **Meetings, etc**.: Care is taken to ensure that people with disabilities can fully participate in meetings or other fora by avoiding the inappropriate use of presentation aids or other media and by ensuring the availability of relevant material in accessible formats.

- **Flexible work**: Where reasonable, flexible working arrangements are made to meet both the Institution's work requirements and the particular needs of an official with a disability. Examples are:

- *flexible starting and finishing times to accommodate the difficulties some people with a disability have getting to and from work using public transport,*

- *regular short breaks to assist people who require periodic medication or rest periods,*

- *part-time work; teleworking, with adequate technological supports provided by the employer.*

Article 7 - Information and Awareness Training

This CODE OF GOOD PRACTICE will be brought to the attention of all staff by the Equal Opportunities Service and by the human resources units of DGs. It is available in all EU languages on the EUROPA web site, on the Intranets of the Institutions and their Offices and Agencies and is distributed to all Human Resources Management staff and to senior and middle management staff. Wherever possible, the Institutions will seek to make information services and documentation accessible to different groups of people with disabilities, taking into account language and cultural needs.

Training courses which deal with the question of disabilities in depth will be targeted at those most particularly involved, e.g. staff with HR responsibilities, local career guidance staff, relevant Heads of Units, and members of Selection Boards.

Article 8 - Monitoring

An essential element in the implementation of this CODE OF GOOD PRACTICE is continuous monitoring of how it is performing, thus ensuring that improved procedures for its better application are introduced at all levels, including the recruitment process and throughout an official's career. In the event of complaints, it will be for DGs to show that they meet the requirements of people with disabilities. The Equal Opportunities Service and the Interservice Working Party on the Accessibility of People with Disabilities will discuss and fix targets to achieve barrier-free conditions.

A disability audit, under which directorates-general conduct a survey of their employees, who will declare if they believe that they have a disability, is conducted regularly and the results reported to DG Personnel. The purpose of collecting this information is to:

- ensure that appropriate consultation takes place with all relevant staff;

- eliminate discrimination and barriers to equal opportunities for staff with disabilities;

- identify what accommodation might need to be provided when interviewing or employing a person with a disability;

- develop the full potential of all staff and ensure equality of opportunity in career development.

The data are used to produce anonymous statistical reports to enable Institutions to assess if the non-discrimination policy and this Code are working effectively and to help frame new initiatives. Having due regard to the provisions of the Data Protection Regulation concerning the processing of personal data by the Community Institutions[8], the information gathered in

8 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 (OJ L8, 12.01.2001, p. 1)

the audit will not be used for any other purpose. Statistics regarding the number of staff with disabilities will be published.

The **Interservice Working Party on the Accessibility of People with Disabilities** is also forwarding the direct input received from staff with disabilities in the DGs on questions of working conditions, accessibility, recruitment and career development to DG Personnel.

Additionally, the Equal Opportunities service of DG Personnel may be approached on a confidential basis if matters of dissatisfaction arise in relation to the implementation of this Code in the European Parliament. The Service pursues the issues discreetly, with due regard to the level of confidentiality sought.

I

(Legislative acts)

REGULATIONS

REGULATION (EU) No 181/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 16 February 2011

concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91(1) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure, in the light of the joint text approved by the Conciliation Committee on 24 January 2011 [2],

Whereas:

(1) Action by the Union in the field of bus and coach transport should aim, among other things, at ensuring a high level of protection for passengers, that is comparable with other modes of transport, wherever they travel. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Since the bus or coach passenger is the weaker party to the transport contract, all passengers should be granted a minimum level of protection.

(3) Union measures to improve passengers' rights in the bus and coach transport sector should take account of the specific characteristics of this sector, which consists largely of small- and medium-sized undertakings.

(4) Passengers and, as a minimum, persons whom the passenger had, or would have had, a legal duty to maintain should enjoy adequate protection in the event of accidents arising out of the use of the bus or coach, taking into account Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability [3].

(5) In choosing the national law applicable to compensation for death, including reasonable funeral expenses, or personal injury as well as for loss of or damage to luggage due to accidents arising out of the use of the bus or coach, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [4] and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [5] should be taken into account.

(6) Passengers should, in addition to compensation in accordance with applicable national law in the event of death or personal injury or loss of or damage to luggage due to accidents arising out of the use of the bus or coach, be entitled to assistance with regard to their immediate practical needs following an accident. Such assistance should include, where necessary, first aid, accommodation, food, clothes and transport.

---

[1] OJ C 317, 23.12.2009, p. 99.

[2] Position of the European Parliament of 23 April 2009 (OJ C 184 E, 8.7.2010, p. 312), position of the Council at first reading of 11 March 2010 (OJ C 122 E, 11.5.2010, p. 1), position of the European Parliament of 6 July 2010 (not yet published in the Official Journal), decision of the Council of 31 January 2011 and legislative resolution of the European Parliament of 15 February 2011 (not yet published in the Official Journal).

[3] OJ L 263, 7.10.2009, p. 11.

[4] OJ L 199, 31.7.2007, p. 40.

[5] OJ L 177, 4.7.2008, p. 6.

(7) Bus and coach passenger services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for using bus and coach services that are comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same rights as all other citizens with regard to free movement, freedom of choice and non-discrimination.

(8) In the light of Article 9 of the United Nations Convention on the Rights of Persons with Disabilities and in order to give disabled persons and persons with reduced mobility opportunities for bus and coach travel comparable to those of other citizens, rules for non-discrimination and assistance during their journey should be established. Those persons should therefore be accepted for carriage and not refused transport on the grounds of their disability or reduced mobility, except for reasons which are justified on the grounds of safety or of the design of vehicles or infrastructure. Within the framework of relevant legislation for the protection of workers, disabled persons and persons with reduced mobility should enjoy the right to assistance at terminals and on board vehicles. In the interest of social inclusion, the persons concerned should receive the assistance free of charge. Carriers should establish access conditions, preferably using the European standardisation system.

(9) In deciding on the design of new terminals, and as part of major refurbishments, terminal managing bodies should endeavour to take into account the needs of disabled persons and persons with reduced mobility, in accordance with 'design for all' requirements. In any case, terminal managing bodies should designate points where such persons can notify their arrival and need for assistance.

(10) Similarly, without prejudice to current or future legislation on technical requirements for buses and coaches, carriers should, where possible, take those needs into account when deciding on the equipment of new and newly refurbished vehicles.

(11) Member States should endeavour to improve existing infrastructure where this is necessary to enable carriers to ensure access for disabled persons and persons with reduced mobility as well as to provide appropriate assistance.

(12) In order to respond to the needs of disabled persons and persons with reduced mobility, staff should be adequately trained. With a view to facilitating the mutual recognition of national qualifications of drivers, disability awareness training could be provided as a part of the initial qualification or periodic training as referred to in 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 [1]. In order to ensure coherence between the introduction of the training requirements and the time-limits set out in that Directive, a possibility for exemption during a limited period of time should be allowed.

(13) Organisations representative of disabled persons or persons with reduced mobility should be consulted or involved in preparing the content of the disability-related training.

(14) Rights of bus and coach passengers should include the receipt of information regarding the service before and during the journey. All essential information provided to bus and coach passengers should also be provided, upon request, in alternative formats accessible to disabled persons and persons with reduced mobility, such as large print, plain language, Braille, electronic communications that can be accessed with adaptive technology, or audio tapes.

(15) This Regulation should not restrict the rights of carriers to seek compensation from any person, including third parties, in accordance with the applicable national law.

(16) Inconvenience experienced by passengers due to cancellation or significant delay of their journey should be reduced. To this end, passengers departing from terminals should be adequately looked after and informed in a way which is accessible to all passengers. Passengers should also be able to cancel their journey and have their tickets reimbursed or to continue their journey or to obtain re-routing under satisfactory conditions. If carriers fail to provide passengers with the necessary assistance, passengers should have the right to obtain financial compensation.

(17) With the involvement of stakeholders, professional associations and associations of customers, passengers, disabled persons and persons with reduced mobility, carriers should cooperate in order to adopt arrangements at national or European level. Such arrangements should aim at improving the information, care and assistance offered to passengers whenever their travel is interrupted, in particular in the event of long delays or cancellation of travel, with a particular focus on passengers with special needs due to disability, reduced mobility, illness, elderly age and pregnancy, and including accompanying passengers and passengers travelling with young children. National enforcement bodies should be informed of those arrangements.

[1] OJ L 226, 10.9.2003, p. 4.

(18) This Regulation should not affect the rights of passengers established by Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1]. This Regulation should not apply in cases where a package tour is cancelled for reasons other than cancellation of the bus or coach transport service.

(19) Passengers should be fully informed of their rights under this Regulation, so that they can effectively exercise those rights.

(20) Passengers should be able to exercise their rights by means of appropriate complaint procedures implemented by carriers or, as the case may be, by submission of complaints to the body or bodies designated to that end by the relevant Member State.

(21) Member States should ensure compliance with this Regulation and designate a competent body or bodies to carry out supervision and enforcement tasks. This does not affect the rights of passengers to seek legal redress from courts under national law.

(22) Taking into account the procedures established by Member States for the submission of complaints, a complaint concerning assistance should preferably be addressed to the body or bodies designated for the enforcement of this Regulation in the Member State where the boarding point or alighting point is situated.

(23) Member States should promote the use of public transport and the use of integrated information and integrated tickets in order to optimise the use and interoperability of the various transport modes and operators.

(24) Member States should lay down penalties applicable to infringements of this Regulation and ensure that those penalties are applied. Those penalties should be effective, proportionate and dissuasive.

(25) Since the objective of this Regulation, namely to ensure an equivalent level of protection of and assistance to passengers in bus and coach transport throughout the Member States, cannot sufficiently be achieved by the Member States and can therefore by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. 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 that objective.

(26) This Regulation should be without prejudice to 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 on the free movement of such data [2].

(27) The enforcement of this Regulation should be based on Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection law (the Regulation on consumer protection cooperation) [3]. That Regulation should therefore be amended accordingly.

(28) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, as referred to in Article 6 of the Treaty on European Union, bearing in mind also Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [4] and Council 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 [5],

HAVE ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation establishes rules for bus and coach transport as regards the following:

(a) non-discrimination between passengers with regard to transport conditions offered by carriers;

(b) rights of passengers in the event of accidents arising out of the use of the bus or coach resulting in death or personal injury or loss of or damage to luggage;

(c) non-discrimination and mandatory assistance for disabled persons and persons with reduced mobility;

(d) rights of passengers in cases of cancellation or delay;

(e) minimum information to be provided to passengers;

(f) handling of complaints;

(g) general rules on enforcement.

[1] OJ L 158, 23.6.1990, p. 59.

[2] OJ L 281, 23.11.1995, p. 31.
[3] OJ L 364, 9.12.2004, p. 1.
[4] OJ L 180, 19.7.2000, p. 22.
[5] OJ L 373, 21.12.2004, p. 37.

Article 2

Scope

1. This Regulation shall apply to passengers travelling with regular services for non-specified categories of passengers where the boarding or the alighting point of the passengers is situated in the territory of a Member State and where the scheduled distance of the service is 250 km or more.

2. As regards the services referred to in paragraph 1 but where the scheduled distance of the service is shorter than 250 km, Article 4(2), Article 9, Article 10(1), point (b) of Article 16(1), Article 16(2), Article 17(1) and (2), and Articles 24 to 28 shall apply.

3. In addition, with the exception of Articles 9 to 16, Article 17(3), and Chapters IV, V and VI, this Regulation shall apply to passengers travelling with occasional services where the initial boarding point or the final alighting point of the passenger is situated in the territory of a Member State.

4. With the exception of Article 4(2), Article 9, Article 10(1), point (b) of Article 16(1), Article 16(2), Article 17(1) and (2), and Articles 24 to 28, Member States may, on a transparent and non-discriminatory basis, exempt domestic regular services from the application of this Regulation. Such exemptions may be granted as from the date of application of this Regulation for a period no longer than 4 years, which may be renewed once.

5. For a maximum period of 4 years from the date of application of this Regulation, Member States may, on a transparent and non-discriminatory basis, exempt from the application of this Regulation particular regular services because a significant part of such regular services, including at least one scheduled stop, is operated outside the Union. Such exemptions may be renewed once.

6. Member States shall inform the Commission of exemptions of different types of services granted pursuant to paragraphs 4 and 5. The Commission shall take appropriate action if such an exemption is deemed not to be in accordance with the provisions of this Article. By 2 March 2018, the Commission shall submit to the European Parliament and the Council a report on exemptions granted pursuant to paragraphs 4 and 5.

7. Nothing in this Regulation shall be understood as conflicting with or introducing additional requirements to those in current legislation on technical requirements for buses or coaches or infrastructure or equipment at bus stops and terminals.

8. This Regulation shall not affect the rights of passengers under Directive 90/314/EEC and shall not apply in case where a package tour referred to in that Directive is cancelled for reasons other than cancellation of a regular service.

Article 3

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(a) 'regular services' means services which provide for the carriage of passengers by bus or coach at specified intervals along specified routes, passengers being picked up and set down at predetermined stopping points;

(b) 'occasional services' means services which do not fall within the definition of regular services and the main characteristic of which is the carriage by bus or coach of groups of passengers constituted on the initiative of the customer or the carrier himself;

(c) 'transport contract' means a contract of carriage between a carrier and a passenger for the provision of one or more regular or occasional services;

(d) 'ticket' means a valid document or other evidence of a transport contract;

(e) 'carrier' means a natural or legal person, other than a tour operator, travel agent or ticket vendor, offering transport by regular or occasional services to the general public;

(f) 'performing carrier' means a natural or legal person other than the carrier, who actually performs the carriage wholly or partially;

(g) 'ticket vendor' means any intermediary concluding transport contracts on behalf of a carrier;

(h) 'travel agent' means any intermediary acting on behalf of a passenger for the conclusion of transport contracts;

(i) 'tour operator' means an organiser or retailer, other than the carrier, within the meaning of Article 2(2) and (3) of Directive 90/314/EEC;

(j) 'disabled person' or 'person with reduced mobility' means any person whose mobility when using transport is reduced as a result of any physical disability (sensory or locomotory, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or as a result of age, and whose situation needs appropriate attention and adaptation to his particular needs of the services made available to all passengers;

(k) 'access conditions' means relevant standards, guidelines and information on the accessibility of buses and/or of designated terminals including their facilities for disabled persons or persons with reduced mobility;

(l) 'reservation' means a booking of a seat on board a bus or coach for a regular service at a specific departure time;

(m) 'terminal' means a staffed terminal where according to the specified route a regular service is scheduled to stop for passengers to board or alight, equipped with facilities such as a check-in counter, waiting room or ticket office;

(n) 'bus stop' means any point other than a terminal where according to the specified route a regular service is scheduled to stop for passengers to board or alight;

(o) 'terminal managing body' means an organisational entity in a Member State responsible for the management of a designated terminal;

(p) 'cancellation' means the non-operation of a regular service which was previously scheduled;

(q) 'delay' means a difference between the time the regular service was scheduled to depart in accordance with the published timetable and the time of its actual departure.

Article 4

Tickets and non-discriminatory contract conditions

1. Carriers shall issue a ticket to the passenger, unless other documents give entitlement to transport. A ticket may be issued in an electronic format.

2. Without prejudice to social tariffs, the contract conditions and tariffs applied by carriers shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of the carriers, or ticket vendors within the Union.

Article 5

Other performing parties

1. If the performance of the obligations under this Regulation has been entrusted to a performing carrier, ticket vendor or any other person, the carrier, travel agent, tour operator or terminal managing body, who has entrusted such obligations, shall nevertheless be liable for the acts and omissions of that performing party.

2. In addition, the party to whom the performance of an obligation has been entrusted by the carrier, travel agent, tour operator or terminal managing body shall be subject to the provisions of this Regulation with regard to the obligation entrusted.

Article 6

Exclusion of waiver

1. Obligations to passengers pursuant to this Regulation shall not be limited or waived, in particular by a derogation or restrictive clause in the transport contract.

2. Carriers may offer contract conditions that are more favourable for the passenger than the conditions laid down in this Regulation.

CHAPTER II

COMPENSATION AND ASSISTANCE IN THE EVENT OF ACCIDENTS

Article 7

Death or personal injury to passengers and loss of or damage to luggage

1. Passengers shall, in accordance with applicable national law, be entitled to compensation for death, including reasonable funeral expenses, or personal injury as well as to loss of or damage to luggage due to accidents arising out of the use of the bus or coach. In case of death of a passenger, this right shall as a minimum apply to persons whom the passenger had, or would have had, a legal duty to maintain.

2. The amount of compensation shall be calculated in accordance with applicable national law. Any maximum limit provided by national law to the compensation for death and personal injury or loss of or damage to luggage shall on each distinct occasion not be less than:

(a) EUR 220 000 per passenger;

(b) EUR 1 200 per item of luggage. In the event of damage to wheelchairs, other mobility equipment or assistive devices the amount of compensation shall always be equal to the cost of replacement or repair of the equipment lost or damaged.

Article 8

Immediate practical needs of passengers

In the event of an accident arising out of the use of the bus or coach, the carrier shall provide reasonable and proportionate assistance with regard to the passengers' immediate practical needs following the accident. Such assistance shall include, where necessary, accommodation, food, clothes, transport and the facilitation of first aid. Any assistance provided shall not constitute recognition of liability.

For each passenger, the carrier may limit the total cost of accommodation to EUR 80 per night and for a maximum of 2 nights.

CHAPTER III

RIGHTS OF DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY

Article 9

Right to transport

1. Carriers, travel agents and tour operators shall not refuse to accept a reservation from, to issue or otherwise provide a ticket to, or to take on board, a person on the grounds of disability or of reduced mobility.

2. Reservations and tickets shall be offered to disabled persons and persons with reduced mobility at no additional cost.

Article 10

Exceptions and special conditions

1. Notwithstanding Article 9(1), carriers, travel agents and tour operators may refuse to accept a reservation from, to issue or otherwise provide a ticket to, or to take on board, a person on the grounds of disability or of reduced mobility:

(a) in order to meet applicable safety requirements established by international, Union or national law, or in order to meet health and safety requirements established by the competent authorities;

(b) where the design of the vehicle or the infrastructure, including bus stops and terminals, makes it physically impossible to take on board, alight or carry the disabled person or person with reduced mobility in a safe and operationally feasible manner.

2. In the event of a refusal to accept a reservation or to issue or otherwise provide a ticket on the grounds referred to in paragraph 1, carriers, travel agents and tour operators shall inform the person concerned about any acceptable alternative service operated by the carrier.

3. If a disabled person or a person with reduced mobility, who holds a reservation or has a ticket and has complied with the requirements of point (a) of Article 14(1), is nonetheless refused permission to board on the grounds of his disability or reduced mobility, that person and any accompanying person pursuant to paragraph 4 of this Article shall be offered the choice between:

(a) the right to reimbursement, and where relevant a return service free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity; and

(b) except where not feasible, continuation of the journey or re-routing by reasonable alternative transport services to the place of destination set out in the transport contract.

The right to reimbursement of the money paid for the ticket shall not be affected by the failure to notify in accordance with point (a) of Article 14(1).

4. If a carrier, travel agent or tour operator refuses to accept a reservation from, to issue or otherwise provide a ticket to, or to take on board, a person on the grounds of disability or of reduced mobility for the reasons set out in paragraph 1, that person may request to be accompanied by another person of his own choosing who is capable of providing the assistance required by the disabled person or person with reduced mobility in order that the reasons set out in paragraph 1 no longer apply.

Such an accompanying person shall be transported free of charge and, where feasible, seated next to the disabled person or person with reduced mobility.

5. When carriers, travel agents or tour operators have recourse to paragraph 1, they shall immediately inform the disabled person or person with reduced mobility of the reasons therefor, and, upon request, inform the person in question in writing within 5 working days of the request.

Article 11

Accessibility and information

1. In cooperation with organisations representative of disabled persons or persons with reduced mobility, carriers and terminal managing bodies shall, where appropriate through their organisations, establish, or have in place, non-discriminatory access conditions for the transport of disabled persons and persons with reduced mobility.

2. The access conditions provided for in paragraph 1, including the text of international, Union or national laws establishing the safety requirements, on which these non-discriminatory access conditions are based, shall be made publicly available by carriers and terminal managing bodies physically or on the Internet, in accessible formats on request, in the same languages as those in which information is generally made available to all passengers. When providing this information particular attention shall be paid to the needs of disabled persons and persons with reduced mobility.

3. Tour operators shall make available the access conditions provided for in paragraph 1 which apply to journeys included in package travel, package holidays and package tours which they organise, sell or offer for sale.

4. The information on access conditions referred to in paragraphs 2 and 3 shall be physically distributed at the request of the passenger.

5. Carriers, travel agents and tour operators shall ensure that all relevant general information concerning the journey and the conditions of carriage is available in appropriate and accessible formats for disabled persons and persons with reduced mobility including, where applicable, online booking and information. The information shall be physically distributed at the request of the passenger.

Article 12

Designation of terminals

Member States shall designate bus and coach terminals where assistance for disabled persons and persons with reduced mobility shall be provided. Member States shall inform the Commission thereof. The Commission shall make available a list of the designated bus and coach terminals on the Internet.

Article 13

Right to assistance at designated terminals and on board buses and coaches

1. Subject to the access conditions provided for in Article 11(1), carriers and terminal managing bodies shall, within their respective areas of competence, at terminals designated by Member States, provide assistance free of charge to disabled persons and persons with reduced mobility, at least to the extent specified in part (a) of Annex I.

2. Subject to the access conditions provided for in Article 11(1), carriers shall, on board buses and coaches, provide assistance free of charge to disabled persons and persons with reduced mobility, at least to the extent specified in part (b) of Annex I.

Article 14

Conditions under which assistance is provided

1. Carriers and terminal managing bodies shall cooperate in order to provide assistance to disabled persons and persons with reduced mobility on condition that:

(a) the person's need for such assistance is notified to carriers, terminal managing bodies, travel agents or tour operators at the latest 36 hours before the assistance is needed; and

(b) the persons concerned present themselves at the designated point:

(i) at the time stipulated in advance by the carrier which shall be no more than 60 minutes before the published departure time, unless a shorter period is agreed between the carrier and the passenger; or

(ii) if no time is stipulated, no later than 30 minutes before the published departure time.

2. In addition to paragraph 1, disabled persons or persons with reduced mobility shall notify the carrier, travel agent or tour operator at the time of reservation or advance purchase of the ticket of their specific seating needs, provided that the need is known at that time.

3. Carriers, terminal managing bodies, travel agents and tour operators shall take all measures necessary to facilitate the receipt of notifications of the need for assistance made by disabled persons or persons with reduced mobility. This obligation shall apply at all designated terminals and their points of sale including sale by telephone and via the Internet.

4. If no notification is made in accordance with point (a) of paragraph 1 and paragraph 2, carriers, terminal managing bodies, travel agents and tour operators shall make every reasonable effort to ensure that the assistance is provided in such a way that the disabled person or person with reduced mobility is able to board the departing service, to change to the corresponding service or to alight from the arriving service for which he has purchased a ticket.

5. The terminal managing body shall designate a point inside or outside the terminal at which disabled persons or persons with reduced mobility can announce their arrival and request assistance. The point shall be clearly signposted and shall offer basic information about the terminal and assistance provided, in accessible formats.

Article 15

Transmission of information to a third party

If travel agents or tour operators receive a notification referred to in point (a) of Article 14(1) they shall, within their normal office hours, transfer the information to the carrier or terminal managing body as soon as possible.

Article 16

Training

1. Carriers and, where appropriate, terminal managing bodies shall establish disability-related training procedures, including instructions, and ensure that:

(a) their personnel, other than drivers, including those employed by any other performing party, providing direct assistance to disabled persons and persons with reduced mobility are trained or instructed as described in parts (a) and (b) of Annex II; and

(b) their personnel, including drivers, who deal directly with the travelling public or with issues related to the travelling public, are trained or instructed as described in part (a) of Annex II.

2. A Member State may for a maximum period of 5 years from 1 March 2013 grant an exemption from the application of point (b) of paragraph 1 with regard to training of drivers.

Article 17

Compensation in respect of wheelchairs and other mobility equipment

1. Carriers and terminal managing bodies shall be liable where they have caused loss of or damage to wheelchairs, other mobility equipment or assistive devices. The loss or damage shall be compensated by the carrier or terminal managing body liable for that loss or damage.

2. The compensation referred to in paragraph 1 shall be equal to the cost of replacement or repair of the equipment or devices lost or damaged.

3. Where necessary, every effort shall be undertaken to rapidly provide temporary replacement equipment or devices. The wheelchairs, other mobility equipment or assistive devices shall, where possible, have technical and functional features similar to those lost or damaged.

Article 18

Exemptions

1. Without prejudice to Article 2(2), Member States may exempt domestic regular services from the application of all or some of the provisions of this Chapter, provided that they ensure that the level of protection of disabled persons and persons with reduced mobility under their national rules is at least the same as under this Regulation.

2. Member States shall inform the Commission of exemptions granted pursuant to paragraph 1. The Commission shall take appropriate action if such an exemption is deemed not to be in accordance with the provisions of this Article. By 2 March 2018, the Commission shall submit to the European Parliament and the Council a report on exemptions granted pursuant to paragraph 1.

CHAPTER IV

PASSENGER RIGHTS IN THE EVENT OF CANCELLATION OR DELAY

Article 19

Continuation, re-routing and reimbursement

1. Where a carrier reasonably expects a regular service to be cancelled or delayed in departure from a terminal for more than 120 minutes or in the case of overbooking, the passenger shall immediately be offered the choice between:

(a) continuation or re-routing to the final destination, at no additional cost and under comparable conditions, as set out in the transport contract, at the earliest opportunity;

(b) reimbursement of the ticket price, and, where relevant, a return service by bus or coach free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity.

2. If the carrier fails to offer the passenger the choice referred to in paragraph 1, the passenger shall have the right to compensation amounting to 50 % of the ticket price, in addition to the reimbursement referred to in point (b) of paragraph 1. This sum shall be paid by the carrier within 1 month after the submission of the request for compensation.

3. Where the bus or coach becomes inoperable during the journey, the carrier shall provide either the continuation of the service with another vehicle from the location of the inoperable vehicle, or transport from the location of the inoperable vehicle to a suitable waiting point or terminal from where continuation of the journey becomes possible.

4. Where a regular service is cancelled or delayed in departure from a bus stop for more than 120 minutes, passengers shall have the right to the continuation or re-routing or reimbursement of the ticket price from the carrier, as referred to in paragraph 1.

5. The payment of reimbursement provided for in point (b) of paragraph 1 and paragraph 4 shall be made within 14 days after the offer has been made or request has been received. The payment shall cover the full cost of the ticket at the price at which it was purchased, for the part or parts of the journey not made, and for the part or parts already made if the journey no longer serves any purpose in relation to the passenger's original travel plan. In case of travel passes or season tickets the payment shall be equal to its proportional part of the full cost of the pass or ticket. The reimbursement shall be paid in money, unless the passenger accepts another form of reimbursement.

Article 20

Information

1. In the event of cancellation or delay in departure of a regular service, passengers departing from terminals shall be informed by the carrier or, where appropriate, the terminal managing body, of the situation as soon as possible and in any event no later than 30 minutes after the scheduled departure time, and of the estimated departure time as soon as this information is available.

2. If passengers miss, according to the timetable, a connecting service due to a cancellation or delay, the carrier or, where appropriate, the terminal managing body, shall make reasonable efforts to inform the passengers concerned of alternative connections.

3. The carrier or, where appropriate, the terminal managing body, shall ensure that disabled persons and persons with reduced mobility receive the information required under paragraphs 1 and 2 in accessible formats.

4. Where feasible, the information required under paragraphs 1 and 2 shall be provided by electronic means to all passengers, including those departing from bus stops, within the time-limit stipulated in paragraph 1, if the passenger has requested this and has provided the necessary contact details to the carrier.

Article 21

Assistance in case of cancelled or delayed departures

For a journey of a scheduled duration of more than 3 hours the carrier shall, in case of cancellation or delay in departure from a terminal of more than 90 minutes, offer the passenger free of charge:

(a) snacks, meals or refreshments in reasonable relation to the waiting time or delay, provided they are available on the bus or in the terminal, or can reasonably be supplied;

(b) a hotel room or other accommodation as well as assistance to arrange transport between the terminal and the place of accommodation in cases where a stay of 1 or more nights becomes necessary. For each passenger, the carrier may limit the total cost of accommodation, not including transport to and from the terminal and place of accommodation, to EUR 80 per night and for a maximum of 2 nights.

In applying this Article the carrier shall pay particular attention to the needs of disabled persons and persons with reduced mobility and any accompanying persons.

Article 22

Further claims

Nothing in this Chapter shall preclude passengers from seeking damages in accordance with national law before national courts in respect of loss resulting from cancellation or delay of regular services.

Article 23

Exemptions

1. Articles 19 and 21 shall not apply to passengers with open tickets as long as the time of departure is not specified, except for passengers holding a travel pass or a season ticket.

2. Point (b) of Article 21 shall not apply where the carrier proves that the cancellation or delay is caused by severe weather conditions or major natural disasters endangering the safe operation of bus or coach services.

CHAPTER V

GENERAL RULES ON INFORMATION AND COMPLAINTS

Article 24

Right to travel information

Carriers and terminal managing bodies shall, within their respective areas of competence, provide passengers with adequate information throughout their travel. Where feasible, this information shall be provided in accessible formats upon request.

Article 25

Information on passenger rights

1. Carriers and terminal managing bodies shall, within their respective areas of competence, ensure that passengers are provided with appropriate and comprehensible information regarding their rights under this Regulation at the latest on departure. This information shall be provided at terminals and where applicable, on the Internet. At the request of a disabled person or person with reduced mobility the information shall be provided, where feasible, in an accessible format. This information shall include contact details of the enforcement body or bodies designated by the Member State pursuant to Article 28(1).

2. In order to comply with the information requirement referred to in paragraph 1, carriers and terminal managing bodies may use a summary of the provisions of this Regulation prepared by the Commission in all the official languages of the institutions of the European Union and made available to them.

Article 26

Complaints

Carriers shall set up or have in place a complaint handling mechanism for the rights and obligations set out in this Regulation.

Article 27

Submission of complaints

Without prejudice to claims for compensation in accordance with Article 7, if a passenger covered by this Regulation wants to make a complaint to the carrier, he shall submit it within 3 months from the date on which the regular service was performed or when a regular service should have been performed. Within 1 month of receiving the complaint, the carrier shall give notice to the passenger that his complaint has been substantiated, rejected or is still being considered. The time taken to provide the final reply shall not be longer than 3 months from the receipt of the complaint.

CHAPTER VI

ENFORCEMENT AND NATIONAL ENFORCEMENT BODIES

Article 28

National enforcement bodies

1. Each Member State shall designate a new or existing body or bodies responsible for the enforcement of this Regulation as regards regular services from points situated on its territory and regular services from a third country to such points. Each body shall take the measures necessary to ensure compliance with this Regulation.

Each body shall, in its organisation, funding decisions, legal structure and decision making, be independent of carriers, tour operators and terminal managing bodies.

2. Member States shall inform the Commission of the body or bodies designated in accordance with this Article.

3. Any passenger may submit a complaint, in accordance with national law, to the appropriate body designated under paragraph 1, or to any other appropriate body designated by a Member State, about an alleged infringement of this Regulation.

A Member State may decide that the passenger as a first step shall submit a complaint to the carrier in which case the national enforcement body or any other appropriate body designated by the Member State shall act as an appeal body for complaints not resolved under Article 27.

Article 29

Report on enforcement

By 1 June 2015 and every 2 years thereafter, the enforcement bodies designated pursuant to Article 28(1) shall publish a report on their activity in the previous 2 calendar years, containing in particular a description of actions taken in order to implement this Regulation and statistics on complaints and sanctions applied.

Article 30

Cooperation between enforcement bodies

National enforcement bodies as referred to in Article 28(1) shall, whenever appropriate, exchange information on their work and decision-making principles and practices. The Commission shall support them in this task.

Article 31

Penalties

Member States shall lay down rules on penalties applicable to infringements of the provisions of this Regulation and shall take all the measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those rules and measures to the Commission by 1 March 2013 and shall notify it without delay of any subsequent amendment affecting them.

CHAPTER VII

FINAL PROVISIONS

Article 32

Report

The Commission shall report to the European Parliament and the Council by 2 March 2016 on the operation and effects of this Regulation. The report shall be accompanied, where necessary, by legislative proposals implementing in further detail the provisions of this Regulation, or amending it.

Article 33

Amendment to Regulation (EC) No 2006/2004

In the Annex to Regulation (EC) No 2006/2004 the following point is added:

'19. Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 on the rights of passengers in bus and coach transport (*).

(*) OJ L 55, 28.2.2011, p. 1'.

Article 34

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from 1 March 2013.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 16 February 2011.

For the European Parliament
The President
J. BUZEK

For the Council
The President
MARTONYI J.

ANNEX I

ASSISTANCE PROVIDED TO DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY

(a) **Assistance at designated terminals**

Assistance and arrangements necessary to enable disabled persons and persons with reduced mobility to:

— communicate their arrival at the terminal and their request for assistance at designated points,

— move from the designated point to the check-in counter, waiting room and embarkation area,

— board the vehicle, with the provision of lifts, wheelchairs or other assistance needed, as appropriate,

— load their luggage,

— retrieve their luggage,

— alight from the vehicle,

— carry a recognised assistance dog on board a bus or coach,

— proceed to the seat;

(b) **Assistance on board**

Assistance and arrangements necessary to enable disabled persons and persons with reduced mobility to:

— be provided with essential information on a journey in accessible formats subject to request made by the passenger,

— board/alight during pauses in a journey, if there are personnel other than the driver on board.

ANNEX II

DISABILITY-RELATED TRAINING

(a) **Disability-awareness training**

Training of staff that deal directly with the travelling public includes:

— awareness of and appropriate responses to passengers with physical, sensory (hearing and visual), hidden or learning disabilities, including how to distinguish between the different abilities of persons whose mobility, orientation, or communication may be reduced,

— barriers faced by disabled persons and persons with reduced mobility, including attitudinal, environmental/physical and organisational barriers,

— recognised assistance dogs, including the role and the needs of an assistance dog,

— dealing with unexpected occurrences,

— interpersonal skills and methods of communication with deaf people and people with hearing impairments, people with visual impairments, people with speech impairments, and people with a learning disability,

— how to handle wheelchairs and other mobility aids carefully so as to avoid damage (if any, for all staff who are responsible for luggage handling);

(b) **Disability-assistance training**

Training of staff directly assisting disabled persons and persons with reduced mobility includes:

— how to help wheelchair users make transfers into and out of a wheelchair,

— skills for providing assistance to disabled persons and persons with reduced mobility travelling with a recognised assistance dog, including the role and the needs of those dogs,

— techniques for escorting visually impaired passengers and for the handling and carriage of recognised assistance dogs,

— an understanding of the types of equipment which can assist disabled persons and persons with reduced mobility and a knowledge of how to handle such an equipment,

— the use of boarding and alighting assistance equipment used and knowledge of the appropriate boarding and alighting assistance procedures that safeguard the safety and dignity of disabled persons and persons with reduced mobility,

— understanding of the need for reliable and professional assistance. Also awareness of the potential of certain disabled passengers to experience feelings of vulnerability during travel because of their dependence on the assistance provided,

— a knowledge of first aid.

I

(Legislative acts)

REGULATIONS

REGULATION (EU) No 1177/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 24 November 2010

concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 91(1) and 100(2) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) Action by the Union in the field of maritime and inland waterway transport should aim, among other things, at ensuring a high level of protection for passengers that is comparable with other modes of transport. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Since the maritime and inland waterway passenger is the weaker party to the transport contract, all passengers should be granted a minimum level of protection. Nothing should prevent carriers from offering contract conditions more favourable for the passenger than the conditions laid down in this Regulation. At the same time, the aim of this Regulation is not to interfere in commercial business-to-business relationships concerning the transport of goods. In particular, agreements between a road haulier and a carrier should not be construed as transport contracts for the purposes of this Regulation and should therefore not give the road haulier or its employees the right to compensation under this Regulation in the case of delays.

(3) The protection of passengers should cover not only passenger services between ports situated in the territory of the Member States, but also passenger services between such ports and ports situated outside the territory of the Member States, taking into account the risk of distortion of competition on the passenger transport market. Therefore the term 'Union carrier' should, for the purposes of this Regulation, be interpreted as broadly as possible, but without affecting other legal acts of the Union, such as Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport [3] and Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) [4].

[1] OJ C 317, 23.12.2009, p. 89.

[2] Position of the European Parliament of 23 April 2009 (OJ C 184 E, 8.7.2010, p. 293), position of the Council at first reading of 11 March 2010 (OJ C 122 E, 11.5.2010, p. 19), position of the European Parliament of 6 July 2010 (not yet published in the Official Journal) and decision of the Council of 11 October 2010.

[3] OJ L 378, 31.12.1986, p. 4.

[4] OJ L 364, 12.12.1992, p. 7.

(4) The internal market for maritime and inland waterway passenger services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for using passenger services and cruises that are comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same rights as all other citizens with regard to free movement, freedom of choice and non-discrimination.

(5) Member States should promote the use of public transport and the use of integrated tickets in order to optimise the use and interoperability of the various transport modes and operators.

(6) In the light of Article 9 of the United Nations Convention on the Rights of Persons with Disabilities and in order to give disabled persons and persons with reduced mobility opportunities for maritime and inland waterway travel comparable to those of other citizens, rules for non-discrimination and assistance during their journey should be established. Those persons should therefore be accepted for carriage and not refused transport, except for reasons which are justified on the grounds of safety and established by the competent authorities. They should enjoy the right to assistance in ports and on board passenger ships. In the interests of social inclusion, the persons concerned should receive this assistance free of charge. Carriers should establish access conditions, preferably using the European standardisation system.

(7) In deciding on the design of new ports and terminals, and as part of major refurbishments, the bodies responsible for those facilities should take into account the needs of disabled persons and persons with reduced mobility, in particular with regard to accessibility, paying particular consideration to 'design for all' requirements. Carriers should take such needs into account when deciding on the design of new and newly refurbished passenger ships in accordance with Directive 2006/87/EC of the European Parliament and of the Council of 12 December 2006 laying down technical requirements for inland waterway vessels [1] and Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships [2].

(8) Assistance given at ports situated in the territory of a Member State should, among other things, enable disabled persons and persons with reduced mobility to proceed from a designated point of arrival at a port to a passenger ship and from a passenger ship to a designated point of departure at a port, including embarking and disembarking.

(9) In organising assistance to disabled persons and persons with reduced mobility, and the training of their personnel, carriers should cooperate with organisations representative of disabled persons or persons with reduced mobility. In that work they should also take into account the relevant provisions of the International Convention and Code on Standards of Training, Certification and Watchkeeping for Seafarers as well as the Recommendation of the International Maritime Organisation (IMO) on the design and operation of passenger ships to respond to elderly and disabled persons' needs.

(10) The provisions governing the embarkation of disabled persons or persons with reduced mobility should be without prejudice to the general provisions applicable to the embarkation of passengers laid down by the international, Union or national rules in force.

(11) Legal acts of the Union on passenger rights should take into account the needs of passengers, in particular those of disabled persons and persons with reduced mobility, to use different transport modes and to transfer smoothly between different modes, subject to the applicable safety regulations for the operation of ships.

(12) Passengers should be adequately informed in the event of cancellation or delay of any passenger service or cruise. That information should help passengers to make the necessary arrangements and, if needed, to obtain information about alternative connections.

(13) Inconvenience experienced by passengers due to the cancellation or long delay of their journey should be reduced. To this end, passengers should be adequately looked after and should be able to cancel their journey and have their tickets reimbursed or to obtain re-routing under satisfactory conditions. Adequate accommodation for passengers may not necessarily consist of hotel rooms but also of any other suitable accommodation that is available, depending in particular on the circumstances relating to each specific situation, the passengers' vehicles and the characteristics of the ship. In this respect and in duly justified cases of extraordinary and urgent circumstances, carriers should be able to take full advantage of the available relevant facilities, in cooperation with civil authorities.

[1] OJ L 389, 30.12.2006, p. 1.
[2] OJ L 163, 25.6.2009, p. 1.

(14) Carriers should provide for the payment of compensation for passengers in the event of the cancellation or delay of a passenger service based on a percentage of the ticket price, except when the cancellation or delay occurs due to weather conditions endangering the safe operation of the ship or to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

(15) Carriers should, in accordance with generally accepted principles, bear the burden of proving that the cancellation or delay was caused by such weather conditions or extraordinary circumstances.

(16) Weather conditions endangering the safe operation of the ship should include, but not be limited to, strong winds, heavy seas, strong currents, difficult ice conditions and extremely high or low water levels, hurricanes, tornados and floods.

(17) Extraordinary circumstances should include, but not be limited to, natural disasters such as fires and earthquakes, terrorist attacks, wars and military or civil armed conflicts, uprisings, military or illegal confiscations, labour conflicts, landing any sick, injured or dead person, search and rescue operations at sea or on inland waterways, measures necessary to protect the environment, decisions taken by traffic management bodies or port authorities, or decisions by the competent authorities with regard to public order and safety as well as to cover urgent transport needs.

(18) With the involvement of stakeholders, professional associations and associations of customers, passengers, disabled persons and persons with reduced mobility, carriers should cooperate in order to adopt arrangements at national or European level for improving care and assistance offered to passengers whenever their travel is interrupted, notably in the event of long delays or cancellation of travel. National enforcement bodies should be informed of those arrangements.

(19) The Court of Justice of the European Union has already ruled that problems leading to cancellations or delays can be covered by the concept of extraordinary circumstances only to the extent that they stem from events which are not inherent in the normal exercise of the activity of the carrier concerned and are beyond its actual control. It should be noted that weather conditions endangering the safe operation of the ship are indeed beyond the actual control of the carrier.

(20) This Regulation should not affect the rights of passengers established by Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1]. This Regulation should not apply in cases where a package tour is cancelled for reasons other than cancellation of the passenger service or the cruise.

(21) Passengers should be fully informed of their rights under this Regulation in formats which are accessible to everybody, so that they can effectively exercise those rights. Rights of passengers should include the receipt of information regarding the passenger service or cruise before and during the journey. All essential information provided to passengers should also be provided in formats accessible to disabled persons and persons with reduced mobility, with such accessible formats allowing passengers to access the same information using, for example, text, Braille, audio, video and/or electronic formats.

(22) Passengers should be able to exercise their rights by means of appropriate and accessible complaint procedures implemented by carriers and terminal operators within their respective areas of competence or, as the case may be, by the submission of complaints to the body or bodies designated to that end by the Member State concerned. Carriers and terminal operators should respond to complaints by passengers within a set period of time, bearing in mind that the non-reaction to a complaint could be held against them.

(23) Taking into account the procedures established by a Member State for the submission of complaints, a complaint concerning assistance in a port or on board a ship should preferably be addressed to the body or bodies designated for the enforcement of this Regulation in the Member State where the port of embarkation is situated and, for passenger services from a third country, where the port of disembarkation is situated.

(24) Member States should ensure compliance with this Regulation and designate a competent body or bodies to carry out supervision and enforcement tasks. This does not affect the rights of passengers to seek legal redress from courts under national law.

(25) The body or bodies designated for the enforcement of this Regulation should be independent of commercial interests. Each Member State should appoint at least one body which, when applicable, should have the power and capability to investigate individual complaints and

[1] OJ L 158, 23.6.1990, p. 59.

to facilitate dispute settlement. Passengers should be entitled to receive a substantiated reply from the designated body, within a reasonable period of time. Given the importance of reliable statistics for the enforcement of this Regulation, in particular to ensure coherent application throughout the Union, the reports prepared by those bodies should if possible include statistics on complaints and their outcome.

(26) Member States should lay down penalties applicable to infringements of this Regulation and ensure that those penalties are applied. Those penalties should be effective, proportionate and dissuasive.

(27) Since the objectives of this Regulation, namely to ensure a high level of protection of and assistance to passengers throughout the Member States and to ensure that economic agents operate under harmonised conditions in the internal market, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. 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.

(28) The enforcement of this Regulation should be based on Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) [1]. That Regulation should therefore be amended accordingly.

(29) 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 on the free movement of such data [2] should be strictly respected and enforced in order to guarantee respect for the privacy of natural and legal persons, and to ensure that the information and reports requested serve solely to fulfil the obligations laid down in this Regulation and are not used to the detriment of such persons.

(30) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, as referred to in Article 6 of the Treaty on European Union,

HAVE ADOPTED THIS REGULATION:

[1] OJ L 364, 9.12.2004, p. 1.
[2] OJ L 281, 23.11.1995, p. 31.

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation establishes rules for sea and inland waterway transport as regards the following:

(a) non-discrimination between passengers with regard to transport conditions offered by carriers;

(b) non-discrimination and assistance for disabled persons and persons with reduced mobility;

(c) the rights of passengers in cases of cancellation or delay;

(d) minimum information to be provided to passengers;

(e) the handling of complaints;

(f) general rules on enforcement.

Article 2

Scope

1. This Regulation shall apply in respect of passengers travelling:

(a) on passenger services where the port of embarkation is situated in the territory of a Member State;

(b) on passenger services where the port of embarkation is situated outside the territory of a Member State and the port of disembarkation is situated in the territory of a Member State, provided that the service is operated by a Union carrier as defined in Article 3(e);

(c) on a cruise where the port of embarkation is situated in the territory of a Member State. However, Articles 16(2), 18, 19 and 20(1) and (4) shall not apply to those passengers.

2. This Regulation shall not apply in respect of passengers travelling:

(a) on ships certified to carry up to 12 passengers;

(b) on ships which have a crew responsible for the operation of the ship composed of not more than three persons or where the distance of the overall passenger service is less than 500 metres, one way;

(c) on excursion and sightseeing tours other than cruises; or

(d) on ships not propelled by mechanical means as well as original, and individual replicas of, historical passenger ships designed before 1965, built predominantly with the original materials, certified to carry up to 36 passengers.

3. Member States may, for a period of 2 years from 18 December 2012, exempt from the application of this Regulation seagoing ships of less than 300 gross tons operated in domestic transport, provided that the rights of passengers under this Regulation are adequately ensured under national law.

4. Member States may exempt from the application of this Regulation passenger services covered by public service obligations, public service contracts or integrated services provided that the rights of passengers under this Regulation are comparably guaranteed under national law.

5. Without prejudice to Directive 2006/87/EC and to Directive 2009/45/EC, nothing in this Regulation shall be understood as constituting technical requirements imposing obligations on carriers, terminal operators or other entities to modify or replace ships, infrastructure, ports or port terminals.

Article 3

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(a) 'disabled person' or 'person with reduced mobility' means any person whose mobility when using transport is reduced as a result of any physical disability (sensory or locomotor, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or as a result of age, and whose situation needs appropriate attention and adaptation to his particular needs of the service made available to all passengers;

(b) 'territory of a Member State' means a territory to which the Treaty on the Functioning of the European Union applies as referred to in Article 355 thereof, under the conditions set out therein;

(c) 'access conditions' means relevant standards, guidelines and information on the accessibility of port terminals and ships including their facilities for disabled persons or persons with reduced mobility;

(d) 'carrier' means a natural or legal person, other than a tour operator, travel agent or ticket vendor, offering transport by passenger services or cruises to the general public;

(e) 'Union carrier' means a carrier established within the territory of a Member State or offering transport by passenger services operated to or from the territory of a Member State;

(f) 'passenger service' means a commercial passenger transport service by sea or inland waterways operated according to a published timetable;

(g) 'integrated services' means interconnected transport services within a determined geographical area with a single information service, ticketing scheme and timetable;

(h) 'performing carrier' means a person, other than the carrier, who actually performs the carriage wholly or partially;

(i) 'inland waterway' means a natural or artificial navigable inland body of water, or system of interconnected bodies of water, used for transport, such as lakes, rivers or canals or any combination of these;

(j) 'port' means a place or a geographical area made up of such improvement works and facilities as to permit the reception of ships from which passengers regularly embark or disembark;

(k) 'port terminal' means a terminal, staffed by a carrier or a terminal operator, in a port with facilities, such as check-in, ticket counters or lounges, and staff for the embarkation or disembarkation of passengers travelling on passenger services or on a cruise;

(l) 'ship' means a vessel used for navigation at sea or on inland waterways;

(m) 'transport contract' means a contract of carriage between a carrier and a passenger for the provision of one or more passenger services or cruises;

(n) 'ticket' means a valid document or other evidence of a transport contract;

(o) 'ticket vendor' means any retailer concluding transport contracts on behalf of a carrier;

(p) 'travel agent' means any retailer acting on behalf of a passenger or a tour operator for the conclusion of transport contracts;

(q) 'tour operator' means an organiser or retailer, other than a carrier, within the meaning of Article 2(2) and (3) of Directive 90/314/EEC;

(r) 'reservation' means a booking of a specific departure of a passenger service or a cruise;

(s) 'terminal operator' means a private or public body in the territory of a Member State responsible for the administration and management of a port terminal;

(t) 'cruise' means a transport service by sea or inland waterway, operated exclusively for the purpose of pleasure or recreation, supplemented by accommodation and other facilities, exceeding two overnight stays on board;

(u) 'shipping incident' means shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship.

Article 4

Tickets and non-discriminatory contract conditions

1. Carriers shall issue a ticket to the passenger, unless under national law other documents give entitlement to transport. A ticket may be issued in an electronic format.

2. Without prejudice to social tariffs, the contract conditions and tariffs applied by carriers or ticket vendors shall be offered to the general public without any direct or indirect discrimination based on the nationality of the final customer or on the place of establishment of carriers or ticket vendors within the Union.

Article 5

Other performing parties

1. Where the performance of the obligations under this Regulation has been entrusted to a performing carrier, ticket vendor or any other person, the carrier, travel agent, tour operator or terminal operator who has entrusted such obligations shall nevertheless be liable for the acts and omissions of that performing party, acting within that party's scope of employment.

2. In addition to paragraph 1, the party to whom the performance of an obligation has been entrusted by the carrier, travel agent, tour operator or terminal operator shall be subject to the provisions of this Regulation, including provisions on liabilities and defences, with regard to the obligation entrusted.

Article 6

Exclusion of waiver

Rights and obligations pursuant to this Regulation shall not be waived or limited, in particular by a derogation or restrictive clause in the transport contract.

CHAPTER II

RIGHTS OF DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY

Article 7

Right to transport

1. Carriers, travel agents and tour operators shall not refuse to accept a reservation, to issue or otherwise provide a ticket or to embark persons on the grounds of disability or of reduced mobility as such.

2. Reservations and tickets shall be offered to disabled persons and persons with reduced mobility at no additional cost under the same conditions that apply to all other passengers.

Article 8

Exceptions and special conditions

1. By way of derogation from Article 7(1), carriers, travel agents and tour operators may refuse to accept a reservation from, to issue or otherwise provide a ticket to or to embark a disabled person or person with reduced mobility:

(a) in order to meet applicable safety requirements established by international, Union or national law or in order to meet safety requirements established by the competent authorities;

(b) where the design of the passenger ship or port infrastructure and equipment, including port terminals, makes it impossible to carry out the embarkation, disembarkation or carriage of the said person in a safe or operationally feasible manner.

2. In the event of a refusal to accept a reservation or to issue or otherwise provide a ticket on the grounds referred to in paragraph 1, carriers, travel agents and tour operators shall make all reasonable efforts to propose to the person concerned an acceptable alternative transport on a passenger service or a cruise operated by the carrier.

3. Where a disabled person or a person with reduced mobility, who holds a reservation or has a ticket and has complied with the requirements referred to in Article 11(2), is nonetheless denied embarkation on the basis of this Regulation, that person, and any accompanying person referred to in paragraph 4 of this Article, shall be offered the choice between the right to reimbursement and re-routing as provided for in Annex I. The right to the option of a return journey or re-routing shall be conditional upon all safety requirements being met.

4. Where strictly necessary and under the same conditions set out in paragraph 1, carriers, travel agents and tour operators may require that a disabled person or person with reduced mobility be accompanied by another person who is capable of providing the assistance required by the disabled person or person with reduced mobility. As regards passenger services, such an accompanying person shall be carried free of charge.

5. When carriers, travel agents and tour operators have recourse to paragraphs 1 or 4, they shall immediately inform the disabled person or person with reduced mobility of the specific reasons therefor. On request, those reasons shall be notified to the disabled person or person with reduced mobility in writing, no later than five working days after the request. In the event of refusal according to paragraph 1(a), reference shall be made to the applicable safety requirements.

Article 9

Accessibility and information

1. In cooperation with organisations representative of disabled persons or persons with reduced mobility, carriers and terminal operators shall, where appropriate through their organisations, establish, or have in place, non-discriminatory access conditions for the transport of disabled persons and persons with reduced mobility and accompanying persons. The access conditions shall upon request be communicated to national enforcement bodies.

2. The access conditions provided for in paragraph 1 shall be made publicly available by carriers and terminal operators physically or on the Internet, in accessible formats on request, and in the same languages as those in which information is generally made available to all passengers. Particular attention shall be paid to the needs of disabled persons and persons with reduced mobility.

3. Tour operators shall make available the access conditions provided for in paragraph 1 which apply to journeys included in package travel, package holidays and package tours which they organise, sell or offer for sale.

4. Carriers, travel agents and tour operators shall ensure that all relevant information, including online reservation and information, concerning the conditions of carriage, journey information and access conditions is available in appropriate and accessible formats for disabled persons and persons with reduced mobility. Persons needing assistance shall receive confirmation of such assistance by any means available, including electronic means or Short Message Service (SMS).

Article 10

Right to assistance in ports and on board ships

Subject to the access conditions provided for in Article 9(1), carriers and terminal operators shall, within their respective areas of competence, provide assistance free of charge to disabled persons and persons with reduced mobility, as specified in Annexes II and III, in ports, including embarkation and disembarkation, and on board ships. The assistance shall, if possible, be adapted to the individual needs of the disabled person or person with reduced mobility.

Article 11

Conditions under which assistance is provided

1. Carriers and terminal operators shall, within their respective areas of competence, provide assistance to disabled persons and persons with reduced mobility as set out in Article 10 provided that:

(a) the carrier or the terminal operator is notified, by any means available, including electronic means or SMS, of the person's need for such assistance at the latest 48 hours before the assistance is needed, unless a shorter period is agreed between the passenger and the carrier or terminal operator; and

(b) the disabled person or person with reduced mobility presents himself at the port or at the designated point as referred to in Article 12(3):

(i) at a time stipulated in writing by the carrier which shall not be more than 60 minutes before the published embarkation time; or

(ii) if no embarkation time is stipulated, no later than 60 minutes before the published departure time, unless a shorter period is agreed between the passenger and the carrier or terminal operator.

2. In addition to paragraph 1, disabled persons or persons with reduced mobility shall notify the carrier, at the time of reservation or advance purchase of the ticket, of their specific needs with regard to accommodation, seating or services required or their need to bring medical equipment, provided the need is known at that time.

3. A notification made in accordance with paragraphs 1(a) and 2 may always be submitted to the travel agent or the tour operator from which the ticket was purchased. Where the ticket permits multiple journeys, one notification shall be sufficient provided that adequate information on the timing of subsequent journeys is provided. The passenger shall receive a confirmation stating that the assistance needs have been notified as required in accordance with paragraphs 1(a) and 2.

4. Where no notification is made in accordance with paragraphs 1(a) and 2, carriers and terminal operators shall nonetheless make all reasonable efforts to ensure that the assistance is provided in such a way that the disabled person or person with reduced mobility is able to embark, disembark and travel on the ship.

5. Where a disabled person or person with reduced mobility is accompanied by a recognised assistance dog, that dog shall be accommodated together with that person, provided that the carrier, travel agent or tour operator is notified in accordance with applicable national rules on the carriage of recognised assistance dogs on board passenger ships, where such rules exist.

Article 12

Reception of notifications and designation of meeting points

1. Carriers, terminal operators, travel agents and tour operators shall take all measures necessary for the request for notifications, and for the reception of notifications made in accordance with Article 11(1)(a) and 11(2). That obligation shall apply at all their points of sale, including sale by telephone and over the Internet.

2. If travel agents or tour operators receive the notification referred to in paragraph 1 they shall, within their normal office hours, transfer the information to the carrier or terminal operator without delay.

3. Carriers and terminal operators shall designate a point inside or outside port terminals at which disabled persons or persons with reduced mobility can announce their arrival and request assistance. That point shall be clearly signposted and shall offer basic information about the port terminal and assistance provided, in accessible formats.

Article 13

Quality standards for assistance

1. Terminal operators and carriers operating port terminals or passenger services with a total of more than 100 000 commercial passenger movements during the previous calendar year shall, within their respective areas of competence, set quality standards for the assistance specified in Annexes II and III and shall, where appropriate through their organisations, determine resource requirements for meeting those standards, in cooperation with organisations representative of disabled persons or persons with reduced mobility.

2. In setting quality standards, full account shall be taken of internationally recognised policies and codes of conduct concerning facilitation of the transport of disabled persons or persons with reduced mobility, notably the IMO's Recommendation on the design and operation of passenger ships to respond to elderly and disabled persons' needs.

3. The quality standards provided for in paragraph 1 shall be made publicly available by terminal operators and carriers physically or on the Internet in accessible formats and in the same languages as those in which information is generally made available to all passengers.

Article 14

Training and instructions

Without prejudice to the International Convention and Code on Standards of Training, Certification and Watchkeeping for Seafarers and to the regulations adopted under the Revised Convention for Rhine Navigation and the Convention regarding the Regime of Navigation on the Danube, carriers and, where appropriate, terminal operators shall establish disability-related training procedures, including instructions, and ensure that:

(a) their personnel, including those employed by any other performing party, providing direct assistance to disabled persons and persons with reduced mobility are trained or instructed as described in Annex IV, Parts A and B;

(b) their personnel who are otherwise responsible for the reservation and selling of tickets or embarkation and disembarkation, including those employed by any other performing party, are trained or instructed as described in Annex IV, Part A; and

(c) the categories of personnel referred to in points (a) and (b) maintain their competences, for example through instructions or refresher training courses when appropriate.

Article 15

Compensation in respect of mobility equipment or other specific equipment

1. Carriers and terminal operators shall be liable for loss suffered as a result of the loss of or damage to mobility equipment or other specific equipment, used by a disabled person or person with reduced mobility, if the incident which caused the loss was due to the fault or neglect of the carrier or the terminal operator. The fault or neglect of the carrier shall be presumed for loss caused by a shipping incident.

2. The compensation referred to in paragraph 1 shall correspond to the replacement value of the equipment concerned or, where applicable, to the costs relating to repairs.

3. Paragraphs 1 and 2 shall not apply if Article 4 of Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents [1] applies.

4. Moreover, every effort shall be undertaken to rapidly provide temporary replacement equipment which is a suitable alternative.

[1] OJ L 131, 28.5.2009, p. 24.

CHAPTER III

OBLIGATIONS OF CARRIERS AND TERMINAL OPERATORS IN THE EVENT OF INTERRUPTED TRAVEL

Article 16

Information in the event of cancelled or delayed departures

1. In the case of a cancellation or a delay in departure of a passenger service or a cruise, passengers departing from port terminals or, if possible, passengers departing from ports shall be informed by the carrier or, where appropriate, by the terminal operator, of the situation as soon as possible and in any event no later than 30 minutes after the scheduled time of departure, and of the estimated departure time and estimated arrival time as soon as that information is available.

2. If passengers miss a connecting transport service due to a cancellation or delay, the carrier and, where appropriate, the terminal operator shall make reasonable efforts to inform the passengers concerned of alternative connections.

3. The carrier or, where appropriate, the terminal operator, shall ensure that disabled persons or persons with reduced mobility receive the information required under paragraphs 1 and 2 in accessible formats.

Article 17

Assistance in the event of cancelled or delayed departures

1. Where a carrier reasonably expects the departure of a passenger service or a cruise to be cancelled or delayed for more than 90 minutes beyond its scheduled time of departure, passengers departing from port terminals shall be offered free of charge snacks, meals or refreshments in reasonable relation to the waiting time, provided they are available or can reasonably be supplied.

2. In the case of a cancellation or a delay in departure where a stay of one or more nights or a stay additional to that intended by the passenger becomes necessary, where and when physically possible, the carrier shall offer passengers departing from port terminals, free of charge, adequate accommodation on board, or ashore, and transport to and from the port terminal and place of accommodation in addition to the snacks, meals or refreshments provided for in paragraph 1. For each passenger, the carrier may limit the total cost of accommodation ashore, not including transport to and from the port terminal and place of accommodation, to EUR 80 per night, for a maximum of three nights.

3. In applying paragraphs 1 and 2, the carrier shall pay particular attention to the needs of disabled persons and persons with reduced mobility and any accompanying persons.

Article 18

Re-routing and reimbursement in the event of cancelled or delayed departures

1. Where a carrier reasonably expects a passenger service to be cancelled or delayed in departure from a port terminal for more than 90 minutes, the passenger shall immediately be offered the choice between:

(a) re-routing to the final destination, under comparable conditions, as set out in the transport contract, at the earliest opportunity and at no additional cost;

(b) reimbursement of the ticket price and, where relevant, a return service free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity.

2. Where a passenger service is cancelled or delayed in departure from a port for more than 90 minutes, passengers shall have the right to such re-routing or reimbursement of the ticket price from the carrier.

3. The payment of the reimbursement provided for in paragraphs 1(b) and 2 shall be made within 7 days, in cash, by electronic bank transfer, bank order or bank cheque, of the full cost of the ticket at the price at which it was purchased, for the part or parts of the journey not made, and for the part or parts already made where the journey no longer serves any purpose in relation to the passenger's original travel plan. Where the passenger agrees, the full reimbursement may also be paid in the form of vouchers and/or other services in an amount equivalent to the price for which the ticket was purchased, provided that the conditions are flexible, particularly regarding the period of validity and the destination.

Article 19

Compensation of the ticket price in the event of delay in arrival

1. Without losing the right to transport, passengers may request compensation from the carrier if they are facing a delay in arrival at the final destination as set out in the transport contract. The minimum level of compensation shall be 25 % of the ticket price for a delay of at least:

(a) 1 hour in the case of a scheduled journey of up to 4 hours;

(b) 2 hours in the case of a scheduled journey of more than 4 hours, but not exceeding 8 hours;

(c) 3 hours in the case of a scheduled journey of more than 8 hours, but not exceeding 24 hours; or

(d) 6 hours in the case of a scheduled journey of more than 24 hours.

If the delay exceeds double the time set out in points (a) to (d), the compensation shall be 50 % of the ticket price.

2. Passengers who hold a travel pass or a season ticket and who encounter recurrent delays in arrival during its period of validity may request adequate compensation in accordance with the carrier's compensation arrangements. These arrangements shall state the criteria for determining delay in arrival and for calculation of compensation.

3. Compensation shall be calculated in relation to the price which the passenger actually paid for the delayed passenger service.

4. Where the transport is for a return journey, compensation for delay in arrival on either the outward or the return leg shall be calculated in relation to half of the price paid for the transport by that passenger service.

5. The compensation shall be paid within 1 month after the submission of the request for compensation. The compensation may be paid in vouchers and/or other services, provided that the conditions are flexible, particularly regarding the period of validity and the destination. The compensation shall be paid in money at the request of the passenger.

6. The compensation of the ticket price shall not be reduced by financial transaction costs such as fees, telephone costs or stamps. Carriers may introduce a minimum threshold under which payments for compensation will not be paid. This threshold shall not exceed EUR 6.

Article 20

Exemptions

1. Articles 17, 18 and 19 shall not apply to passengers with open tickets as long as the time of departure is not specified, except for passengers holding a travel pass or a season ticket.

2. Articles 17 and 19 shall not apply if the passenger is informed of the cancellation or delay before the purchase of the ticket or if the cancellation or delay is caused by the fault of the passenger.

3. Article 17(2) shall not apply where the carrier proves that the cancellation or delay is caused by weather conditions endangering the safe operation of the ship.

4. Article 19 shall not apply where the carrier proves that the cancellation or delay is caused by weather conditions endangering the safe operation of the ship or by extraordinary circumstances hindering the performance of the passenger service which could not have been avoided even if all reasonable measures had been taken.

Article 21

Further claims

Nothing in this Regulation shall preclude passengers from seeking damages in accordance with national law in respect of loss resulting from cancellation or delay of transport services before national courts, including under Directive 90/314/EEC.

CHAPTER IV

GENERAL RULES ON INFORMATION AND COMPLAINTS

Article 22

Right to travel information

Carriers and terminal operators shall, within their respective areas of competence, provide passengers with adequate information throughout their travel in formats which are accessible to everybody and in the same languages as those in which information is generally made available to all passengers. Particular attention shall be paid to the needs of disabled persons and persons with reduced mobility.

Article 23

Information on passenger rights

1. Carriers, terminal operators and, when applicable, port authorities, shall, within their respective areas of competence, ensure that information on the rights of passengers under this Regulation is publicly available on board ships, in ports, if possible, and in port terminals. The information shall be provided as far as possible in accessible formats and in the same languages as those in which information is generally made available to all passengers. When that information is provided particular attention shall be paid to the needs of disabled persons and persons with reduced mobility.

2. In order to comply with the information requirement referred to in paragraph 1, carriers, terminal operators and, when applicable, port authorities, may use a summary of the provisions of this Regulation prepared by the Commission in all the official languages of the institutions of the European Union and made available to them.

3. Carriers, terminal operators and, when applicable, port authorities shall inform passengers in an appropriate manner on board ships, in ports, if possible, and in port terminals, of the contact details of the enforcement body designated by the Member State concerned pursuant to Article 25(1).

Article 24

Complaints

1. Carriers and terminal operators shall set up or have in place an accessible complaint-handling mechanism for rights and obligations covered by this Regulation.

2. Where a passenger covered by this Regulation wants to make a complaint to the carrier or terminal operator, he shall submit it within 2 months from the date on which the service was performed or when a service should have been performed. Within 1 month of receiving the complaint, the carrier or terminal operator shall give notice to the passenger that his complaint has been substantiated, rejected or is still being considered. The time taken to provide the final reply shall not be longer than 2 months from the receipt of a complaint.

CHAPTER V

ENFORCEMENT AND NATIONAL ENFORCEMENT BODIES

Article 25

National enforcement bodies

1. Each Member State shall designate a new or existing body or bodies responsible for the enforcement of this Regulation as regards passenger services and cruises from ports situated on its territory and passenger services from a third country to such ports. Each body shall take the measures necessary to ensure compliance with this Regulation.

Each body shall, in its organisation, funding decisions, legal structure and decision-making, be independent of commercial interests.

2. Member States shall inform the Commission of the body or bodies designated in accordance with this Article.

3. Any passenger may submit a complaint, in accordance with national law, to the competent body designated under paragraph 1, or to any other competent body designated by a Member State, about an alleged infringement of this Regulation. The competent body shall provide passengers with a substantiated reply to their complaint within a reasonable period of time.

A Member State may decide:

(a) that the passenger as a first step shall submit the complaint covered by this Regulation to the carrier or terminal operator; and/or

(b) that the national enforcement body or any other competent body designated by the Member State shall act as an appeal body for complaints not resolved under Article 24.

4. Member States that have chosen to exempt certain services pursuant to Article 2(4) shall ensure that a comparable mechanism of enforcement of passenger rights is in place.

Article 26

Report on enforcement

By 1 June 2015 and every 2 years thereafter, the enforcement bodies designated pursuant to Article 25 shall publish a report on their activity in the previous two calendar years, containing in particular a description of actions taken in order to implement the provisions of this Regulation, details of sanctions applied and statistics on complaints and sanctions applied.

Article 27

Cooperation between enforcement bodies

National enforcement bodies referred to in Article 25(1) shall exchange information on their work and decision-making principles and practice to the extent necessary for the coherent application of this Regulation. The Commission shall support them in that task.

Article 28

Penalties

The Member States shall lay down rules on penalties applicable to infringements of the provisions of this Regulation and shall take all the measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those rules and measures to the Commission by 18 December 2012 and shall notify it without delay of any subsequent amendment affecting them.

CHAPTER VI

FINAL PROVISIONS

Article 29

Report

The Commission shall report to the European Parliament and to the Council by 19 December 2015 on the operation and the effects of this Regulation. The report shall be accompanied where necessary by legislative proposals implementing in further detail the provisions of this Regulation, or amending it.

Article 30

Amendment to Regulation (EC) No 2006/2004

In the Annex to Regulation (EC) No 2006/2004 the following point shall be added:

'18. Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway (*).

(*) OJ L 334, 17.12.2010, p. 1.'

Article 31

Entry into force

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from 18 December 2012.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 24 November 2010.

For the European Parliament
The President
J. BUZEK

For the Council
The President
O. CHASTEL

ANNEX I

RIGHT TO REIMBURSEMENT OR RE-ROUTING FOR DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY AS REFERRED TO IN ARTICLE 8

1. Where reference is made to this Annex, disabled persons and persons with reduced mobility shall be offered the choice between:

   (a) — reimbursement within 7 days, paid in cash, by electronic bank transfer, bank order or bank cheque, of the full cost of the ticket at the price at which it was purchased, for the part or parts of the journey not made, and for the part or parts already made if the journey no longer serves any purpose in relation to the passenger's original travel plan, plus, where relevant,

   — a return service to the first point of departure, at the earliest opportunity; or

   (b) re-routing to the final destination as set out in the transport contract, at no additional cost and under comparable conditions, at the earliest opportunity; or

   (c) re-routing to the final destination as set out in the transport contract, under comparable conditions, at a later date at the passenger's convenience, subject to availability of tickets.

2. Paragraph 1(a) shall also apply to passengers whose journeys form part of a package, except for the right to reimbursement where such a right arises under Directive 90/314/EEC.

3. When, in the case where a town, city or region is served by several ports, a carrier offers a passenger a journey to an alternative port to that for which the reservation was made, the carrier shall bear the cost of transferring the passenger from that alternative port either to that for which the reservation was made, or to another nearby destination agreed with the passenger.

ANNEX II

ASSISTANCE IN PORTS, INCLUDING EMBARKATION AND DISEMBARKATION, AS REFERRED TO IN ARTICLES 10 AND 13

1. Assistance and arrangements necessary to enable disabled persons and persons with reduced mobility to:

   — communicate their arrival at a port terminal or, if possible, a port and their request for assistance,

   — move from an entry point to the check-in counter, if any, or to the ship,

   — check in and register baggage, if necessary,

   — proceed from the check-in counter, if any, to the ship, through emigration and security points,

   — embark the ship, with the provision of lifts, wheelchairs or other assistance needed, as appropriate,

   — proceed from the ship door to their seats/area,

   — store and retrieve baggage on the ship,

   — proceed from their seats to the ship door,

   — disembark from the ship, with the provision of lifts, wheelchairs or other assistance needed, as appropriate,

   — retrieve baggage, if necessary, and proceed through immigration and customs points,

   — proceed from the baggage hall or the disembarkation point to a designated point of exit,

   — if required, make their way to the toilet facilities (if any).

2. Where a disabled person or person with reduced mobility is assisted by an accompanying person, that person must, if requested, be allowed to provide the necessary assistance in the port and with embarking and disembarking.

3. Handling of all necessary mobility equipment, including equipment such as electric wheelchairs.

4. Temporary replacement of damaged or lost mobility equipment with equipment which is a suitable alternative.

5. Ground handling of recognised assistance dogs, when relevant.

6. Communication in accessible formats of information needed to embark and disembark.

ANNEX III

ASSISTANCE ON BOARD SHIPS AS REFERRED TO IN ARTICLES 10 AND 13

1. Carriage of recognised assistance dogs on board the ship, subject to national regulations.

2. Carriage of medical equipment and of the mobility equipment necessary for the disabled person or person with reduced mobility, including electric wheelchairs.

3. Communication of essential information concerning a route in accessible formats.

4. Making all reasonable efforts to arrange seating to meet the needs of disabled persons or persons with reduced mobility on request and subject to safety requirements and availability.

5. If required, assistance in moving to toilet facilities (if any).

6. Where a disabled person or person with reduced mobility is assisted by an accompanying person, the carrier shall make all reasonable efforts to give such person a seat or a cabin next to the disabled person or person with reduced mobility.

ANNEX IV

DISABILITY-RELATED TRAINING, INCLUDING INSTRUCTIONS, AS REFERRED TO IN ARTICLE 14

A. Disability-awareness training, including instructions

Disability-awareness training, including instructions, includes:

— awareness of and appropriate responses to passengers with physical, sensory (hearing and visual), hidden or learning disabilities, including how to distinguish between the different abilities of persons whose mobility, orientation or communication may be reduced,

— barriers faced by disabled persons and persons with reduced mobility, including attitudinal, environmental/physical and organisational barriers,

— recognised assistance dogs, including the role and the needs of an assistance dog,

— dealing with unexpected occurrences,

— interpersonal skills and methods of communication with people with hearing impairments, visual impairments or speech impairments and people with a learning disability,

— general awareness of IMO guidelines relating to the Recommendation on the design and operation of passenger ships to respond to elderly and disabled persons' needs.

B. Disability-assistance training, including instructions

Disability-assistance training, including instructions, includes:

— how to help wheelchair users make transfers into and out of a wheelchair,

— skills for providing assistance to disabled persons and persons with reduced mobility travelling with a recognised assistance dog, including the role and the needs of those dogs,

— techniques for escorting passengers with visual impairments and for the handling and carriage of recognised assistance dogs,

— an understanding of the types of equipment which can assist disabled persons and persons with reduced mobility and a knowledge of how to carefully handle such equipment,

— the use of boarding and deboarding assistance equipment used and knowledge of the appropriate boarding and deboarding assistance procedures that safeguard the safety and dignity of disabled persons and persons with reduced mobility,

— understanding of the need for reliable and professional assistance. Also awareness of the potential of certain disabled persons and persons with reduced mobility to experience feelings of vulnerability during travel because of their dependence on the assistance provided,

— a knowledge of first aid.

REGULATION (EC) No 1371/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 23 October 2007

on rail passengers' rights and obligations

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 71(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Having regard to the opinion of the Committee of the Regions [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty, in the light of the joint text approved by the Conciliation Committee on 31 July 2007 [3],

Whereas:

(1) In the framework of the common transport policy, it is important to safeguard users' rights for rail passengers and to improve the quality and effectiveness of rail passenger services in order to help increase the share of rail transport in relation to other modes of transport.

(2) The Commission's communication 'Consumer Policy Strategy 2002-2006' [4] sets the aim of achieving a high level of consumer protection in the field of transport in accordance with Article 153(2) of the Treaty.

(3) Since the rail passenger is the weaker party to the transport contract, passengers' rights in this respect should be safeguarded.

(4) Users' rights to rail services include the receipt of information regarding the service both before and during the journey. Whenever possible, railway undertakings and ticket vendors should provide this information in advance and as soon as possible.

(5) More detailed requirements regarding the provision of travel information will be set out in the technical specifications for interoperability (TSIs) referred to in Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the conventional rail system [5].

(6) Strengthening of the rights of rail passengers should build on the existing system of international law on this subject contained in Appendix A — Uniform rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention concerning International Carriage by Rail of 3 June 1999 (1999 Protocol). However, it is desirable to extend the scope of this Regulation and protect not only international passengers but domestic passengers too.

(7) Railway undertakings should cooperate to facilitate the transfer of rail passengers from one operator to another by the provision of through tickets, whenever possible.

(8) The provision of information and tickets for rail passengers should be facilitated by the adaptation of computerised systems to a common specification.

(9) The further implementation of travel information and reservation systems should be executed in accordance with the TSIs.

(10) Rail passenger services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for rail travel comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same right as all other citizens to free movement, freedom of choice and to non-discrimination. *Inter alia*, special attention should be given to the provision of information to disabled persons and persons with reduced mobility concerning the accessibility of rail services, access conditions of rolling stock and the facilities on board. In order to provide passengers with sensory impairment with the best information on delays, visual and audible systems should be used, as appropriate. Disabled persons and persons with reduced mobility should be enabled to buy tickets on board a train without extra charges.

---

[1] OJ C 221, 8.9.2005, p. 8.

[2] OJ C 71, 22.3.2005, p. 26.

[3] Opinion of the European Parliament of 28 September 2005 (OJ C 227 E, 21.9.2006, p. 490), Council Common Position of 24 July 2006 (OJ C 289 E, 28.11.2006, p. 1), Position of the European Parliament of 18 January 2007 (not yet published in the Official Journal), Legislative Resolution of the European Parliament of 25 September 2007 and Council Decision of 26 September 2007.

[4] OJ C 137, 8.6.2002, p. 2.

[5] OJ L 110, 20.4.2001, p. 1. Directive as last amended by Commission Directive 2007/32/EC (OJ L 141, 2.6.2007, p. 63).

(11) Railway undertakings and station managers should take into account the needs of disabled persons and persons with reduced mobility, through compliance with the TSI for persons with reduced mobility, so as to ensure that, in accordance with Community public procurement rules, all buildings and rolling stock are made accessible through the progressive elimination of physical obstacles and functional hindrances when acquiring new material or carrying out construction or major renovation work.

(12) Railway undertakings should be obliged to be insured, or to make equivalent arrangements, for their liability to rail passengers in the event of accident. The minimum amount of insurance for railway undertakings should be the subject of future review.

(13) Strengthened rights of compensation and assistance in the event of delay, missed connection or cancellation of a service should lead to greater incentives for the rail passenger market, to the benefit of passengers.

(14) It is desirable that this Regulation create a system of compensation for passengers in the case of delay which is linked to the liability of the railway undertaking, on the same basis as the international system provided by the COTIF and in particular appendix CIV thereto relating to passengers' rights.

(15) Where a Member State grants railway undertakings an exemption from the provisions of this Regulation, it should encourage railway undertakings, in consultation with organisations representing passengers, to put in place arrangements for compensation and assistance in the event of major disruption to a rail passenger service.

(16) It is also desirable to relieve accident victims and their dependants of short-term financial concerns in the period immediately after an accident.

(17) It is in the interests of rail passengers that adequate measures be taken, in agreement with public authorities, to ensure their personal security at stations as well as on board trains.

(18) Rail passengers should be able to submit a complaint to any railway undertaking involved regarding the rights and obligations conferred by this Regulation, and be entitled to receive a response within a reasonable period of time.

(19) Railway undertakings should define, manage and monitor service quality standards for rail passenger services.

(20) The contents of this Regulation should be reviewed in respect of the adjustment of financial amounts for inflation and in respect of information and service quality requirements in the light of market developments as well as in the light of the effects on service quality of this Regulation.

(21) This Regulation should be without prejudice to 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 on the free movement of such data [1].

(22) Member States should lay down penalties applicable to infringements of this Regulation and ensure that these penalties are applied. The penalties, which might include the payment of compensation to the person in question, should be effective, proportionate and dissuasive.

(23) Since the objectives of this Regulation, namely the development of the Community's railways and the introduction of passenger rights, cannot be sufficiently achieved by the Member States, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as 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.

(24) It is an aim of this Regulation to improve rail passenger services within the Community. Therefore, Member States should be able to grant exemptions for services in regions where a significant part of the service is operated outside the Community.

(25) Railway undertakings in some Member States may experience difficulty in applying the entirety of the provisions of this Regulation on its entry into force. Therefore, Member States should be able to grant temporary exemptions from the application of the provisions of this Regulation to long-distance domestic rail passenger services. The temporary exemption should, however, not apply to the provisions of this Regulation that grant disabled persons or persons with reduced mobility access to travel by rail, nor to the right of those wishing to purchase tickets for travel by rail to do so without undue difficulty, nor to the provisions on railway undertakings' liability in respect of passengers and their luggage, the requirement that undertakings be adequately insured, and the requirement that those undertakings take adequate measures to ensure passengers' personal security in railway stations and on trains and to manage risk.

[1] OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

(26) Urban, suburban and regional rail passenger services are different in character from long-distance services. Therefore, with the exception of certain provisions which should apply to all rail passenger services throughout the Community, Member States should be able to grant exemptions from the application of the provisions of this Regulation to urban, suburban and regional rail passenger services.

(27) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1].

(28) In particular, the Commission should be empowered to adopt implementing measures. Since those measures are of general scope and are designed to amend non-essential elements of this Regulation, or to supplement it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation establishes rules as regards the following:

(a) the information to be provided by railway undertakings, the conclusion of transport contracts, the issuing of tickets and the implementation of a Computerised Information and Reservation System for Rail Transport,

(b) the liability of railway undertakings and their insurance obligations for passengers and their luggage,

(c) the obligations of railway undertakings to passengers in cases of delay,

(d) the protection of, and assistance to, disabled persons and persons with reduced mobility travelling by rail,

(e) the definition and monitoring of service quality standards, the management of risks to the personal security of passengers and the handling of complaints, and

(f) general rules on enforcement.

[1] OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

Article 2

Scope

1. This Regulation shall apply to all rail journeys and services throughout the Community provided by one or more railway undertakings licensed in accordance with Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings [2].

2. This Regulation does not apply to railway undertakings and transport services which are not licensed under Directive 95/18/EC.

3. On the entry into force of this Regulation, Articles 9, 11, 12, 19, 20(1) and 26 shall apply to all rail passenger services throughout the Community.

4. With the exception of the provisions set out in paragraph 3, a Member State may, on a transparent and non-discriminatory basis, grant an exemption for a period no longer than five years, which may be renewed twice for a maximum period of five years on each occasion, from the application of the provisions of this Regulation to domestic rail passenger services.

5. With the exception of the provisions set out in paragraph 3 of this Article, a Member State may exempt from the application of the provisions of this Regulation urban, suburban and regional rail passenger services. In order to distinguish between urban, suburban and regional rail passenger services, Member States shall apply the definitions contained in Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways [3]. In applying these definitions, Member States shall take into account the following criteria: distance, frequency of services, number of scheduled stops, rolling stock employed, ticketing schemes, fluctuations in passenger numbers between services in peak and off-peak periods, train codes and timetables.

6. For a maximum period of five years, a Member State may, on a transparent and non-discriminatory basis, grant an exemption, which may be renewed, from the application of the provisions of this Regulation to particular services or journeys because a significant part of the rail passenger service, including at least one scheduled station stop, is operated outside the Community.

7. Member States shall inform the Commission of exemptions granted pursuant to paragraphs 4, 5 and 6. The Commission shall take appropriate action if such an exemption is deemed not to be in accordance with the provisions of this Article. No later than 3 December 2014, the Commission shall submit to the European Parliament and the Council a report on exemptions granted pursuant to paragraphs 4, 5 and 6.

[2] OJ L 143, 27.6.1995, p. 70. Directive as last amended by Directive 2004/49/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 44).

[3] OJ L 237, 24.8.1991, p. 25. Directive as last amended by Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344).

Article 3

Definitions

For the purposes of this Regulation the following definitions shall apply:

1. 'railway undertaking' means a railway undertaking as defined in Article 2 of Directive 2001/14/EC [1], and any other public or private undertaking the activity of which is to provide transport of goods and/or passengers by rail on the basis that the undertaking must ensure traction; this also includes undertakings which provide traction only;

2. 'carrier' means the contractual railway undertaking with whom the passenger has concluded the transport contract or a series of successive railway undertakings which are liable on the basis of this contract;

3. 'substitute carrier' means a railway undertaking, which has not concluded a transport contract with the passenger, but to whom the railway undertaking party to the contract has entrusted, in whole or in part, the performance of the transport by rail;

4. 'infrastructure manager' means any body or undertaking that is responsible in particular for establishing and maintaining railway infrastructure, or a part thereof, as defined in Article 3 of Directive 91/440/EEC, which may also include the management of infrastructure control and safety systems; the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or undertakings;

5. 'station manager' means an organisational entity in a Member State, which has been made responsible for the management of a railway station and which may be the infrastructure manager;

6. 'tour operator' means an organiser or retailer, other than a railway undertaking, within the meaning of Article 2, points (2) and (3) of Directive 90/314/EEC [2];

7. 'ticket vendor' means any retailer of rail transport services concluding transport contracts and selling tickets on behalf of a railway undertaking or for its own account;

8. 'transport contract' means a contract of carriage for reward or free of charge between a railway undertaking or a ticket vendor and the passenger for the provision of one or more transport services;

9. 'reservation' means an authorisation, on paper or in electronic form, giving entitlement to transportation subject to previously confirmed personalised transport arrangements;

10. 'through ticket' means a ticket or tickets representing a transport contract for successive railway services operated by one or several railway undertakings;

11. 'domestic rail passenger service' means a rail passenger service which does not cross a border of a Member State;

12. 'delay' means the time difference between the time the passenger was scheduled to arrive in accordance with the published timetable and the time of his or her actual or expected arrival;

13. 'travel pass' or 'season ticket' means a ticket for an unlimited number of journeys which provides the authorised holder with rail travel on a particular route or network during a specified period;

14. 'Computerised Information and Reservation System for Rail Transport (CIRSRT)' means a computerised system containing information about rail services offered by railway undertakings; the information stored in the CIRSRT on passenger services shall include information on:

    (a) schedules and timetables of passenger services;

    (b) availability of seats on passenger services;

    (c) fares and special conditions;

    (d) accessibility of trains for disabled persons and persons with reduced mobility;

    (e) facilities through which reservations may be made or tickets or through tickets may be issued to the extent that some or all of these facilities are made available to users;

15. 'disabled person' or 'person with reduced mobility' means any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotory, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or as a result of age, and whose situation needs appropriate attention and adaptation to his or her particular needs of the service made available to all passengers;

16. 'General Conditions of Carriage' means the conditions of the carrier in the form of general conditions or tariffs legally in force in each Member State and which have become, by the conclusion of the contract of carriage, an integral part of it;

17. 'vehicle' means a motor vehicle or a trailer carried on the occasion of the carriage of passengers.

---

[1] Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure (OJ L 75, 15.3.2001, p. 29). Directive as last amended by Directive 2004/49/EC.

[2] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59).

CHAPTER II

TRANSPORT CONTRACT, INFORMATION AND TICKETS

Article 4

Transport contract

Subject to the provisions of this Chapter, the conclusion and performance of a transport contract and the provision of information and tickets shall be governed by the provisions of Title II and Title III of Annex I.

Article 5

Bicycles

Railway undertakings shall enable passengers to bring bicycles on to the train, where appropriate for a fee, if they are easy to handle, if this does not adversely affect the specific rail service, and if the rolling-stock so permits.

Article 6

Exclusion of waiver and stipulation of limits

1. Obligations towards passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the transport contract.

2. Railway undertakings may offer contract conditions more favourable for the passenger than the conditions laid down in this Regulation.

Article 7

Obligation to provide information concerning discontinuation of services

Railway undertakings or, where appropriate, competent authorities responsible for a public service railway contract shall make public by appropriate means, and before their implementation, decisions to discontinue services.

Article 8

Travel information

1. Without prejudice to Article 10, railway undertakings and ticket vendors offering transport contracts on behalf of one or more railway undertakings shall provide the passenger, upon request, with at least the information set out in Annex II, Part I in relation to the journeys for which a transport contract is offered by the railway undertaking concerned. Ticket vendors offering transport contracts on their own account, and tour operators, shall provide this information where available.

2. Railway undertakings shall provide the passenger during the journey with at least the information set out in Annex II, Part II.

3. The information referred to in paragraphs 1 and 2 shall be provided in the most appropriate format. Particular attention shall be paid in this regard to the needs of people with auditory and/or visual impairment.

Article 9

Availability of tickets, through tickets and reservations

1. Railway undertakings and ticket vendors shall offer, where available, tickets, through tickets and reservations.

2. Without prejudice to paragraph 4, railway undertakings shall distribute tickets to passengers via at least one of the following points of sale:

(a) ticket offices or selling machines;

(b) telephone, the Internet or any other widely available information technology;

(c) on board trains.

3. Without prejudice to paragraphs 4 and 5, railway undertakings shall distribute tickets for services provided under public service contracts via at least one of the following points of sale:

(a) ticket offices or selling machines;

(b) on board trains.

4. Railway undertakings shall offer the possibility to obtain tickets for the respective service on board the train, unless this is limited or denied on grounds relating to security or antifraud policy or compulsory train reservation or reasonable commercial grounds.

5. Where there is no ticket office or selling machine in the station of departure, passengers shall be informed at the station:

(a) of the possibility of purchasing tickets via telephone or the Internet or on board the train, and of the procedure for such purchase;

(b) of the nearest railway station or place at which ticket offices and/or selling machines are available.

Article 10

Travel information and reservation systems

1. In order to provide the information and to issue tickets referred to in this Regulation, railway undertakings and ticket vendors shall make use of CIRSRT, to be established by the procedures referred to in this Article.

2. The technical specifications for interoperability (TSIs) referred to in Directive 2001/16/EC shall be applied for the purposes of this Regulation.

3. The Commission shall, on a proposal to be submitted by the European Railway Agency (ERA), adopt the TSI of telematics applications for passengers by 3 December 2010. The TSI shall make possible the provision of the information, set out in Annex II, and the issuing of tickets as governed by this Regulation.

4. Railway undertakings shall adapt their CIRSRT according to the requirements set out in the TSI in accordance with a deployment plan set out in that TSI.

5. Subject to the provisions of Directive 95/46/EC, no railway undertaking or ticket vendor shall disclose personal information on individual bookings to other railway undertakings and/or ticket vendors.

CHAPTER III

LIABILITY OF RAILWAY UNDERTAKINGS FOR PASSENGERS AND THEIR LUGGAGE

Article 11

Liability for passengers and luggage

Subject to the provisions of this Chapter, and without prejudice to applicable national law granting passengers further compensation for damages, the liability of railway undertakings in respect of passengers and their luggage shall be governed by Chapters I, III and IV of Title IV, Title VI and Title VII of Annex I.

Article 12

Insurance

1. The obligation set out in Article 9 of Directive 95/18/EC as far as it relates to liability for passengers shall be understood as requiring a railway undertaking to be adequately insured or to make equivalent arrangements for cover of its liabilities under this Regulation.

2. The Commission shall submit to the European Parliament and the Council a report on the setting of a minimum amount of insurance for railway undertakings by 3 December 2010. If appropriate, that report shall be accompanied by suitable proposals or recommendations on this matter.

Article 13

Advance payments

1. If a passenger is killed or injured, the railway undertaking as referred to in Article 26(5) of Annex I shall without delay, and in any event not later than fifteen days after the establishment of the identity of the natural person entitled to compensation, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the damage suffered.

2. Without prejudice to paragraph 1, an advance payment shall not be less than EUR 21 000 per passenger in the event of death.

3. An advance payment shall not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of this Regulation but is not returnable, except in the cases where damage was caused by the negligence or fault of the passenger or where the person who received the advance payment was not the person entitled to compensation.

Article 14

Contestation of liability

Even if the railway undertaking contests its responsibility for physical injury to a passenger whom it conveys, it shall make every reasonable effort to assist a passenger claiming compensation for damage from third parties.

CHAPTER IV

DELAYS, MISSED CONNECTIONS AND CANCELLATIONS

Article 15

Liability for delays, missed connections and cancellations

Subject to the provisions of this Chapter, the liability of railway undertakings in respect of delays, missed connections and cancellations shall be governed by Chapter II of Title IV of Annex I.

Article 16

Reimbursement and re-routing

Where it is reasonably to be expected that the delay in the arrival at the final destination under the transport contract will be more than 60 minutes, the passenger shall immediately have the choice between:

(a) reimbursement of the full cost of the ticket, under the conditions by which it was paid, for the part or parts of his or her journey not made and for the part or parts already made if the journey is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return service to the first point of departure at the earliest opportunity. The payment of the reimbursement shall be made under the same conditions as the payment for compensation referred to in Article 17; or

(b) continuation or re-routing, under comparable transport conditions, to the final destination at the earliest opportunity; or

(c) continuation or re-routing, under comparable transport conditions, to the final destination at a later date at the passenger's convenience.

Article 17

Compensation of the ticket price

1. Without losing the right of transport, a passenger may request compensation for delays from the railway undertaking if he or she is facing a delay between the places of departure and destination stated on the ticket for which the ticket has not been reimbursed in accordance with Article 16. The minimum compensations for delays shall be as follows:

(a) 25 % of the ticket price for a delay of 60 to 119 minutes,

(b) 50 % of the ticket price for a delay of 120 minutes or more.

Passengers who hold a travel pass or season ticket and who encounter recurrent delays or cancellations during its period of validity may request adequate compensation in accordance with the railway undertaking's compensation arrangements. These arrangements shall state the criteria for determining delay and for the calculation of the compensation.

Compensation for delay shall be calculated in relation to the price which the passenger actually paid for the delayed service.

Where the transport contract is for a return journey, compensation for delay on either the outward or the return leg shall be calculated in relation to half of the price paid for the ticket. In the same way the price for a delayed service under any other form of transport contract allowing travelling several subsequent legs shall be calculated in proportion to the full price.

The calculation of the period of delay shall not take into account any delay that the railway undertaking can demonstrate as having occurred outside the territories in which the Treaty establishing the European Community is applied.

2. The compensation of the ticket price shall be paid within one month after the submission of the request for compensation. The compensation may be paid in vouchers and/or other services if the terms are flexible (in particular regarding the validity period and destination). The compensation shall be paid in money at the request of the passenger.

3. The compensation of the ticket price shall not be reduced by financial transaction costs such as fees, telephone costs or stamps. Railway undertakings may introduce a minimum threshold under which payments for compensation will not be paid. This threshold shall not exceed EUR 4.

4. The passenger shall not have any right to compensation if he is informed of a delay before he buys a ticket, or if a delay due to continuation on a different service or re-routing remains below 60 minutes.

Article 18

Assistance

1. In the case of a delay in arrival or departure, passengers shall be kept informed of the situation and of the estimated departure time and estimated arrival time by the railway undertaking or by the station manager as soon as such information is available.

2. In the case of any delay as referred to in paragraph 1 of more than 60 minutes, passengers shall also be offered free of charge:

(a) meals and refreshments in reasonable relation to the waiting time, if they are available on the train or in the station, or can reasonably be supplied;

(b) hotel or other accommodation, and transport between the railway station and place of accommodation, in cases where a stay of one or more nights becomes necessary or an additional stay becomes necessary, where and when physically possible;

(c) if the train is blocked on the track, transport from the train to the railway station, to the alternative departure point or to the final destination of the service, where and when physically possible.

3. If the railway service cannot be continued anymore, railway undertakings shall organise as soon as possible alternative transport services for passengers.

4. Railway undertakings shall, at the request of the passenger, certify on the ticket that the rail service has suffered a delay, led to a missed connection or that it has been cancelled, as the case might be.

5. In applying paragraphs 1, 2 and 3, the operating railway undertaking shall pay particular attention to the needs of disabled persons and persons with reduced mobility and any accompanying persons.

CHAPTER V

DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY

Article 19

Right to transport

1. Railway undertakings and station managers shall, with the active involvement of representative organisations of disabled persons and persons with reduced mobility, establish, or shall have in place, non-discriminatory access rules for the transport of disabled persons and persons with reduced mobility.

2. Reservations and tickets shall be offered to disabled persons and persons with reduced mobility at no additional cost. A railway undertaking, ticket vendor or tour operator may not refuse to accept a reservation from, or issue a ticket to, a disabled person or a person with reduced mobility, or require that such person be accompanied by another person, unless this is strictly necessary in order to comply with the access rules referred to in paragraph 1.

Article 20

Information to disabled persons and persons with reduced mobility

1. Upon request, a railway undertaking, a ticket vendor or a tour operator shall provide disabled persons and persons with reduced mobility with information on the accessibility of rail services and on the access conditions of rolling stock in accordance with the access rules referred to in Article 19(1) and shall inform disabled persons and persons with reduced mobility about facilities on board.

2. When a railway undertaking, ticket vendor and/or tour operator exercises the derogation provided for in Article 19(2), it shall upon request inform in writing the disabled person or person with reduced mobility concerned of its reasons for doing so within five working days of the refusal to make the reservation or to issue the ticket or the imposition of the condition of being accompanied.

Article 21

Accessibility

1. Railway undertakings and station managers shall, through compliance with the TSI for persons with reduced mobility, ensure that the station, platforms, rolling stock and other facilities are accessible to disabled persons and persons with reduced mobility.

2. In the absence of accompanying staff on board a train or of staff at a station, railway undertakings and station managers shall make all reasonable efforts to enable disabled persons or persons with reduced mobility to have access to travel by rail.

Article 22

Assistance at railway stations

1. On departure from, transit through or arrival at, a staffed railway station of a disabled person or a person with reduced mobility, the station manager shall provide assistance free of charge in such a way that that person is able to board the departing service, or to disembark from the arriving service for which he or she purchased a ticket, without prejudice to the access rules referred to in Article 19(1).

2. Member States may provide for a derogation from paragraph 1 in the case of persons travelling on services which are the subject of a public service contract awarded in conformity with Community law, on condition that the competent authority has put in place alternative facilities or arrangements guaranteeing an equivalent or higher level of accessibility of transport services.

3. In unstaffed stations, railway undertakings and station managers shall ensure that easily accessible information is displayed in accordance with the access rules referred to in Article 19(1) regarding the nearest staffed stations and directly available assistance for disabled persons and persons with reduced mobility.

Article 23

Assistance on board

Without prejudice to the access rules as referred to in Article 19(1), railway undertakings shall provide disabled persons and persons with reduced mobility assistance free of charge on board a train and during boarding and disembarking from a train.

For the purposes of this Article, assistance on board shall consist of all reasonable efforts to offer assistance to a disabled person or a person with reduced mobility in order to allow that person to have access to the same services in the train as other passengers, should the extent of the person's disability or reduced mobility not allow him or her to have access to those services independently and in safety.

Article 24

Conditions on which assistance is provided

Railway undertakings, station managers, ticket vendors and tour operators shall cooperate in order to provide assistance to disabled persons and persons with reduced mobility in line with Articles 22 and 23 in accordance with the following points:

(a) assistance shall be provided on condition that the railway undertaking, the station manager, the ticket vendor or the tour operator with which the ticket was purchased is notified of the person's need for such assistance at least 48 hours before the assistance is needed. Where the ticket permits multiple journeys, one notification shall be sufficient provided that adequate information on the timing of subsequent journeys is provided;

(b) railway undertakings, station managers, ticket vendors and tour operators shall take all measures necessary for the reception of notifications;

(c) if no notification is made in accordance with point (a), the railway undertaking and the station manager shall make all reasonable efforts to provide assistance in such a way that the disabled person or person with reduced mobility may travel;

(d) without prejudice to the powers of other entities regarding areas located outside the railway station premises, the station manager or any other authorised person shall designate points, within and outside the railway station, at which disabled persons and persons with reduced mobility can announce their arrival at the railway station and, if need be, request assistance;

(e) assistance shall be provided on condition that the disabled person or person with reduced mobility present him or herself at the designated point at a time stipulated by the railway undertaking or station manager providing such assistance. Any time stipulated shall not be more than 60 minutes before the published departure time or the time at which all passengers are asked to check in. If no time is stipulated by which the disabled person or person with reduced mobility is required to present him or herself, the person shall present him or herself at the designated point at least 30 minutes before the published departure time or the time at which all passengers are asked to check in.

Article 25

Compensation in respect of mobility equipment or other specific equipment

If the railway undertaking is liable for the total or partial loss of, or damage to, mobility equipment or other specific equipment used by disabled persons or persons with reduced mobility, no financial limit shall be applicable.

CHAPTER VI

SECURITY, COMPLAINTS AND QUALITY OF SERVICE

Article 26

Personal security of passengers

In agreement with public authorities, railway undertakings, infrastructure managers and station managers shall take adequate measures in their respective fields of responsibility and adapt them to the level of security defined by the public authorities to ensure passengers' personal security in railway stations and on trains and to manage risks. They shall cooperate and exchange information on best practices concerning the prevention of acts, which are likely to deteriorate the level of security.

Article 27

Complaints

1. Railway undertakings shall set up a complaint handling mechanism for the rights and obligations covered in this Regulation. The railway undertaking shall make its contact details and working language(s) widely known to passengers.

2. Passengers may submit a complaint to any railway undertaking involved. Within one month, the addressee of the complaint shall either give a reasoned reply or, in justified cases, inform the passenger by what date within a period of less than three months from the date of the complaint a reply can be expected.

3. The railway undertaking shall publish in the annual report referred to in Article 28 the number and categories of received complaints, processed complaints, response time and possible improvement actions undertaken.

Article 28

Service quality standards

1. Railway undertakings shall define service quality standards and implement a quality management system to maintain service quality. The service quality standards shall at least cover the items listed in Annex III.

2. Railway undertakings shall monitor their own performance as reflected in the service quality standards. Railway undertakings shall each year publish a report on their service quality performance together with their annual report. The reports on service quality performance shall be published on the Internet website of the railway undertakings. In addition, these reports shall be made available on the Internet website of the ERA.

CHAPTER VII

INFORMATION AND ENFORCEMENT

Article 29

Information to passengers about their rights

1. When selling tickets for journeys by rail, railway undertakings, station managers and tour operators shall inform passengers of their rights and obligations under this Regulation. In order to comply with this information requirement, railway undertakings, station managers and tour operators may use a summary of the provisions of this Regulation prepared by the Commission in all official languages of the European Union institutions and made available to them.

2. Railway undertakings and station managers shall inform passengers in an appropriate manner, at the station and on the train, of the contact details of the body or bodies designated by Member States pursuant to Article 30.

Article 30

Enforcement

1. Each Member State shall designate a body or bodies responsible for the enforcement of this Regulation. Each body shall take the measures necessary to ensure that the rights of passengers are respected.

Each body shall be independent in its organisation, funding decisions, legal structure and decision-making of any infrastructure manager, charging body, allocation body or railway undertaking.

Member States shall inform the Commission of the body or bodies designated in accordance with this paragraph and of its or their respective responsibilities.

2. Each passenger may complain to the appropriate body designated under paragraph 1, or to any other appropriate body designated by a Member State, about an alleged infringement of this Regulation.

Article 31

Cooperation between enforcement bodies

Enforcement bodies as referred to in Article 30 shall exchange information on their work and decision-making principles and practice for the purpose of coordinating their decision-making principles across the Community. The Commission shall support them in this task.

CHAPTER VIII

FINAL PROVISIONS

Article 32

Penalties

Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive. Member States shall notify those rules and measures to the Commission by 3 June 2010 and shall notify it without delay of any subsequent amendment affecting them.

Article 33

Annexes

Measures designed to amend non-essential elements of this Regulation by adapting the Annexes thereto, except Annex I, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 35(2).

Article 34

Amending provisions

1. Measures designed to amend non-essential elements of this Regulation by supplementing it and necessary for the implementation of Articles 2, 10 and 12 shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 35(2).

2. Measures designed to amend non-essential elements of this Regulation by adjusting the financial amounts referred to therein, other than in Annex I, in light of inflation shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 35(2).

Article 35

Committee procedure

1. The Commission shall be assisted by the Committee instituted by Article 11a of Directive 91/440/EEC.

2. Where reference is made to this paragraph, Articles 5a(1) to (4), and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 36

Report

The Commission shall report to the European Parliament and the Council on the implementation and the results of this Regulation by 3 December 2012, and in particular on the service quality standards.

The report shall be based on information to be provided pursuant to this Regulation and to Article 10b of Directive 91/440/EEC. The report shall be accompanied where necessary by appropriate proposals.

Article 37

Entry into force

This Regulation shall enter into force 24 months after the date of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 23 October 2007.

For the European Parliament
The President
H.-G. PÖTTERING

For the Council
The President
M. LOBO ANTUNES

ANNEX I

Extract from Uniform Rules concerning the contract for international carriage of passengers and luggage by rail (CIV)

Appendix A

to the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention Concerning International Carriage by Rail of 3 June 1999

TITLE II

CONCLUSION AND PERFORMANCE OF THE CONTRACT OF CARRIAGE

Article 6

Contract of carriage

1. By the contract of carriage the carrier shall undertake to carry the passenger as well as, where appropriate, luggage and vehicles to the place of destination and to deliver the luggage and vehicles at the place of destination.

2. The contract of carriage must be confirmed by one or more tickets issued to the passenger. However, subject to Article 9 the absence, irregularity or loss of the ticket shall not affect the existence or validity of the contract which shall remain subject to these Uniform Rules.

3. The ticket shall be prima facie evidence of the conclusion and the contents of the contract of carriage.

Article 7

Ticket

1. The General Conditions of Carriage shall determine the form and content of tickets as well as the language and characters in which they are to be printed and made out.

2. The following, at least, must be entered on the ticket:

(a) the carrier or carriers;

(b) a statement that the carriage is subject, notwithstanding any clause to the contrary, to these Uniform Rules; this may be indicated by the acronym CIV;

(c) any other statement necessary to prove the conclusion and contents of the contract of carriage and enabling the passenger to assert the rights resulting from this contract.

3. The passenger must ensure, on receipt of the ticket, that it has been made out in accordance with his instructions.

4. The ticket shall be transferable if it has not been made out in the passenger's name and if the journey has not begun.

5. The ticket may be established in the form of electronic data registration, which can be transformed into legible written symbols. The procedure used for the registration and treatment of data must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the ticket represented by those data.

Article 8

Payment and refund of the carriage charge

1. Subject to a contrary agreement between the passenger and the carrier, the carriage charge shall be payable in advance.

2. The General Conditions of Carriage shall determine under what conditions a refund of the carriage charge shall be made.

Article 9

Right to be carried. Exclusion from carriage

1. The passenger must, from the start of his journey, be in possession of a valid ticket and produce it on the inspection of tickets. The General Conditions of Carriage may provide:

(a) that a passenger who does not produce a valid ticket must pay, in addition to the carriage charge, a surcharge;

(b) that a passenger who refuses to pay the carriage charge or the surcharge upon demand may be required to discontinue his journey;

(c) if and under what conditions a refund of the surcharge shall be made.

2. The General Conditions of Carriage may provide that passengers who:

(a) present a danger for safety and the good functioning of the operations or for the safety of other passengers,

(b) inconvenience other passengers in an intolerable manner,

shall be excluded from carriage or may be required to discontinue their journey and that such persons shall not be entitled to a refund of their carriage charge or of any charge for the carriage of registered luggage they may have paid.

Article 10

Completion of administrative formalities

The passenger must comply with the formalities required by customs or other administrative authorities.

Article 11

Cancellation and late running of trains. Missed connections

The carrier must, where necessary, certify on the ticket that the train has been cancelled or the connection missed.

TITLE III

CARRIAGE OF HAND LUGGAGE, ANIMALS, REGISTERED LUGGAGE AND VEHICLES

Chapter I

Common provisions

Article 12

Acceptable articles and animals

1. The passenger may take with him articles which can be handled easily (hand luggage) and also live animals in accordance with the General Conditions of Carriage. Moreover, the passenger may take with him cumbersome articles in accordance with the special provisions, contained in the General Conditions of Carriage. Articles and animals likely to annoy or inconvenience passengers or cause damage shall not be allowed as hand luggage.

2. The passenger may consign articles and animals as registered luggage in accordance with the General Conditions of Carriage.

3. The carrier may allow the carriage of vehicles on the occasion of the carriage of passengers in accordance with special provisions, contained in the General Conditions of Carriage.

4. The carriage of dangerous goods as hand luggage, registered luggage as well as in or on vehicles which, in accordance with this Title are carried by rail, must comply with the Regulation concerning the Carriage of Dangerous Goods by Rail (RID).

Article 13

Examination

1. When there is good reason to suspect a failure to observe the conditions of carriage, the carrier shall have the right to examine whether the articles (hand luggage, registered luggage, vehicles including their loading) and animals carried comply with the conditions of carriage, unless the laws and prescriptions of the State in which the examination would take place prohibit such examination. The passenger must be invited to attend the examination. If he does not appear or cannot be reached, the carrier must require the presence of two independent witnesses.

2. If it is established that the conditions of carriage have not been respected, the carrier can require the passenger to pay the costs arising from the examination.

Article 14

Completion of administrative formalities

The passenger must comply with the formalities required by customs or other administrative authorities when, on being carried, he has articles (hand luggage, registered luggage, vehicles including their loading) or animals carried. He shall be present at the inspection of these articles save where otherwise provided by the laws and prescriptions of each State.

Chapter II

Hand luggage and animals

Article 15

Supervision

It shall be the passenger's responsibility to supervise the hand luggage and animals that he takes with him.

Chapter III

Registered luggage

Article 16

Consignment of registered luggage

1. The contractual obligations relating to the forwarding of registered luggage must be established by a luggage registration voucher issued to the passenger.

2. Subject to Article 22 the absence, irregularity or loss of the luggage registration voucher shall not affect the existence or the validity of the agreements concerning the forwarding of the registered luggage, which shall remain subject to these Uniform Rules.

3. The luggage registration voucher shall be prima facie evidence of the registration of the luggage and the conditions of its carriage.

4. Subject to evidence to the contrary, it shall be presumed that when the carrier took over the registered luggage it was apparently in a good condition, and that the number and the mass of the items of luggage corresponded to the entries on the luggage registration voucher.

Article 17

Luggage registration voucher

1. The General Conditions of Carriage shall determine the form and content of the luggage registration voucher as well as the language and characters in which it is to be printed and made out. Article 7(5) shall apply *mutatis mutandis*.

2. The following, at least, must be entered on the luggage registration voucher:

(a) the carrier or carriers;

(b) a statement that the carriage is subject, notwithstanding any clause to the contrary, to these Uniform Rules; this may be indicated by the acronym CIV;

(c) any other statement necessary to prove the contractual obligations relating to the forwarding of the registered luggage and enabling the passenger to assert the rights resulting from the contract of carriage.

3. The passenger must ensure, on receipt of the luggage registration voucher, that it has been made out in accordance with his instructions.

Article 18

Registration and carriage

1. Save where the General Conditions of Carriage otherwise provide, luggage shall be registered only on production of a ticket valid at least as far as the destination of the luggage. In other respects the registration of luggage shall be carried out in accordance with the prescriptions in force at the place of consignment.

2. When the General Conditions of Carriage provide that luggage may be accepted for carriage without production of a ticket, the provisions of these Uniform Rules determining the rights and obligations of the passenger in respect of his registered luggage shall apply *mutatis mutandis* to the consignor of registered luggage.

3. The carrier can forward the registered luggage by another train or by another mode of transport and by a different route from that taken by the passenger.

Article 19

Payment of charges for the carriage of registered luggage

Subject to a contrary agreement between the passenger and the carrier, the charge for the carriage of registered luggage shall be payable on registration.

Article 20

Marking of registered luggage

The passenger must indicate on each item of registered luggage in a clearly visible place, in a sufficiently durable and legible manner:

(a) his name and address;

(b) the place of destination.

Article 21

Right to dispose of registered luggage

1. If circumstances permit and if customs requirements or the requirements of other administrative authorities are not thereby contravened, the passenger can request luggage to be handed back at the place of consignment on surrender of the luggage registration voucher and, if the General Conditions of Carriage so require, on production of the ticket.

2. The General Conditions of Carriage may contain other provisions concerning the right to dispose of registered luggage, in particular modifications of the place of destination and the possible financial consequences to be borne by the passenger.

Article 22

Delivery

1. Registered luggage shall be delivered on surrender of the luggage registration voucher and, where appropriate, on payment of the amounts chargeable against the consignment.

The carrier shall be entitled, but not obliged, to examine whether the holder of the voucher is entitled to take delivery.

2. It shall be equivalent to delivery to the holder of the luggage registration voucher if, in accordance with the prescriptions in force at the place of destination:

(a) the luggage has been handed over to the customs or octroi authorities at their premises or warehouses, when these are not subject to the carrier's supervision;

(b) live animals have been handed over to third parties.

3. The holder of the luggage registration voucher may require delivery of the luggage at the place of destination as soon as the agreed time and, where appropriate, the time necessary for the operations carried out by customs or other administrative authorities, has elapsed.

4. Failing surrender of the luggage registration voucher, the carrier shall only be obliged to deliver the luggage to the person proving his right thereto; if the proof offered appears insufficient, the carrier may require security to be given.

5. Luggage shall be delivered at the place of destination for which it has been registered.

6. The holder of a luggage registration voucher whose luggage has not been delivered may require the day and time to be endorsed on the voucher when he requested delivery in accordance with paragraph 3.

7. The person entitled may refuse to accept the luggage if the carrier does not comply with his request to carry out an examination of the registered luggage in order to establish alleged damage.

8. In all other respects delivery of luggage shall be carried out in accordance with the prescriptions in force at the place of destination.

Chapter IV

Vehicles

Article 23

Conditions of carriage

The special provisions governing the carriage of vehicles, contained in the General Conditions of Carriage, shall specify in particular the conditions governing acceptance for carriage, registration, loading and carriage, unloading and delivery as well as the obligations of the passenger.

Article 24

Carriage voucher

1. The contractual obligations relating to the carriage of vehicles must be established by a carriage voucher issued to the passenger. The carriage voucher may be integrated into the passenger's ticket.

2. The special provisions governing the carriage of vehicles, contained in the General Conditions of Carriage, shall determine the form and content of the carriage voucher as well as the language and the characters in which it is to be printed and made out. Article 7(5) shall apply *mutatis mutandis*.

3. The following, at least, must be entered on the carriage voucher:

(a) the carrier or carriers;

(b) a statement that the carriage is subject, notwithstanding any clause to the contrary, to these Uniform Rules; this may be indicated by the acronym CIV;

(c) any other statement necessary to prove the contractual obligations relating to the carriage of vehicles and enabling the passenger to assert the rights resulting from the contract of carriage.

4. The passenger must ensure, on receipt of the carriage voucher, that it has been made out in accordance with his instructions.

Article 25

Applicable law

Subject to the provisions of this Chapter, the provisions of Chapter III relating to the carriage of luggage shall apply to vehicles.

TITLE IV

LIABILITY OF THE CARRIER

Chapter I

Liability in case of death of, or personal injury to, passengers

Article 26

Basis of liability

1. The carrier shall be liable for the loss or damage resulting from the death of, personal injuries to, or any other physical or mental harm to, a passenger, caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from railway vehicles whatever the railway infrastructure used.

2. The carrier shall be relieved of this liability

(a) if the accident has been caused by circumstances not connected with the operation of the railway and which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent;

(b) to the extent that the accident is due to the fault of the passenger;

(c) if the accident is due to the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent; another undertaking using the same railway infrastructure shall not be considered as a third party; the right of recourse shall not be affected.

3. If the accident is due to the behaviour of a third party and if, in spite of that, the carrier is not entirely relieved of his liability in accordance with paragraph 2, letter c), he shall be liable in full up to the limits laid down in these Uniform Rules but without prejudice to any right of recourse which the carrier may have against the third party.

4. These Uniform Rules shall not affect any liability which may be incurred by the carrier in cases not provided for in paragraph 1.

5. If carriage governed by a single contract of carriage is performed by successive carriers, the carrier bound pursuant to the contract of carriage to provide the service of carriage in the course of which the accident happened shall be liable in case of death of, and personal injuries to, passengers. When this service has not been provided by the carrier, but by a substitute carrier, the two carriers shall be jointly and severally liable in accordance with these Uniform Rules.

Article 27

Damages in case of death

1. In case of death of the passenger the damages shall comprise:

(a) any necessary costs following the death, in particular those of transport of the body and the funeral expenses;

(b) if death does not occur at once, the damages provided for in Article 28.

2. If, through the death of the passenger, persons whom he had, or would have had, a legal duty to maintain are deprived of their support, such persons shall also be compensated for that loss. Rights of action for damages of persons whom the passenger was maintaining without being legally bound to do so, shall be governed by national law.

Article 28

Damages in case of personal injury

In case of personal injury or any other physical or mental harm to the passenger the damages shall comprise:

(a) any necessary costs, in particular those of treatment and of transport;

(b) compensation for financial loss, due to total or partial incapacity to work, or to increased needs.

Article 29

Compensation for other bodily harm

National law shall determine whether and to what extent the carrier must pay damages for bodily harm other than that for which there is provision in Articles 27 and 28.

Article 30

Form and amount of damages in case of death and personal injury

1. The damages under Article 27(2) and Article 28(b) must be awarded in the form of a lump sum. However, if national law permits payment of an annuity, the damages shall be awarded in that form if so requested by the injured passenger or by the persons entitled referred to in Article 27(2).

2. The amount of damages to be awarded pursuant to paragraph 1 shall be determined in accordance with national law. However, for the purposes of these Uniform Rules, the upper limit per passenger shall be set at 175 000 units of account as a lump sum or as an annual annuity corresponding to that sum, where national law provides for an upper limit of less than that amount.

Article 31

Other modes of transport

1. Subject to paragraph 2, the provisions relating to the liability of the carrier in case of death of, or personal injury to, passengers shall not apply to loss or damage arising in the course of carriage which, in accordance with the contract of carriage, was not carriage by rail.

2. However, where railway vehicles are carried by ferry, the provisions relating to liability in case of death of, or personal injury to, passengers shall apply to loss or damage referred to in Article 26(1) and Article 33(1), caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from the said vehicles.

3. When, because of exceptional circumstances, the operation of the railway is temporarily suspended and the passengers are carried by another mode of transport, the carrier shall be liable pursuant to these Uniform Rules.

Chapter II

Liability in case of failure to keep to the timetable

Article 32

Liability in case of cancellation, late running of trains or missed connections

1. The carrier shall be liable to the passenger for loss or damage resulting from the fact that, by reason of cancellation, the late running of a train or a missed connection, his journey cannot be continued the same day, or that a continuation of the journey the same day could not reasonably be required because of given circumstances. The damages shall comprise the reasonable costs of accommodation as well as the reasonable costs occasioned by having to notify persons expecting the passenger.

2. The carrier shall be relieved of this liability, when the cancellation, late running or missed connection is attributable to one of the following causes:

(a) circumstances not connected with the operation of the railway which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent;

(b) fault on the part of the passenger; or

(c) the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent; another undertaking using the same railway infrastructure shall not be considered as a third party; the right of recourse shall not be affected.

3. National law shall determine whether and to what extent the carrier must pay damages for harm other than that provided for in paragraph 1. This provision shall be without prejudice to Article 44.

Chapter III

Liability in respect of hand luggage, animals, registered luggage and vehicles

SECTION 1

Hand luggage and animals

Article 33

Liability

1. In case of death of, or personal injury to, passengers the carrier shall also be liable for the loss or damage resulting from the total or partial loss of, or damage to, articles which the passenger had on him or with him as hand luggage; this shall apply also to animals which the passenger had brought with him. Article 26 shall apply *mutatis mutandis*.

2. In other respects, the carrier shall not be liable for the total or partial loss of, or damage to, articles, hand luggage or animals the supervision of which is the responsibility of the passenger in accordance with Article 15, unless this loss or damage is caused by the fault of the carrier. The other Articles of Title IV, with exception of Article 51, and Title VI shall not apply in this case.

Article 34

Limit of damages in case of loss of or damage to articles

When the carrier is liable under Article 33(1), he must pay compensation up to a limit of 1 400 units of account per passenger.

Article 35

Exclusion of liability

The carrier shall not be liable to the passenger for loss or damage arising from the fact that the passenger does not conform to the formalities required by customs or other administrative authorities.

SECTION 2

Registered luggage

Article 36

Basis of liability

1. The carrier shall be liable for loss or damage resulting from the total or partial loss of, or damage to, registered luggage between the time of taking over by the carrier and the time of delivery as well as from delay in delivery.

2. The carrier shall be relieved of this liability to the extent that the loss, damage or delay in delivery was caused by a fault of the passenger, by an order given by the passenger other than as a result of the fault of the carrier, by an inherent defect in the registered luggage or by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

3. The carrier shall be relieved of this liability to the extent that the loss or damage arises from the special risks inherent in one or more of the following circumstances:

(a) the absence or inadequacy of packing;

(b) the special nature of the luggage;

(c) the consignment as luggage of articles not acceptable for carriage.

Article 37

Burden of proof

1. The burden of proving that the loss, damage or delay in delivery was due to one of the causes specified in Article 36(2) shall lie on the carrier.

2. When the carrier establishes that, having regard to the circumstances of a particular case, the loss or damage could have arisen from one or more of the special risks referred to in Article 36(3), it shall be presumed that it did so arise. The person entitled shall, however, have the right to prove that the loss or damage was not attributable either wholly or in part to one of those risks.

Article 38

Successive carriers

If carriage governed by a single contract is performed by several successive carriers, each carrier, by the very act of taking over the luggage with the luggage registration voucher or the vehicle with the carriage voucher, shall become a party to the contract of carriage in respect of the forwarding of luggage or the carriage of vehicles, in accordance with the terms of the luggage registration voucher or of the carriage voucher and shall assume the obligations arising therefrom. In such a case each carrier shall be responsible for the carriage over the entire route up to delivery.

Article 39

Substitute carrier

1. Where the carrier has entrusted the performance of the carriage, in whole or in part, to a substitute carrier, whether or not in pursuance of a right under the contract of carriage to do so, the carrier shall nevertheless remain liable in respect of the entire carriage.

2. All the provisions of these Uniform Rules governing the liability of the carrier shall apply also to the liability of the substitute carrier for the carriage performed by him. Articles 48 and 52 shall apply if an action is brought against the servants or any other persons whose services the substitute carrier makes use of for the performance of the carriage.

3. Any special agreement under which the carrier assumes obligations not imposed by these Uniform Rules or waives rights conferred by these Uniform Rules shall be of no effect in respect of the substitute carrier who has not accepted it expressly and in writing. Whether or not the substitute carrier has accepted it, the carrier shall nevertheless remain bound by the obligations or waivers resulting from such special agreement.

4. Where and to the extent that both the carrier and the substitute carrier are liable, their liability shall be joint and several.

5. The aggregate amount of compensation payable by the carrier, the substitute carrier and their servants and other persons whose services they make use of for the performance of the carriage shall not exceed the limits provided for in these Uniform Rules.

6. This Article shall not prejudice rights of recourse which may exist between the carrier and the substitute carrier.

Article 40

Presumption of loss

1. The person entitled may, without being required to furnish further proof, consider an item of luggage as lost when it has not been delivered or placed at his disposal within 14 days after a request for delivery has been made in accordance with Article 22(3).

2. If an item of luggage deemed to have been lost is recovered within one year after the request for delivery, the carrier must notify the person entitled if his address is known or can be ascertained.

3. Within thirty days after receipt of a notification referred to in paragraph 2, the person entitled may require the item of luggage to be delivered to him. In that case he must pay the charges in respect of carriage of the item from the place of consignment to the place where delivery is effected and refund the compensation received less, where appropriate, any costs included therein. Nevertheless he shall retain his rights to claim compensation for delay in delivery provided for in Article 43.

4. If the item of luggage recovered has not been claimed within the period stated in paragraph 3 or if it is recovered more than one year after the request for delivery, the carrier shall dispose of it in accordance with the laws and prescriptions in force at the place where the item of luggage is situated.

Article 41

Compensation for loss

1. In case of total or partial loss of registered luggage, the carrier must pay, to the exclusion of all other damages:

(a) if the amount of the loss or damage suffered is proved, compensation equal to that amount but not exceeding 80 units of account per kilogram of gross mass short or 1 200 units of account per item of luggage;

(b) if the amount of the loss or damage suffered is not established, liquidated damages of 20 units of account per kilogram of gross mass short or 300 units of account per item of luggage.

The method of compensation, by kilogram missing or by item of luggage, shall be determined by the General Conditions of Carriage.

2. The carrier must in addition refund the charge for the carriage of luggage and the other sums paid in relation to the carriage of the lost item as well as the customs duties and excise duties already paid.

Article 42

Compensation for damage

1. In case of damage to registered luggage, the carrier must pay compensation equivalent to the loss in value of the luggage, to the exclusion of all other damages.

2. The compensation shall not exceed:

(a) if all the luggage has lost value through damage, the amount which would have been payable in case of total loss;

(b) if only part of the luggage has lost value through damage, the amount which would have been payable had that part been lost.

Article 43

Compensation for delay in delivery

1. In case of delay in delivery of registered luggage, the carrier must pay in respect of each whole period of 24 hours after delivery has been requested, but subject to a maximum of 14 days:

(a) if the person entitled proves that loss or damage has been suffered thereby, compensation equal to the amount of the loss or damage, up to a maximum of 0,80 units of account per kilogram of gross mass of the luggage or 14 units of account per item of luggage, delivered late;

(b) if the person entitled does not prove that loss or damage has been suffered thereby, liquidated damages of 0,14 units of account per kilogram of gross mass of the luggage or 2,80 units of account per item of luggage, delivered late.

The methods of compensation, by kilogram missing or by item of luggage, shall be determined by the General Conditions of Carriage.

2. In case of total loss of luggage, the compensation provided for in paragraph 1 shall not be payable in addition to that provided for in Article 41.

3. In case of partial loss of luggage, the compensation provided for in paragraph 1 shall be payable in respect of that part of the luggage which has not been lost.

4. In case of damage to luggage not resulting from delay in delivery the compensation provided for in paragraph 1 shall, where appropriate, be payable in addition to that provided for in Article 42.

5. In no case shall the total of compensation provided for in paragraph 1 together with that payable under Articles 41 and 42 exceed the compensation which would be payable in case of total loss of the luggage.

SECTION 3

Vehicles

Article 44

Compensation for delay

1. In case of delay in loading for a reason attributable to the carrier or delay in delivery of a vehicle, the carrier must, if the person entitled proves that loss or damage has been suffered thereby, pay compensation not exceeding the amount of the carriage charge.

2. If, in case of delay in loading for a reason attributable to the carrier, the person entitled elects not to proceed with the contract of carriage, the carriage charge shall be refunded to him. In addition the person entitled may, if he proves that loss or damage has been suffered as a result of the delay, claim compensation not exceeding the carriage charge.

Article 45

Compensation for loss

In case of total or partial loss of a vehicle the compensation payable to the person entitled for the loss or damage proved shall be calculated on the basis of the usual value of the vehicle. It shall not exceed 8 000 units of account. A loaded or unloaded trailer shall be considered as a separate vehicle.

Article 46

Liability in respect of other articles

1. In respect of articles left inside the vehicle or situated in boxes (e.g. luggage or ski boxes) fixed to the vehicle, the carrier shall be liable only for loss or damage caused by his fault. The total compensation payable shall not exceed 1 400 units of account.

2. So far as concerns articles stowed on the outside of the vehicle, including the boxes referred to in paragraph 1, the carrier shall be liable in respect of articles placed on the outside of the vehicle only if it is proved that the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such a loss or damage or recklessly and with knowledge that such loss or damage would probably result.

Article 47

Applicable law

Subject to the provisions of this Section, the provisions of Section 2 relating to liability for luggage shall apply to vehicles.

Chapter IV

Common provisions

Article 48

Loss of right to invoke the limits of liability

The limits of liability provided for in these Uniform Rules as well as the provisions of national law, which limit the compensation to a fixed amount, shall not apply if it is proved that the loss or damage results from an act or omission, which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

Article 49

Conversion and interest

1. Where the calculation of compensation requires the conversion of sums expressed in foreign currency, conversion shall be at the exchange rate applicable on the day and at the place of payment of the compensation.

2. The person entitled may claim interest on compensation, calculated at five per cent per annum, from the day of the claim provided for in Article 55 or, if no such claim has been made, from the day on which legal proceedings were instituted.

3. However, in the case of compensation payable pursuant to Articles 27 and 28, interest shall accrue only from the day on which the events relevant to the assessment of the amount of compensation occurred, if that day is later than that of the claim or the day when legal proceedings were instituted.

4. In the case of luggage, interest shall only be payable if the compensation exceeds 16 units of account per luggage registration voucher.

5. In the case of luggage, if the person entitled does not submit to the carrier, within a reasonable time allotted to him, the supporting documents required for the amount of the claim to be finally settled, no interest shall accrue between the expiry of the time allotted and the actual submission of such documents.

Article 50

Liability in case of nuclear incidents

The carrier shall be relieved of liability pursuant to these Uniform Rules for loss or damage caused by a nuclear incident when the operator of a nuclear installation or another person who is substituted for him is liable for the loss or damage pursuant to the laws and prescriptions of a State governing liability in the field of nuclear energy.

Article 51

Persons for whom the carrier is liable

The carrier shall be liable for his servants and other persons whose services he makes use of for the performance of the carriage, when these servants and other persons are acting within the scope of their functions. The managers of the railway infrastructure on which the carriage is performed shall be considered as persons whose services the carrier makes use of for the performance of the carriage.

Article 52

Other actions

1. In all cases where these Uniform Rules shall apply, any action in respect of liability, on whatever grounds, may be brought against the carrier only subject to the conditions and limitations laid down in these Uniform Rules.

2. The same shall apply to any action brought against the servants and other persons for whom the carrier is liable pursuant to Article 51.

TITLE V

LIABILITY OF THE PASSENGER

Article 53

Special principles of liability

The passenger shall be liable to the carrier for any loss or damage:

(a) resulting from failure to fulfil his obligations pursuant to

1. Articles 10, 14 and 20,

2. the special provisions for the carriage of vehicles, contained in the General Conditions of Carriage, or

3. the Regulation concerning the International Carriage of Dangerous Goods by Rail (RID), or

(b) caused by articles and animals that he brings with him,

unless he proves that the loss or damage was caused by circumstances that he could not avoid and the consequences of which he was unable to prevent, despite the fact that he exercised the diligence required of a conscientious passenger. This provision shall not affect the liability of the carrier pursuant to Articles 26 and 33(1).

TITLE VI

ASSERTION OF RIGHTS

Article 54

Ascertainment of partial loss or damage

1. When partial loss of, or damage to, an article carried in the charge of the carrier (luggage, vehicles) is discovered or presumed by the carrier or alleged by the person entitled, the carrier must without delay, and if possible in the presence of the person entitled, draw up a report stating, according to the nature of the loss or damage, the condition of the article and, as far as possible, the extent of the loss or damage, its cause and the time of its occurrence.

2. A copy of the report must be supplied free of charge to the person entitled.

3. Should the person entitled not accept the findings in the report, he may request that the condition of the luggage or vehicle and the cause and amount of the loss or damage be ascertained by an expert appointed either by the parties to the contract of carriage or by a court or tribunal. The procedure to be followed shall be governed by the laws and prescriptions of the State in which such ascertainment takes place.

Article 55

Claims

1. Claims relating to the liability of the carrier in case of death of, or personal injury to, passengers must be addressed in writing to the carrier against whom an action may be brought. In the case of a carriage governed by a single contract and performed by successive carriers the claims may also be addressed to the first or the last carrier as well as to the carrier having his principal place of business or the branch or agency which concluded the contract of carriage in the State where the passenger is domiciled or habitually resident.

2. Other claims relating to the contract of carriage must be addressed in writing to the carrier specified in Article 56(2) and (3).

3. Documents which the person entitled thinks fit to submit with the claim shall be produced either in the original or as copies, where appropriate, the copies duly certified if the carrier so requires. On settlement of the claim, the carrier may require the surrender of the ticket, the luggage registration voucher and the carriage voucher.

Article 56

Carriers against whom an action may be brought

1. An action based on the liability of the carrier in case of death of, or personal injury to, passengers may only be brought against the carrier who is liable pursuant to Article 26(5).

2. Subject to paragraph 4 other actions brought by passengers based on the contract of carriage may be brought only against the first carrier, the last carrier or the carrier having performed the part of carriage on which the event giving rise to the proceedings occurred.

3. When, in the case of carriage performed by successive carriers, the carrier who must deliver the luggage or the vehicle is entered with his consent on the luggage registration voucher or the carriage voucher, an action may be brought against him in accordance with paragraph 2 even if he has not received the luggage or the vehicle.

4. An action for the recovery of a sum paid pursuant to the contract of carriage may be brought against the carrier who has collected that sum or against the carrier on whose behalf it was collected.

5. An action may be brought against a carrier other than those specified in paragraphs 2 and 4 when instituted by way of counter-claim or by way of exception in proceedings relating to a principal claim based on the same contract of carriage.

6. To the extent that these Uniform Rules apply to the substitute carrier, an action may also be brought against him.

7. If the plaintiff has a choice between several carriers, his right to choose shall be extinguished as soon as he brings an action against one of them; this shall also apply if the plaintiff has a choice between one or more carriers and a substitute carrier.

Article 58

Extinction of right of action in case of death or personal injury

1. Any right of action by the person entitled based on the liability of the carrier in case of death of, or personal injury to, passengers shall be extinguished if notice of the accident to the passenger is not given by the person entitled, within 12 months of his becoming aware of the loss or damage, to one of the carriers to whom a claim may be addressed in accordance with Article 55(1). Where the person entitled gives oral notice of the accident to the carrier, the carrier shall furnish him with an acknowledgement of such oral notice.

2. Nevertheless, the right of action shall not be extinguished if

(a) within the period provided for in paragraph 1 the person entitled has addressed a claim to one of the carriers designated in Article 55(1);

(b) within the period provided for in paragraph 1 the carrier who is liable has learned of the accident to the passenger in some other way;

(c) notice of the accident has not been given, or has been given late, as a result of circumstances not attributable to the person entitled;

(d) the person entitled proves that the accident was caused by fault on the part of the carrier.

Article 59

Extinction of right of action arising from carriage of luggage

1. Acceptance of the luggage by the person entitled shall extinguish all rights of action against the carrier arising from the contract of carriage in case of partial loss, damage or delay in delivery.

2. Nevertheless, the right of action shall not be extinguished:

(a) in case of partial loss or damage, if

1. the loss or damage was ascertained in accordance with Article 54 before the acceptance of the luggage by the person entitled,

2. the ascertainment which should have been carried out in accordance with Article 54 was omitted solely through the fault of the carrier;

(b) in case of loss or damage which is not apparent whose existence is ascertained after acceptance of the luggage by the person entitled, if he

1. asks for ascertainment in accordance with Article 54 immediately after discovery of the loss or damage and not later than three days after the acceptance of the luggage, and

2. in addition, proves that the loss or damage occurred between the time of taking over by the carrier and the time of delivery;

(c) in case of delay in delivery, if the person entitled has, within twenty-one days, asserted his rights against one of the carriers specified in Article 56(3);

(d) if the person entitled proves that the loss or damage was caused by fault on the part of the carrier.

Article 60

Limitation of actions

1. The period of limitation of actions for damages based on the liability of the carrier in case of death of, or personal injury to, passengers shall be:

(a) in the case of a passenger, three years from the day after the accident;

(b) in the case of other persons entitled, three years from the day after the death of the passenger, subject to a maximum of five years from the day after the accident.

2. The period of limitation for other actions arising from the contract of carriage shall be one year. Nevertheless, the period of limitation shall be two years in the case of an action for loss or damage resulting from an act or omission committed either with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

3. The period of limitation provided for in paragraph 2 shall run for actions:

(a) for compensation for total loss, from the fourteenth day after the expiry of the period of time provided for in Article 22(3);

(b) for compensation for partial loss, damage or delay in delivery, from the day when delivery took place;

(c) in all other cases involving the carriage of passengers, from the day of expiry of validity of the ticket.

The day indicated for the commencement of the period of limitation shall not be included in the period.

4. […]

5. […]

6. Otherwise, the suspension and interruption of periods of limitation shall be governed by national law.

TITLE VII

RELATIONS BETWEEN CARRIERS

Article 61

Apportionment of the carriage charge

1. Any carrier who has collected or ought to have collected a carriage charge must pay to the carriers concerned their respective shares of such a charge. The methods of payment shall be fixed by agreement between the carriers.

2. Article 6(3), Article 16(3) and Article 25 shall also apply to the relations between successive carriers.

Article 62

Right of recourse

1. A carrier who has paid compensation pursuant to these Uniform Rules shall have a right of recourse against the carriers who have taken part in the carriage in accordance with the following provisions:

(a) the carrier who has caused the loss or damage shall be solely liable for it;

(b) when the loss or damage has been caused by several carriers, each shall be liable for the loss or damage he has caused; if such distinction is impossible, the compensation shall be apportioned between them in accordance with letter c);

(c) if it cannot be proved which of the carriers has caused the loss or damage, the compensation shall be apportioned between all the carriers who have taken part in the carriage, except those who prove that the loss or damage was not caused by them; such apportionment shall be in proportion to their respective shares of the carriage charge.

2. In the case of insolvency of any one of these carriers, the unpaid share due from him shall be apportioned among all the other carriers who have taken part in the carriage, in proportion to their respective shares of the carriage charge.

Article 63

Procedure for recourse

1. The validity of the payment made by the carrier exercising a right of recourse pursuant to Article 62 may not be disputed by the carrier against whom the right to recourse is exercised, when compensation has been determined by a court or tribunal and when the latter carrier, duly served with notice of the proceedings, has been afforded an opportunity to intervene in the proceedings. The court or tribunal seized of the principal action shall determine what time shall be allowed for such notification of the proceedings and for intervention in the proceedings.

2. A carrier exercising his right of recourse must present his claim in one and the same proceedings against all the carriers with whom he has not reached a settlement, failing which he shall lose his right of recourse in the case of those against whom he has not taken proceedings.

3. The court or tribunal shall give its decision in one and the same judgment on all recourse claims brought before it.

4. The carrier wishing to enforce his right of recourse may bring his action in the courts or tribunals of the State on the territory of which one of the carriers participating in the carriage has his principal place of business, or the branch or agency which concluded the contract of carriage.

5. When the action must be brought against several carriers, the plaintiff carrier shall be entitled to choose the court or tribunal in which he will bring the proceedings from among those having competence pursuant to paragraph 4.

6. Recourse proceedings may not be joined with proceedings for compensation taken by the person entitled under the contract of carriage.

Article 64

Agreements concerning recourse

The carriers may conclude agreements which derogate from Articles 61 and 62.

ANNEX II

MINIMUM INFORMATION TO BE PROVIDED BY RAILWAY UNDERTAKINGS AND/OR BY TICKET VENDORS

Part I: Pre-journey information

General conditions applicable to the contract

Time schedules and conditions for the fastest trip

Time schedules and conditions for the lowest fares

Accessibility, access conditions and availability on board of facilities for disabled persons and persons with reduced mobility

Accessibility and access conditions for bicycles

Availability of seats in smoking and non-smoking, first and second class as well as couchettes and sleeping carriages

Any activities likely to disrupt or delay services

Availability of on-board services

Procedures for reclaiming lost luggage

Procedures for the submission of complaints.

Part II: Information during the journey

On-board services

Next station

Delays

Main connecting services

Security and safety issues.

ANNEX III

MINIMUM SERVICE QUALITY STANDARDS

Information and tickets

Punctuality of services, and general principles to cope with disruptions to services

Cancellations of services

Cleanliness of rolling stock and station facilities (air quality in carriages, hygiene of sanitary facilities, etc.)

Customer satisfaction survey

Complaint handling, refunds and compensation for non-compliance with service quality standards

Assistance provided to disabled persons and persons with reduced mobility.

I

(Acts whose publication is obligatory)

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Having consulted of the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The single market for air services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for air travel comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same right as all other citizens to free movement, freedom of choice and non-discrimination. This applies to air travel as to other areas of life.

(2) Disabled persons and persons with reduced mobility should therefore be accepted for carriage and not refused transport on the grounds of their disability or lack of mobility, except for reasons which are justified on the grounds of safety and prescribed by law. Before accepting reservations from disabled persons or persons with reduced mobility, air carriers, their agents and tour operators should make all reasonable efforts to verify whether there is a reason which is justified on the grounds of safety and which would prevent such persons being accommodated on the flights concerned.

(3) This Regulation should not affect other rights of passengers established by Community legislation and notably Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [3] and 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 air passengers in the event of denied boarding and of cancellation or long delay of flights [4] **.** Where the same event would give rise to the same right of reimbursement or rebooking under either of those legislative acts as well as under this Regulation, the person so entitled should be allowed to exercise that right once only, at his or her discretion.

(4) In order to give disabled persons and persons with reduced mobility opportunities for air travel comparable to those of other citizens, assistance to meet their particular needs should be provided at the airport as well as on board aircraft, by employing the necessary staff and equipment. In the interests of social inclusion, the persons concerned should receive this assistance without additional charge.

(5) Assistance given at airports situated in the territory of a Member State to which the Treaty applies should, among other things, enable disabled persons and persons with reduced mobility to proceed from a designated point of arrival at an airport to an aircraft and from the aircraft to a designated point of departure from the airport, including embarking and disembarking. These points should be designated at least at the main entrances to terminal buildings, in areas with check-in counters, in train, light rail, metro and bus stations, at taxi ranks and other drop-off points, and in airport car parks. The assistance should be organised so as to avoid interruption and delay, while ensuring high and equivalent standards throughout the Community and making best use of resources, whatever airport or air carrier is involved.

[1] OJ C 24, 31.1.2006, p. 12.

[2] Opinion of the European Parliament of 15 December 2005 (not yet published in the Official Journal), and Council Decision of 9 June 2006.

[3] OJ L 158, 23.6.1990, p. 59.

[4] OJ L 46, 17.2.2004, p. 1.

(6) To achieve these aims, ensuring high quality assistance at airports should be the responsibility of a central body. As managing bodies of airports play a central role in providing services throughout their airports, they should be given this overall responsibility.

(7) Managing bodies of airports may provide the assistance to disabled persons and persons with reduced mobility themselves. Alternatively, in view of the positive role played in the past by certain operators and air carriers, managing bodies may contract with third parties for the supply of this assistance, without prejudice to the application of relevant rules of Community law, including those on public procurement.

(8) Assistance should be financed in such a way as to spread the burden equitably among all passengers using an airport and to avoid disincentives to the carriage of disabled persons and persons with reduced mobility. A charge levied on each air carrier using an airport, proportionate to the number of passengers it carries to or from the airport, appears to be the most effective way of funding.

(9) With a view to ensuring, in particular, that the charges levied on an air carrier are commensurate with the assistance provided to disabled persons and persons with reduced mobility, and that these charges do not serve to finance activities of the managing body other than those relating to the provision of such assistance, the charges should be adopted and applied in full transparency. Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports [1] and in particular the provisions on separation of accounts, should therefore apply where this does not conflict with this Regulation.

(10) In organising the provision of assistance to disabled persons and persons with reduced mobility, and the training of their personnel, airports and air carriers should have regard to document 30 of the European Civil Aviation Conference (ECAC), Part I, Section 5 and its associated annexes, in particular the Code of Good Conduct in Ground Handling for Persons with Reduced Mobility as set out in Annex J thereto at the time of adoption of this Regulation.

(11) In deciding on the design of new airports and terminals, and as part of major refurbishments, managing bodies of airports should, where possible, take into account the needs of disabled persons and persons with reduced mobility. Similarly, air carriers should, where possible, take such needs into account when deciding on the design of new and newly refurbished aircraft.

(12) 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 on the free movement of such data [2] should be strictly enforced in order to guarantee respect for the privacy of disabled persons and persons with reduced mobility, and ensure that the information requested serves merely to fulfil the assistance obligations laid down in this Regulation and is not used against passengers seeking the service in question.

(13) All essential information provided to air passengers should be provided in alternative formats accessible to disabled persons and persons with reduced mobility, and should be in at least the same languages as the information made available to other passengers.

(14) Where wheelchairs or other mobility equipment or assistive devices are lost or damaged during handling at the airport or during transport on board aircraft, the passenger to whom the equipment belongs should be compensated, in accordance with rules of international, Community and national law.

(15) Member States should supervise and ensure compliance with this Regulation and designate an appropriate body to carry out enforcement tasks. This supervision does not affect the rights of disabled persons and persons with reduced mobility to seek legal redress from courts under national law.

(16) It is important that a disabled person or person with reduced mobility who considers that this Regulation has been infringed be able to bring the matter to the attention of the managing body of the airport or to the attention of the air carrier concerned, as the case may be. If the disabled person or person with reduced mobility cannot obtain satisfaction in such way, he or she should be free to make a complaint to the body or bodies designated to that end by the relevant Member State.

(17) Complaints concerning assistance given at an airport should be addressed to the body or bodies designated for the enforcement of this Regulation by the Member State where the airport is situated. Complaints concerning assistance given by an air carrier should be addressed to the body or bodies designated for the enforcement of this Regulation by the Member State which has issued the operating licence to the air carrier.

[1] OJ L 272, 25.10.1996, p. 36. Directive as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

[2] OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003.

(18) Member States should lay down penalties applicable to infringements of this Regulation and ensure that those penalties are applied. The penalties, which could include ordering the payment of compensation to the person concerned, should be effective, proportionate and dissuasive.

(19) Since the objectives of this Regulation, namely to ensure high and equivalent levels of protection and assistance throughout the Member States and to ensure that economic agents operate under harmonised conditions in a single market, cannot sufficiently be achieved by the Member States and can therefore, by reason of the scale or effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as 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.

(20) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

(21) Arrangements for greater cooperation over the use of Gibraltar airport were agreed in London on 2 December 1987 by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland in a joint declaration by the Ministers of Foreign Affairs of the two countries. Such arrangements have yet to enter into operation,

HAVE ADOPTED THIS REGULATION:

Article 1

Purpose and scope

1. This Regulation establishes rules for the protection of and provision of assistance to disabled persons and persons with reduced mobility travelling by air, both to protect them against discrimination and to ensure that they receive assistance.

2. The provisions of this Regulation shall apply to disabled persons and persons with reduced mobility, using or intending to use commercial passenger air services on departure from, on transit through, or on arrival at an airport, when the airport is situated in the territory of a Member State to which the Treaty applies.

3. Articles 3, 4 and 10 shall also apply to passengers departing from an airport situated in a third country to an airport situated in the territory of a Member State to which the Treaty applies, if the operating carrier is a Community air carrier.

4. This Regulation shall not affect the rights of passengers established by Directive 90/314/EEC and under Regulation (EC) No 261/2004.

5. In so far as the provisions of this Regulation conflict with those of Directive 96/67/EC, this Regulation shall prevail.

6. Application of this Regulation to Gibraltar airport is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland with regard to the dispute over sovereignty over the territory in which the airport is situated.

7. Application of this Regulation to Gibraltar airport shall be suspended until the arrangements included in the Joint Declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland on 2 December 1987 enter into operation. The Governments of Spain and of the United Kingdom shall inform the Council of the date of entry into operation.

Article 2

Definitions

For the purposes of this Regulation the following definitions shall apply:

(a) 'disabled person' or 'person with reduced mobility' means any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotor, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention and the adaptation to his or her particular needs of the service made available to all passengers;

(b) 'air carrier' means an air transport undertaking with a valid operating licence;

(c) 'operating air carrier' means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger;

(d) 'Community air carrier' means an air carrier with a valid operating licence granted by a Member State in accordance with Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers [1];

(e) 'tour operator' means, with the exception of an air carrier, an organiser or retailer within the meaning of Article 2(2) and (3) of Directive 90/314/EEC;

(f) 'managing body of the airport' or 'managing body' means a body which notably has as its objective under national legislation the administration and management of airport infrastructures, and the coordination and control of the activities of the various operators present in an airport or airport system;

[1] OJ L 240, 24.8.1992, p. 1.

(g) 'airport user' means any natural or legal person responsible for the carriage of passengers by air from or to the airport in question;

(h) 'Airport Users Committee' means a committee of representatives of airport users or organisations representing them;

(i) 'reservation' means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator;

(j) 'airport' means any area of land specially adapted for the landing, taking-off and manoeuvres of aircraft, including ancillary installations which these operations may involve for the requirements of aircraft traffic and services including installations needed to assist commercial air services;

(k) 'airport car park' means a car park, within the airport boundaries or under the direct control of the managing body of an airport, which directly serves the passengers using that airport;

(l) 'commercial passenger air service' means a passenger air transport service operated by an air carrier through a scheduled or non-scheduled flight offered to the general public for valuable consideration, whether on its own or as part of a package.

Article 3

Prevention of refusal of carriage

An air carrier or its agent or a tour operator shall not refuse, on the grounds of disability or of reduced mobility:

(a) to accept a reservation for a flight departing from or arriving at an airport to which this Regulation applies;

(b) to embark a disabled person or a person with reduced mobility at such an airport, provided that the person concerned has a valid ticket and reservation.

Article 4

Derogations, special conditions and information

1. Notwithstanding the provisions of Article 3, an air carrier or its agent or a tour operator may refuse, on the grounds of disability or of reduced mobility, to accept a reservation from or to embark a disabled person or a person with reduced mobility:

(a) in order to meet applicable safety requirements established by international, Community or national law or in order to meet safety requirements established by the authority that issued the air operator's certificate to the air carrier concerned;

(b) if the size of the aircraft or its doors makes the embarkation or carriage of that disabled person or person with reduced mobility physically impossible.

In the event of refusal to accept a reservation on the grounds referred to under points (a) or (b) of the first subparagraph, the air carrier, its agent or the tour operator shall make reasonable efforts to propose an acceptable alternative to the person in question.

A disabled person or a person with reduced mobility who has been denied embarkation on the grounds of his or her disability or reduced mobility and any person accompanying this person pursuant to paragraph 2 of this Article shall be offered the right to reimbursement or re-routing as provided for in Article 8 of Regulation (EC) No 261/2004. The right to the option of a return flight or re-routing shall be conditional upon all safety requirements being met.

2. Under the same conditions referred to in paragraph 1, first subparagraph, point (a), an air carrier or its agent or a tour operator may require that a disabled person or person with reduced mobility be accompanied by another person who is capable of providing the assistance required by that person.

3. An air carrier or its agent shall make publicly available, in accessible formats and in at least the same languages as the information made available to other passengers, the safety rules that it applies to the carriage of disabled persons and persons with reduced mobility, as well as any restrictions on their carriage or on that of mobility equipment due to the size of aircraft. A tour operator shall make such safety rules and restrictions available for flights included in package travel, package holidays and package tours which it organises, sells or offers for sale.

4. When an air carrier or its agent or a tour operator exercises a derogation under paragraphs 1 or 2, it shall immediately inform the disabled person or person with reduced mobility of the reasons therefor. On request, an air carrier, its agent or a tour operator shall communicate these reasons in writing to the disabled person or person with reduced mobility, within five working days of the request.

Article 5

Designation of points of arrival and departure

1. In cooperation with airport users, through the Airport Users Committee where one exists, and relevant organisations representing disabled persons and persons with reduced mobility, the managing body of an airport shall, taking account of local conditions, designate points of arrival and departure within the airport boundary or at a point under the direct control of the managing body, both inside and outside terminal

buildings, at which disabled persons or persons with reduced mobility can, with ease, announce their arrival at the airport and request assistance.

2. The points of arrival and departure referred to in paragraph 1, shall be clearly signed and shall offer basic information about the airport, in accessible formats.

Article 6

Transmission of information

1. Air carriers, their agents and tour operators shall take all measures necessary for the receipt, at all their points of sale in the territory of the Member States to which the Treaty applies, including sale by telephone and via the Internet, of notifications of the need for assistance made by disabled persons or persons with reduced mobility.

2. When an air carrier or its agent or a tour operator receives a notification of the need for assistance at least 48 hours before the published departure time for the flight, it shall transmit the information concerned at least 36 hours before the published departure time for the flight:

(a) to the managing bodies of the airports of departure, arrival and transit, and

(b) to the operating air carrier, if a reservation was not made with that carrier, unless the identity of the operating air carrier is not known at the time of notification, in which case the information shall be transmitted as soon as practicable.

3. In all cases other than those mentioned in paragraph 2, the air carrier or its agent or tour operator shall transmit the information as soon as possible.

4. As soon as possible after the departure of the flight, an operating air carrier shall inform the managing body of the airport of destination, if situated in the territory of a Member State to which the Treaty applies, of the number of disabled persons and persons with reduced mobility on that flight requiring assistance specified in Annex I and of the nature of that assistance.

Article 7

Right to assistance at airports

1. When a disabled person or person with reduced mobility arrives at an airport for travel by air, the managing body of the airport shall be responsible for ensuring the provision of the assistance specified in Annex I in such a way that the person is able to take the flight for which he or she holds a reservation, provided that the notification of the person's particular needs for such assistance has been made to the air carrier or its agent or the tour operator concerned at least 48 hours before the published time of departure of the flight. This notification shall also cover a return flight, if the outward flight and the return flight have been contracted with the same air carrier.

2. Where use of a recognised assistance dog is required, this shall be accommodated provided that notification of the same is made to the air carrier or its agent or the tour operator in accordance with applicable national rules covering the carriage of assistance dogs on board aircraft, where such rules exist.

3. If no notification is made in accordance with paragraph 1, the managing body shall make all reasonable efforts to provide the assistance specified in Annex I in such a way that the person concerned is able to take the flight for which he or she holds a reservation.

4. The provisions of paragraph 1 shall apply on condition that:

(a) the person presents himself or herself for check-in:

  (i) at the time stipulated in advance and in writing (including by electronic means) by the air carrier or its agent or the tour operator, or

  (ii) if no time is stipulated, not later than one hour before the published departure time, or

(b) the person arrives at a point within the airport boundary designated in accordance with Article 5:

  (i) at the time stipulated in advance and in writing (including by electronic means) by the air carrier or its agent or the tour operator, or

  (ii) if no time is stipulated, not later than two hours before the published departure time.

5. When a disabled person or person with reduced mobility transits through an airport to which this Regulation applies, or is transferred by an air carrier or a tour operator from the flight for which he or she holds a reservation to another flight, the managing body shall be responsible for ensuring the provision of the assistance specified in Annex I in such a way that the person is able to take the flight for which he or she holds a reservation.

6. On the arrival by air of a disabled person or person with reduced mobility at an airport to which this Regulation applies, the managing body of the airport shall be responsible for ensuring the provision of the assistance specified in Annex I in such a way that the person is able to reach his or her point of departure from the airport as referred to in Article 5.

7. The assistance provided shall, as far as possible, be appropriate to the particular needs of the individual passenger.

Article 8

Responsibility for assistance at airports

1. The managing body of an airport shall be responsible for ensuring the provision of the assistance specified in Annex I without additional charge to disabled persons and persons with reduced mobility.

2. The managing body may provide such assistance itself. Alternatively, in keeping with its responsibility, and subject always to compliance with the quality standards referred to in Article 9(1), the managing body may contract with one or more other parties for the supply of the assistance. In cooperation with airport users, through the Airport Users Committee where one exists, the managing body may enter into such a contract or contracts on its own initiative or on request, including from an air carrier, and taking into account the existing services at the airport concerned. In the event that it refuses such a request, the managing body shall provide written justification.

3. The managing body of an airport may, on a non-discriminatory basis, levy a specific charge on airport users for the purpose of funding this assistance.

4. This specific charge shall be reasonable, cost-related, transparent and established by the managing body of the airport in cooperation with airport users, through the Airport Users Committee where one exists or any other appropriate entity. It shall be shared among airport users in proportion to the total number of all passengers that each carries to and from that airport.

5. The managing body of an airport shall separate the accounts of its activities relating to the assistance provided to disabled persons and persons with reduced mobility from the accounts of its other activities, in accordance with current commercial practice.

6. The managing body of an airport shall make available to airport users, through the Airport Users Committee where one exists or any other appropriate entity, as well as to the enforcement body or bodies referred to in Article 14, an audited annual overview of charges received and expenses made in respect of the assistance provided to disabled persons and persons with reduced mobility.

Article 9

Quality standards for assistance

1. With the exception of airports whose annual traffic is less than 150 000 commercial passenger movements, the managing body shall set quality standards for the assistance specified in Annex I and determine resource requirements for meeting them, in cooperation with airport users, through the Airport Users Committee where one exists, and organisations representing disabled passengers and passengers with reduced mobility.

2. In the setting of such standards, full account shall be taken of internationally recognised policies and codes of conduct concerning facilitation of the transport of disabled persons or persons with reduced mobility, notably the ECAC Code of Good Conduct in Ground Handling for Persons with Reduced Mobility.

3. The managing body of an airport shall publish its quality standards.

4. An air carrier and the managing body of an airport may agree that, for the passengers whom that air carrier transports to and from the airport, the managing body shall provide assistance of a higher standard than the standards referred to in paragraph 1 or provide services additional to those specified in Annex I.

5. For the purpose of funding either of these, the managing body may levy a charge on the air carrier additional to that referred to in Article 8(3), which shall be transparent, cost-related and established after consultation of the air carrier concerned.

Article 10

Assistance by air carriers

An air carrier shall provide the assistance specified in Annex II without additional charge to a disabled person or person with reduced mobility departing from, arriving at or transiting through an airport to which this Regulation applies provided that the person in question fulfils the conditions set out in Article 7(1), (2) and (4).

Article 11

Training

Air carriers and airport managing bodies shall:

(a) ensure that all their personnel, including those employed by any sub-contractor, providing direct assistance to disabled persons and persons with reduced mobility have knowledge of how to meet the needs of persons having various disabilities or mobility impairments;

(b) provide disability-equality and disability-awareness training to all their personnel working at the airport who deal directly with the travelling public;

(c) ensure that, upon recruitment, all new employees attend disability-related training and that personnel receive refresher training courses when appropriate.

Article 12

Compensation for lost or damaged wheelchairs, other mobility equipment and assistive devices

Where wheelchairs or other mobility equipment or assistive devices are lost or damaged whilst being handled at the airport or

transported on board aircraft, the passenger to whom the equipment belongs shall be compensated, in accordance with rules of international, Community and national law.

Article 13

Exclusion of waiver

Obligations towards disabled persons and persons with reduced mobility pursuant to this Regulation shall not be limited or waived.

Article 14

Enforcement body and its tasks

1. Each Member State shall designate a body or bodies responsible for the enforcement of this Regulation as regards flights departing from or arriving at airports situated in its territory. Where appropriate, this body or bodies shall take the measures necessary to ensure that the rights of disabled persons and persons with reduced mobility are respected, including compliance with the quality standards referred to in Article 9(1). The Member States shall inform the Commission of the body or bodies designated.

2. Member States shall, where appropriate, provide that the enforcement body or bodies designated under paragraph 1 shall also ensure the satisfactory implementation of Article 8, including as regards the provisions on charges with a view to avoiding unfair competition. They may also designate a specific body to that effect.

Article 15

Complaint procedure

1. A disabled person or person with reduced mobility who considers that this Regulation has been infringed may bring the matter to the attention of the managing body of the airport or to the attention of the air carrier concerned, as the case may be.

2. If the disabled person or person with reduced mobility cannot obtain satisfaction in such way, complaints may be made to any body or bodies designated under Article 14(1), or to any other competent body designated by a Member State, about an alleged infringement of this Regulation.

3. A body in one Member State which receives a complaint concerning a matter that comes under the responsibility of a designated body of another Member State shall forward the complaint to the body of that other Member State.

4. The Member States shall take measures to inform disabled persons and persons with reduced mobility of their rights under this Regulation and of the possibility of complaint to this designated body or bodies.

Article 16

Penalties

The Member States shall lay down rules on penalties applicable to infringements of this Regulation and shall take all the measures necessary to ensure that those rules are implemented. The penalties provided for must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission and shall notify it without delay of any subsequent amendment affecting them.

Article 17

Report

The Commission shall report to the European Parliament and the Council by 1 January 2010 at the latest on the operation and the effects of this Regulation. The report shall be accompanied where necessary by legislative proposals implementing in further detail the provisions of this Regulation, or revising it.

Article 18

Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

It shall apply with effect from 26 July 2008, except Articles 3 and 4, which shall apply with effect from 26 July 2007.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 5 July 2006.

For the European Parliament
The President
J. BORRELL FONTELLES

The President
For the Council
P. LEHTOMÄKI

ANNEX I

Assistance under the responsibility of the managing bodies of airports

Assistance and arrangements necessary to enable disabled persons and persons with reduced mobility to:

— communicate their arrival at an airport and their request for assistance at the designated points inside and outside terminal buildings mentioned in Article 5,

— move from a designated point to the check-in counter,

— check-in and register baggage,

— proceed from the check-in counter to the aircraft, with completion of emigration, customs and security procedures,

— board the aircraft, with the provision of lifts, wheelchairs or other assistance needed, as appropriate,

— proceed from the aircraft door to their seats,

— store and retrieve baggage on the aircraft,

— proceed from their seats to the aircraft door,

— disembark from the aircraft, with the provision of lifts, wheelchairs or other assistance needed, as appropriate,

— proceed from the aircraft to the baggage hall and retrieve baggage, with completion of immigration and customs procedures,

— proceed from the baggage hall to a designated point,

— reach connecting flights when in transit, with assistance on the air and land sides and within and between terminals as needed,

— move to the toilet facilities if required.

Where a disabled person or person with reduced mobility is assisted by an accompanying person, this person must, if requested, be allowed to provide the necessary assistance in the airport and with embarking and disembarking.

Ground handling of all necessary mobility equipment, including equipment such as electric wheelchairs subject to advance warning of 48 hours and to possible limitations of space on board the aircraft, and subject to the application of relevant legislation concerning dangerous goods.

Temporary replacement of damaged or lost mobility equipment, albeit not necessarily on a like-for-like basis.

Ground handling of recognised assistance dogs, when relevant.

Communication of information needed to take flights in accessible formats.

ANNEX II

Assistance by air carriers

Carriage of recognised assistance dogs in the cabin, subject to national regulations.

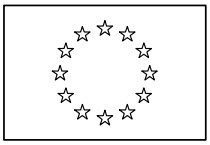
In addition to medical equipment, transport of up to two pieces of mobility equipment per disabled person or person with reduced mobility, including electric wheelchairs (subject to advance warning of 48 hours and to possible limitations of space on board the aircraft, and subject to the application of relevant legislation concerning dangerous goods.

Communication of essential information concerning a flight in accessible formats.

The making of all reasonable efforts to arrange seating to meet the needs of individuals with disability or reduced mobility on request and subject to safety requirements and availability.

Assistance in moving to toilet facilities if required.

Where a disabled person or person with reduced mobility is assisted by an accompanying person, the air carrier will make all reasonable efforts to give such person a seat next to the disabled person or person with reduced mobility.



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 7.8.2008
COM(2008) 510 final

COMMUNICATION FROM THE COMMISSION

Communication on the scope of the liability of air carriers and airports in the event of destroyed, damaged or lost mobility equipment of passengers with reduced mobility when travelling by air.

Text with EEA-relevance

COMMUNICATION FROM THE COMMISSION

Communication on the scope of the liability of air carriers and airports in the event of destroyed, damaged or lost mobility equipment of passengers with reduced mobility when travelling by air.

Text with EEA-relevance

1. BACKGROUND

On 5 July 2006, the Council and the European Parliament adopted the Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air[1] (hereinafter referred to as "the Regulation"). The overall objective of the Regulation is to ensure that disabled passengers and persons with reduced mobility (hereinafter referred to as PRM) are not discriminated against when travelling by air. On 30 November 2005, in the course of the political negotiation process on the Commission proposal, and in relation to the future Article 12 concerning 'Compensation for lost or damaged wheelchairs, other mobility equipment and assistive devices', the Commission presented an statement for the minutes[2], in which the Commission committed to launch an study and to report on it, regarding the possibility of enhancing the existing rights under Community, national or international law of air passengers whose wheelchairs or other mobility equipment are destroyed, damaged or lost during handling at an airport or during transport on-board aircraft.

The Commission published a contract notice[3] for a *"Study on the compensation thresholds for damaged or lost equipment and devices belonging to air passengers with reduced mobility"* (hereinafter referred as to "the Study"), which is available on the Commission website. The purpose of this Communication is to report on the outcome of the study and the possibility to enhance existing rights.

2. THE SCOPE OF THE PROBLEM.

"Damaged or lost luggage is annoying. Damaged or lost mobility equipment can destroy the whole journey and complicate life considerably for a long time. It is a loss of independence and dignity[4]."

A significant proportion of the current EU population has mobility problems which include needing a wheelchair other mobility equipment or assistive devices (hereinafter referred to as "mobility equipment"). The proportion of PRM within the population is likely to increase as the EU population ages.

The Commission does not wish to reproduce in this Communication the data already provided in the study, which should be read as a complement to this Communication. Nevertheless, on

---

1 OJ L 204/1 of 26.07.2006

2 Council working document nº 15206/05 (COD 2005/007).

3 Contract notice 2006/S 111-118193 of 14.06.2006

4 From a PRM association's answer to the consultants.

the basis of those data, the Commission notes that there are clear indications that passengers with reduced mobility who require mobility equipment, are travelling by air less than the general population. It is quite likely that fear of loss, damage or destruction of their mobility equipment is a contributory factor in deterring them from travelling and, therefore, preventing their integration in society. This fear is based on several objective reasons:

(1) The loss or damage of wheelchairs or other mobility equipment takes away the independence of the PRM and affects every aspect of their daily lives until the matter is properly resolved.

(2) PRM face risks to their health and safety if their mobility equipment is lost, damaged or destroyed, as replacements are not always provided and, even when provided, replacements are not always suitable for the person's needs.

(3) The time taken by airlines or airports to resolve practical problems presented by the damage or loss of mobility equipment is inappropriate given the urgency of the need.

(4) The existing procedures and the average training level of the staff of most airlines and airports regarding how to act when confronted with a loss or damage of mobility equipment are deficient.

(5) The financial implications of the loss, damage or destruction of mobility equipment present an additional risk for PRM when travelling by air in comparison with other passengers.

(6) The provision of compensation for damaged, destroyed or lost mobility equipment varies from air carrier to air carrier, and for airports

3. OUTCOME OF THE STUDY: THE CHALLENGES

The actual number of accidents per year and per company involving incidents with mobility equipment is very low. The total number of relevant complaints is somewhere in the range between 600 and 1000 cases per year, compared to 706 million air passengers carried per year in the European Union[5]. That means a ratio between less than one and one and a half complaints as a maximum in a million of passengers.

The study analyses both the experience in the USA and the situation in Europe. The two analysis provide a reasonable basis for believing that this estimate is close to the actual number. The study has also concluded that there are a number of outstanding issues regarding both the quantitative aspects and the qualitative aspects of the problem worth to be highlighted:

3.1. Quantitative objective: to reduce the number of incidents

The number of events of destroyed, damages or lost mobility equipment of PRM is linked to the correct handling and stowage of mobility equipment onboard aircraft and storage at airports is a fundamental part of the conditions of transport of PRM in order to meet their needs, and a skill for which staff must be properly trained. The objective should remain to allow the PRM to use her/his personal device as long as possible. Ideally, the mobility

[5] 705.8 million air passengers carried in the EU in 2005.

equipment should be handed over by the PRM and back to him at the door of the aircraft in all those cases where the PRM cannot use their own mobility equipment onboard. Other procedures may be set up when required for safety, security or practical reasons.

The attachment to the 2001 Airline Passenger Service Commitment[6], signed by the majority of European national carriers (hereinafter referred as to the Airline Commitment) states that signatory airlines must take all reasonable steps to avoid loss or damage to mobility equipment or other disability assistive devices; they will develop their own individual service plans incorporating the Airline Commitment*;* They will establish staff training programmes and introduce changes to their computer systems to implement the Airline Commitment; and that *"PRM must be enabled to remain independent to the greatest possible extent"*.

The Airport Voluntary Commitment on Air Passenger Service (hereinafter referred to as "the Airport Commitment"), developed by European airports under the auspices of Airports Council International Europe[7] states that *"Staff will be given appropriate training in understanding and meeting the needs of PRMs"*. The aim for the signatories was to develop their own individual service plans on the basis of the Commitment and to incorporate the appropriate provisions of the European Civil Aviation Conference (ECAC) Document 30 (Section 5)[8], and the International Civil Aviation Organisation[9] (ICAO Annex 9).

Point 5.2.3.2 of ECAC document 30[10] states that *"Member States should promote the distribution of a booklet to airline and airport operator personnel on procedures and facilities to be provided to assist PRM, which would contain all the necessary information concerning the conditions of transport of such persons and the assistance to be provided to them, as well as the steps to be taken by them. They should ensure that airlines include in their manuals all procedures concerning PRM"*. Point 5.5 of the same document says "*Member States should ensure the provision at airports of a ground handling service for PRMs comprising: staff trained and qualified to meet their needs (…) the appropriate equipment to assist them."*

However, those voluntary agreements are not always properly honoured. Firstly, few companies and airports in the EU have actually developed their own plans or customer policies to implement those voluntary agreements. Secondly, those that have done so have adopted such different plans or policies that they result in widely differing levels of protection for PRM. Thirdly, those plans and customer policies are not always published, which makes it very difficult for PRM to know what to expect in advance.

In the context of the Airport Commitment, the majority of airports spontaneously provide assistance to passengers with reduced mobility. However, the procedures whereby the PRM is allowed to get to the door of the aircraft in their own wheelchair, or receive their own wheelchair on arrival, vary from airport to airport

---

6 The Airline Passenger Service Commitment: see article 8 and attachment

7 ACI Europe (2001), Airport Voluntary Commitment on Air Passenger Service and its Special Protocol to Meet the Needs of People with Reduced Mobility.

8 ECAC Policy Statement in the Field of Civil Aviation Facilitation (ECAC.CEAC DOC No. 30 (PART I) 10th Edition/December 2006

9 Standards and Recommended Practices of the International Civil Aviation Organization (Annex 9 of the Chicago Convention).

10 See footnote 8.

3.2. Qualitative objective: to minimise the consequences of an incident.

3.2.1. The current lack of a common procedure leading to immediate solutions on the spot.

The extent of damage sustained to mobility equipment can have serious implications not just because of its cost. The issue is also about both the time during which the PRM will be unable to use their equipment, and the long period until compensation is finally paid to them. The difficulties of establishing where to send complaints about damage and appeals for assistance on arrival, in what is often an unfamiliar airport, adds to the time and stress involved in finding even a temporary solution to the practical problems of everyday life when without mobility equipment.

There are currently no international, Community or national legislation on offering immediate assistance to PRM whose mobility equipment has been lost, damaged or destroyed, or on how this immediate assistance should be provided, or what are the essential aspects of such assistance.

The Airline Commitment, does not give details of how related claims for compensation are to be dealt with or what action should be taken on the spot when a wheelchair or other mobility equipment is damaged or lost.

The majority of airports do not have a policy regarding claims for damaged or destroyed wheelchairs or mobility equipment. The provision of compensation and the procedures by which airports provide a replacement vary from airport to airport despite the existence of the Airport Commitment[11]. This may result in gaps and inconsistencies regarding replacement and compensation for PRM whose equipment was destroyed or damaged during the time when the airport is in charge. This certainly results in uncertainty and confusion for PRM, who never know how to act or to whom they should turn in the event of an accident involving their mobility equipment.

3.2.2. The difference between the nature and the limits of the liability of airlines and the liability of airports.

Traditionally there has been a difference between the nature and the limits of the liability of the airlines and the airports. This difference may cause confusion among stakeholders.

3.2.2.1. Transport of equipment on board an aircraft (airline liability)

Currently, assistance to PRM is provided by air carriers in the framework of the ground-handling. Air carriers can provide the assistance either directly, through a third company or through the airport when it acts as a service provider for the air carrier. Airline liability is currently limited by a miscellany of international conventions[12], Community Regulations

---

11 See footnote 6.

12 Those conventions are: 1 -The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 10/1929, abbreviated: the Warsaw Convention (1929). 2 -The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929; signed in the Hague on 28/09/1955, abbreviated: The Hague Protocol (1955). 3 -The Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28/05/1999, abbreviated: the Montreal Convention (1999).

implementing those international conventions within the EU[13], and legal or administrative procedures that other countries impose on EU companies that wish to enter their national markets. Companies may waive their limited liability and agree to compensate the full value of the lost mobility equipment or of its repair.

All these legal texts operate according to the same mechanism: presumption of liability of the carrier in case of checked baggage[14]. This means that the victim will not have to prove that the carrier was at fault in order for the carrier's liability to be incurred. The only thing the PRM needs to prove is the fact that the damage or loss occurred while the equipment was in the care of the carrier (also commonly referred to as the "period of transportation").

With regard to equipment that was checked in at the check-in counter (always by or on behalf of the carrier) and consequently labelled as luggage, it is quite clear that the period of transportation starts at the moment the check–in procedure starts. The same holds true for luggage that is "a delivery at cabin". Although the equipment can be labelled prior to being actually handed over to the carrier (at the gate or at the door of the aircraft), the liability of the carrier should only be triggered at the moment the equipment is physically handed over to the carrier (be it at the boarding gate or at the door of the aircraft).

3.2.2.2. Handling of the equipment at an airport (airport liability).

Airports have assumed the responsibility for providing assistance to PRM since the Regulation fully came into effect on 26 July 2008. Airport liability is, in principle, not limited[15] and it is established according to national liability/tort law. This fact that the applicable legal framework is different as between airports and airlines results in two big differences in the nature of their respective liability: First of all, as a rule, airport liability is based on a proven fault by the airport managing body. Secondly, whereas airport liability is not limited, airline liability definitely is. This means that, in the case of airports, the PRM will have to prove the fault of the wrongdoer before a court if the airport does not accept the claim (not so if the air carrier is responsible), but can recover the full damages (not so if the air carrier is liable, since its liability is normally limited).

3.2.3. Compensation: amount and procedure.

For a long time, PRM organisations have been pressing for unlimited liability in cases of incidents regarding mobility equipment both during handling at an airport or during transfer on-board aircraft. This approach is driven by the high cost of modern mobility equipment[16] and the relatively low limit of current liability for baggage under international conventions, and in particular the Montreal Convention[17], which indeed suggest that the amount of compensation under international conventions may not be adequate in all cases.

---

13 Regulation (EC) Nº 889/2002 of the European Parliament and of the Council of 13 May 2002 (JO L 140/02 of 30.05.2002, amending Council Regulation (EC) Nº 2027/97 on air carrier liability in the event of accidents.

14 See Article 1.10 of the REGULATION (EC) Nº 889/2002.

15 Airport liability is not dealt with by any international convention or Community .

16 for example, electric wheelchairs can cost up to € 10000

17 Up to 1000 SDRs (approximate amount in euros based on the SDR value on 10/03/2008 according to the IMF SDR valuation: € 1060).

Most air carriers provide compensation in line with the Montreal Convention. Damages to the mobility equipment above 1000 SDR are at the passenger's own risk, unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires[18]. Special insurance for PRM mobility equipment is proposed by only a minority of companies and for a marginal number of airports. The majority of air carriers and of airports do not offer special insurance coverage for damaged or destroyed wheelchairs or mobility equipment.

According to the study, only a minority of EU companies allow PRM to declare that their mobility equipment has a higher value and that this can then be claimed accordingly. Among those companies, some limit the excess value declaration to a given amount above the level of compensation set by international and EU rules, but below the actual cost of the mobility equipment. Several carriers pointed out that declaring a special value involves “a supplement [that] has to be paid by the passenger”.

All stakeholders agree that the cost of providing for the needs of PRM must not be passed directly to PRM. However, only a few have drawn the logical conclusion and compensate the full cost of the damage or loss of the mobility equipment. The Regulation consolidates the principle that assistance shall be provided without additional charge to PRMs[19] , but its scope does not include the specific amount of compensation, which is left to be dealt with under the "rules of international, Community and national law[20]".

It is worth noticing that for railway transport, Community legislation imposes on railway companies the obligation of full compensation, if the railway undertaking is liable for the total or partial loss or damage of the mobility equipment[21].

3.2.4. The inclusion or exclusion of mobility equipment in the definition of "baggage".

The point of view of PRM organisations and the majority of the Civil Aviation Authorities responding to the survey linked to the study is that mobility equipment should not be regarded as baggage. The purpose of this exclusion is that mobility equipment should not be subject to the airline limited liability rules laid down by the international conventions. As a consequence, airlines and airports should compensate the full cost of the lost mobility equipment or the price of repairing it.

The US Air Carrier Access Act (ACAA) does not give a definition of mobility equipment and does not expressly exclude it from the definition of baggage; however, it does impose full, objective liability without financial limits in the event of an accident involving mobility equipment on all carriers wishing to cover domestic routes in the United States[22]. The U.S. Department of Transportation intends to amend soon its regulation implementing the US Air Carrier Access Act to make foreign air carriers operating to and from the United States

---

18 in line with what it is stipulated by article 22.2 of the Montreal Convention and article 1.5 of Regulation 889/2002.

19 See Article 8 of Regulation nº 1107/2006.

20 See article 12 of Regulation nº 1107/2006.

21 REGULATION (EC) No 1371/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2007 on rail passengers’ rights and obligations, JO 315/14 of 31.12.2007, article 25.

22 The Air Carrier Access Act (ACAA) prohibits discrimination in air travel against individuals with disabilities. The U.S. Department of Transportation issued a regulation (14 CFR Part 382) implementing the ACAA which explicitly refers to the treatment of mobility aids and devices.

subject to most of the disability-related requirements currently available to U.S. carriers under Part 382, including treatment of mobility aids and assistive devices.

The current Canadian legislation in place concerning PRMs is *Part VII of the Air transport Regulations: Terms and Conditions of Carriage Regulations*[23]. The Canadian Transportation Agency seems to define mobility aids as priority checked items of a personal nature, even though the mobility equipment is not excluded from the baggage definition strictu sensu. By doing so the Canadian Transportation Agency does not allow companies working on their territory to apply the limited liability provisions in respect of destroyed, damaged or lost baggage in international conventions to mobility equipment. There is an understanding that to land in Canada, the carrier must respect the Canadian regulations. This understanding seems not to have been challenged by any foreign carrier.

4. AN ANSWER TO THE CHALLENGES: REGULATION Nº 1107/2006.

4.1. Quantitative objective: to reduce the number of accidents.

As has been demonstrated in point 3.1 of this Communication, the absence of specific procedures for handling wheelchairs or other mobility equipment and the fact that, training on handling wheelchairs and other mobility equipment is not being provided in all airports or by all airlines, indicate that improvements could easily be made. Regulation 1107/2006 has tackled this shortcoming in the current state of affairs by establishing legal obligations concerning both the necessary procedures and the necessary training for the staff to ensure adequate assistance to PRM[24].

Such legal obligations include, inter alia, the handling of mobility equipment at the airport or its transportation on board aircraft. Therefore, the quality and the adequacy of the assistance provided by airlines and air carriers should improve significantly. Specific procedures on check-in and training for staff in the handling of mobility equipment will raise awareness among employers and employees alike and help to reduce even further the number and the gravity of accidents, as well as the personal and economic costs.

4.2. Qualitative objective: to minimise the consequences of an incident.

Point 3.2.1 of this Communication highlights the shortcomings of the current lack of a common procedure which would provide immediate solutions on the spot, in the case of damaged or lost mobility equipment. Regulation 1107/2006 partly covers that legal vacuum. First of all, Annex I of Regulation 1107/2006 specifically includes in the definition of airport assistance the *"temporary replacement of damaged or lost mobility equipment, albeit not necessarily on a like for like basis"*[25]. Secondly, Article 9 establishes a legal obligation for airports to set up *"quality standards for the assistance specified in Annex I and determine resource requirements for meeting them".*

---

23 The Terms and Conditions of Carriage Regulations issued under the authority of the Canada Transportation Act. Part V of the Act deals with the transportation of persons with disabilities. Section 155 of this Part V explains the provisions for a damaged or lost aid.

24 See articles 9 and 11 of the Regulation

25 See Annex I to Regulation nº 1107/2006.

As regards the difference between the nature and the limits of the liability of airlines and airports mentioned in point 3.2.2 of this Communication, article 12 of Regulation 1107/2006 establishes the obligation of compensation *"in accordance with rules of international, Community and national law"*.

The Commission will closely monitor how airports and airlines implement this responsibility in the new context laid down by the Regulation, in order to assess in the future whether the inclusion of a more precise definition of the airport's liability, along the lines of what it is laid down for air carriers in Regulation 889/2002, would be advisable.

With regard to the amount of compensation and the relevant procedure, dealt with in point 3.2.3 of this Communication, the number of incidents regarding mobility equipment is already small and the new protection offered by Regulation 1107/2006 should help to further reduce the number of incidents and their consequences. It therefore seems clear that, if the current rules applying to compensation were to be changed, any economic consequences which those accidents could involve for companies or airports would not have a major economic impact on carriers or airports.

Finally, point 3.2.4 of this Communication deals with the issue of whether mobility equipment should be deemed included in the notion of "baggage". This question is relevant because it is linked to the amount of the compensation, since the limits on liability imposed by international conventions only apply to baggage. Some of the Community's biggest air transport partners have already developed detailed administrative procedures regarding the rights of PRM on this issue. Broadly speaking, those administrative procedures impose objective liability and full compensation on air carriers and sometimes on airports. European air carriers covering transoceanic routes to Canada or domestic flights in the US or Canada do already comply with those rules outside the Community's borders. Some companies have already waived their limited liability through their own customer policy or their internal quality standards.

As these examples show, different options can be envisaged when dealing with the amount of the compensation paid in case of destroyed, damaged or lost mobility equipment in order to approximate it to the real value of such equipment. That goal can be achieved by seeking to interpret or define the notion of baggage so as to exclude mobility equipment, while still ensuring legal coverage of such equipment under the applicable international conventions, or alternatively by removing or reviewing the limits on financial compensation under those international conventions. Finally, airlines and airports might voluntarily waive their current limited liability regarding mobility equipment.

The Commission considers that it is worth addressing this issue at ICAO level with the aim of abolishing or reviewing any financial limit on lost, damaged or destroyed mobility equipment, laid down in the Montreal Convention. The Commission recognises the difficulties linked to re-negotiating an international Convention. However, the fact that some ICAO members have decided to unilaterally amend their rules and impose full compensation for their domestic routes regarding the mobility equipment indicates that such an EU initiative may receive political support.

In the mid-term, the Commission considers that the full application of Regulation 1107/2006 will improve both the monitoring and the enforcement of existing rights of PRM related to compensation and/or replacement of destroyed, damaged or lost mobility equipment, as well as the kind of assistance to be provided on the spot when an incident occurs. Before deciding

whether to put forward a legislative proposal on these issues, the Commission considers it prudent to allow Regulation 1107/2006 to become applicable, before assessing its impact on the likely decreasing of incidents. Whilst taking into account current practices in other countries and having regard to Community legislation governing railway transport, the Commission in the short term encourages airlines to voluntarily waive their limited liability.

5. CONCLUSIONS

(1) The Commission reminds airports and airlines of their obligation to put in place the quality standards and the necessary training and procedures regarding the handling of mobility equipment and the rights of PRM passengers in the case of an accident related to their mobility equipment, following in particular ECAC document nº 30 and its relevant annexes.

(2) As regards the amount of compensation and in order to bring it closer to the actual value of the equipment, the Commission will propose to the Council that, with the cooperation of the Member States, the Community launch an initiative within ICAO with the aim of clarifying or defining the term 'baggage' so as to exclude mobility equipment or, alternatively, of abolishing or reviewing any liability limits on lost, damaged or destroyed mobility equipment, in the framework of the Montreal Convention.

(3) The Commission encourages airlines in the UE to voluntarily waive their current liability limits in order to bring the amount of compensation closer to the actual value of the mobility equipment.

(4) The Commission will monitor in 2008-2009 the compliance of Member States, air carriers and airports with Community law, including Regulation 1107/2006.

(5) The Commission encourages the stakeholders to carry out a better and more systematic collection of data concerning claims related to mobility equipment.

(6) The Commission will include in the Report foreseen in Article 17 of Regulation 1107/2006 a chapter on the rights of PRM whose mobility equipment has been lost, damaged or destroyed. The Commission will then assess the actual developments following the entry into force of Regulation 1107/2006 and the progress of the initiative within ICAO mentioned in point (2) of these conclusions. If the assessment shows that necessary improvement has not been achieved, the Commissions will put forward an appropriate legislative proposal to enhance the existing rights under Community law of air passengers whose wheelchairs or other mobility equipment are destroyed, damaged or lost during handling at an airport or during transport on-board aircraft, including the revision of the current threshold for compensation and the need to better define airport liability.

EVALUATION OF REGULATION 1107/2006

Final report

Main report and Appendices A-B

June 2010

Prepared for:

European Commission
Directorate-General Energy and Transport
DM28 5/70
Brussels
Belgium

Prepared by:

Steer Davies Gleave
28-32 Upper Ground
London
SE1 9PD

+44 (0)20 7910 5000
www.steerdaviesgleave.com

Contents

FIGURES

TABLES

APPENDICES

EXECUTIVE SUMMARY

Background

1. Regulation 1107/2006, which took full effect in July 2008, introduced new protections for people with reduced mobility when travelling by air. Key provisions included:

   - The right, subject to certain derogations, not to be refused embarkation or reservation.
   - The right to be provided with assistance at airports, at no additional cost, in order to allow access to the flight.
   - Responsibility for provision of assistance to PRMs at airports is placed with the airport management company; previously, these services were usually contracted by airlines.
   - The costs of providing assistance at airports can be recovered from airlines through transparent and cost-reflective charges levied for all passengers.

2. The Regulation also required Member States to introduce sanctions into national law for non-compliance with the Regulation, and create National Enforcement Bodies (NEBs) responsible for enforcement of the Regulation. The Regulation applies to all flights from and within the European Union (EU), as well as to flights to the EU operated by EU-registered carriers.

3. The Regulation requires the Commission to report to the Council and the Parliament on its operation and results, and if appropriate to bring forward new legislative proposals. In order to inform this report, the Commission has asked Steer Davies Gleave to undertake an independent review of the Regulation.

Factual conclusions

4. Our review has gathered evidence on the implementation of the Regulation through in-depth discussions and consultation with stakeholders, supplemented by desk research. Stakeholders included airports, airlines, NEBs and PRM organisations. The evidence gathered shows that most of the airports and airlines examined for the study have implemented the requirements of the Regulation. However, there is significant variation in the quality of service provided by airports, and in the policies of airlines on carriage of PRMs. We also identified relatively little activity by NEBs to monitor the Regulation's implementation, or to promote awareness of the rights it grants.

5. Conclusions regarding each of the groups of stakeholders are set out below.

Airlines

6. The key issue we identified in the study is the lack of consistency in policies on carriage, and the significant variation between carriers. For example, Ryanair permits a maximum of 4 PRMs who require assistance on any flight, and Brussels Airlines permits at most 2 on most aircraft; in contrast, British Airways does not impose any restrictions. There is similar variation in policies on whether PRMs have to be accompanied. Approval of policies is the responsibility of national safety regulators, however typically airlines propose policies which are then approved with little or no challenge by the licensing authority (often the same organisation as the NEB).

Although the rationale for these restrictions is safety, there is limited evidence to justify them. Limitations on carriage of PRMs are specifically prohibited by the equivalent US regulation on carriage of PRMs[1].

7. All airlines in the study sample had published some information on carriage of PRMs, however 13 of the 21 did not publish on their websites all of the restrictions on carriage of PRMs that they imposed. Most stated in their Conditions of Carriage that PRMs would not be refused, but this was usually conditional on pre-notification; this may be an infringement of the Regulation.

8. The Regulation encourages PRMs to pre-notify their requirements for assistance to airlines, which are then required to pass on this information to the relevant airports. In theory this should both ensure that PRMs promptly receive the services they need, and allow airports to minimise resourcing costs through efficient rostering. However, our research found that levels of pre-notification too low to allow this: at 11 of 16 airports for which we were provided with information, pre-notification rates were lower than 60%.

9. PRM representative organisations informed us that loss or damage to mobility equipment could still be a significant issue. The Regulation requires airports to handle mobility equipment but does not introduce any new provisions which reduce the risk of loss or damage, or increase the amount of compensation payable, which is restricted by the limits defined in the Montreal Convention.

Airports

10. All airports in the study sample had implemented the Regulation, although we were informed that the Regulation had not been implemented at all at regional airports in Greece. Most had subcontracted the service through a competitive tender; several informed us that they were considering or were in the process of retendering the service, generally because service quality in the initial period had not been sufficient.

11. The frequency with which the PRM services are used varies considerably between airports: among the airports for which we have been able to obtain data use of services varies by a factor of 15, although in most cases between 0.2% and 0.7% of passengers requested assistance.

12. Most airports in the case study States had published quality standards, typically following the format of the minimum recommended standards in ECAC Document 30. Most undertook some form of internal monitoring of performance, however few used external checks of service such as ‘mystery shoppers’. Most stakeholders informed us that airports were providing an adequate level of service quality.

13. Variability in airport service quality (including safety) was reported by PRM organisations and some airlines, but this is subjective and hard to quantify. Airports reported variation in equipment and facilities provided, and we observed significant

[1] US Department of Transport 14 CFR part 382.

variation in the level of training given to personnel providing services to PRMs. In the sample examined, training varied between 3 and 14 days, ostensibly to provide the same services.

14. Charges levied by airports varied considerably (between €0.16 and €0.90 per departing passenger), and we were unable to identify any apparent link to frequency of service use, price differentials between States or service quality. Airports in Spain and mainland Portugal levied uniform charges across all airports managed by the national airport company; this may be an infringement of the Regulation. Many airlines believed consultation by airports regarding charges was poor; Cyprus, Spain and Portugal were identified as particular issues.

NEBs

15. All States except Slovenia have designated NEBs; in most cases the NEB is the CAA, and is the same organisation as the NEB for Regulation 261/2004. All States except Poland and Sweden have introduced penalties into national law for infringements of the Regulation, although several have not introduced sanctions for all possible infringements. The maximum sanction which can be imposed varies significantly, and in some States may not be at a high enough level to be dissuasive; for example, in Estonia, Lithuania and Romania the maximum sanction is lower than €1,000.

16. Most States have received very few complaints to date; in total 1,110 received to date, compared to a total of 3.2m passengers assisted in 2009 across 21 case study airports. 80% of all complaints regarding infringements of the Regulation had been submitted to the UK NEBs; this may be the result of national law in the UK which permits financial compensation to be claimed under the Regulation. No sanctions have yet been imposed, although the NEBs for France, Portugal and Spain have opened proceedings to impose fines. In a number of States we identified significant practical difficulties in imposing and collecting sanctions, typically in relation to imposing fines on carriers registered in other States. These issues are in most cases equivalent to those that apply in relation to Regulation 261/2004[2].

17. Although most case study NEBs had taken some action to monitor the services provided under the Regulation beyond the monitoring of complaints (14 out of 16 had undertaken at least one inspection of airports), in most cases this was limited. Most inspections focussed on checks of systems and procedures, and did not assess the experience of passengers using the services. Monitoring of PRM charges was also poor: NEBs in 9 of the 16 States had undertaken no direct monitoring of airport charges.

18. Few NEBs had made significant efforts to promote awareness of the Regulation by passengers, as required by the Regulation; only two informed us of national public awareness campaigns they had undertaken. This lack of promotion undermines the claims of some NEBs that reviewing complaints is sufficient to monitor the

[2] See Evaluation of Regulation 261/2004, February 2010: http://ec.europa.eu/transport/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf.

implementation of the Regulation. Awareness of the NEBs' performance appeared in general to be poor: most stakeholders contacted for the study held no opinion on the effectiveness of enforcement by NEBs, and many informed us that this was because they had had no interaction with them.

Other issues

19. A particular issue raised by stakeholders was the conflict between the Regulation and the equivalent US legislation (14 CFR Part 382), which applies to European carriers operating flights to/from the US, and other flights where these are operated as codeshares with US carriers. The most significant conflict is the allocation of responsibilities for assistance: the Regulation requires airports to arrange the provision of services to PRMs, while under the US legislation it is the airlines that have this responsibility. The US legislation also prohibits airlines from imposing numerical limits on PRMs, and from requiring pre-notification from PRMs. This has caused issues for carriers who are required to comply with pieces of legislation that conflict, although the US legislation does allow carriers to apply for a waiver where there is a conflict of laws.

20. A number of other issues regarding specific Articles are discussed in the section below on recommended changes to the Regulation.

Recommendations

21. We have made a number of recommendations, addressing:

- improvements to the implementation of the Regulation which would not require any legislative changes; and
- further recommendations which could only be implemented through amendment to the text of the Regulation.

Measures to improve the operation of the Regulation

22. Several airlines argued in their submissions to the study that they should be permitted to provide or contract their own PRM assistance services, as they could provide this more cost-efficiently than airports. We believe that this could create an incentive to minimise the service provided and hence would risk a reduction in service quality. Whilst there were initially significant issues with the quality of PRM service provision at certain airports, most stakeholders believed that these issues had now been addressed, and our most important recommendation is therefore that allocation of responsibility for PRM services to airports should not be amended.

23. Many of the concerns raised regarding airports relate to inconsistency of application of the Regulation. To address this, we suggest that the Commission should:

- improve provision of information regarding accessibility of airports, through a centralised website listing factors such as maximum likely walking distance within an airport, means used for access to aircraft, and any facilities available for PRMs;
- develop and share best practice on contracting of PRM service providers, both to improve the content and structure of the contracts used and therefore reduce

the likelihood of unnecessary retendering, and to recommend methods of cooperation; and

- develop and share best practice advice on training of staff providing PRM services, so that a more consistent standard of service is provided.

24. Similarly, many of the concerns raised regarding airlines also relate to inconsistency of application of the Regulation, in particular to inconsistent policies on carriage of PRMs. We therefore suggest that the Commission should:

- work with EASA to determine safe policies on carriage of PRMs, in particular to address the wide and unjustifiable variation in airline policies on carriage of PRMs (in particular on numerical limits and circumstances under which PRMs are required to be accompanied); and
- ensure that the airlines we have identified as not publishing clear policies on carriage of PRMs do so, through actions by the relevant NEBs (which could also review airlines outside the study sample for the same reason).

25. Given the current low rates of rates pre-notification, we suggest that the Commission monitor this issue, through encouraging NEBs to collect rates of pre-notification. In future, the Commission should assess the situation and consider either eliminating the requirement for pre-notification or alternatively retaining it and providing passengers and carriers with more incentive to pre-notify.

26. An additional problem reported with pre-notification is where PRMs had pre-notified their requirements for assistance, but then found that this information had not been passed on to airport or airline staff. To address this, and to provide PRMs with evidence that they can use when making a complaint, we recommend that the Commission encourage airlines to provide PRMs with a receipt for pre-notification.

27. The greatest problem identified by the study regarding NEBs was the lack of pro-active measures taken to monitor or enforce the Regulation. In most cases this has not had significant detrimental effect, as most airports and airlines have implemented the provisions of the Regulation, but could become an issue if the situation changes in the future. We suggest that the Commission should encourage all Member States to:

- designate NEBs and introduce penalties for all infringements of the Regulation;
- take measures to inform PRMs of their rights under the Regulation and of the possibility of complaint to the relevant NEB, for example through national promotional campaigns; and
- pro-actively monitor the application of the Regulation (rather than relying on complaints), for example through increased interaction with PRM organisations, and through direct monitoring of quality of service provided.

28. We also recommend that the Commission should, in consultation with stakeholders, develop a detailed good practice guide regarding implementation of the Regulation. This could include sections regarding recommendations on safety limits, the format and content of policies on carriage, and consultation. It could also specify recommended minimum quality standards covering qualitative aspects of the services provided. Publishing voluntary policies such as these would allow potential future amendments to the Regulation to be tested in practice before adoption.

Changes to the Regulation

29. There are some areas where improvements can only be effected through changes to the text of the Regulation. These include minor amendments which we recommend should be implemented as soon as possible, and more significant amendments to be considered in the longer term.

30. The minor amendments we would suggest are:

- Extend Article 11 to require airlines to ensure that the personnel of their ground handling companies are trained to handle mobility equipment.
- Amend Article 8 to make specific PRM charges obligatory for airports wishing to recover costs from users, and therefore ensure costs are transparent, reasonable and cost-related.
- Amend Article 8 to make clear that that PRM charges are airport-specific and cannot be set at a network level.
- Amend Article 14 to require that NEBs must be independent of any bodies responsible for providing services under the Regulation (at present this is not the case in Greece).
- Amend Article 14 to clarify that NEBs are responsible for flights departing from (rather than both departing from and arriving at) airports in their territory, in addition to flights by Community carriers arriving at airports within the State's territory but departing from a third country.
- Amend Recital 17 to be consistent with Article 14, so that both state that complaints regarding the Regulation should be addressed to the NEB of the State where the flight departed, rather that of the State which issued the operating license to the carrier.

31. These changes would improve the functioning of the Regulation in its current form, without making significant changes to its overall approach.

32. A key issue with the Regulation is its lack of detail when compared to equivalent legislation (in particular, the equivalent US regulations on carriage of PRMs); in our view, as a result of this, it leaves too much scope for interpretation and variation in service provision. We suggest that, to ensure greater consistency, and that PRMs' rights are adequately respected, the Commission should consider making the text more detailed and specific about the requirements for airlines and airports. Some key areas in which we suggest that changes could be made are as follows:

- Specify the circumstances under which carriage of PRMs may be restricted (including any numerical limits) or where PRMs may be required to be accompanied[3].
- Clarify the definitions of 'PRM', 'mobility equipment' and 'cooperation'.

[3] This could be implemented either through amendment to this Regulation or through amendment to Commission Regulation (EC) 859/2008

- Clarify whether airlines may levy additional charges for supply of medical oxygen and for multiple seats where one seat is insufficient for the passenger (for example, in the case of obese or injured passengers).
- Extend the Regulation to include a provision requiring airports to publish information on the rights of PRMs (including the right to complain) at accessible points within the airport.

33. It would be necessary to consult with stakeholders about these changes and to undertake an impact assessment, and therefore these changes could not be introduced immediately.

34. We also suggest that the Commission and the Member States should work with other contracting States to amend the Montreal Convention so as to exclude mobility equipment from the definition of baggage. This would address the problem faced by users of technologically advanced wheelchairs, the values of which often substantially exceed the maximum compensation allowable under the Montreal Convention (1,131 SDRs, or €1,370). Although most airlines we contacted for the study informed us that they waived the Montreal limits in this type of situation, several PRM organisations informed us of cases where they did not, and even in the case that an airline voluntarily waives the limit the PRM is in a position of uncertainty.

1. INTRODUCTION

Background

1.1 Approximately 10% of the EU population has some type of disability[4]. Equal access to air transport services is necessary to enable full and equal participation in modern society. In order to ensure equal treatment as far as possible, Regulation 1107/2006 introduced new protections for people with reduced mobility when travelling by air, including the right, subject to certain derogations, not to be refused embarkation or reservation, and the right to be provided with assistance at airports, at no additional cost, in order to allow access to the flight. Before the introduction of the Regulation, there had been some well-publicised examples of carriers charging passengers for the provision of assistance that was essential in order to travel[5].

1.2 The Regulation creates obligations towards disabled persons and persons of reduced mobility (PRMs) for air carriers and their agents, tour operators, airport management companies, and Member States:

- Airlines are prohibited from refusing carriage (except where necessary to comply with safety regulations or where it is physically impossible) and have to provide certain types of assistance on board the aircraft.
- Airlines, their agents and tour operators have to ensure that they can accept notification of the need for assistance at all points of sale, and transmit this information to the airport and the operating air carrier.
- Airport management companies have to provide assistance at the airport, and develop and publish quality standards for this assistance. The costs of providing this assistance can be recovered through transparent and cost-reflective charges levied for all passengers.
- Member States are required to introduce sanctions into national law for non-compliance with the Regulation, create bodies responsible for enforcement of the Regulation, and promote awareness of the rights created by the Regulation and how to complain about infringements.

The need for this study

1.3 Article 17 of the Regulation requires the Commission, by 2010, to report to the Parliament and the Council on the operation and results of the Regulation. In order to inform this report, the Commission requires an independent evaluation of the operation of the Regulation.

This report

1.4 This report is the Final Report for the study. It sets out the work undertaken over the five month duration of the study, and draws conclusions on the current functioning of the Regulation. The recommendations set out in this report were discussed at the final

[4] ECAC document 30, section 5, annex N

[5] For example, on January 2004 a UK court ruled that Ryanair had acted unlawfully by charging a passenger Bob Ross £18 in each direction for wheelchair hire at London Stansted airport

meeting with the Commission.

Structure of this document

1.5 The rest of this report is structured as follows:

- Section 2 summarises the methodology used for this study;
- Section 3 sets out how the Regulation is being applied by airports;
- Section 4 sets out how the Regulation is being applied by airlines;
- Section 5 describes enforcement and complaint handling by NEBs;
- Section 6 summarises stakeholder views on other policy issues relating to the Regulation;
- Section 7 summarises the factual conclusions; and
- Section 8 summarises the recommendations.

1.6 Further detailed information on the policies of airlines regarding carriage of PRMs is provided in Appendices A and B.

1.7 Case studies have been undertaken of complaint handling and enforcement in 16 Member States. These are provided in Appendix C, which, due to its size, is provided as a separate document.

2. RESEARCH METHODOLOGY

Introduction

2.1 This section provides a summary of the research methodology used. It describes:

- the overall approach used;
- the selection of case studies;
- the scope of the desk research that has been undertaken; and
- the stakeholders that have participated in the study, and how they have provided inputs.

Overview of our approach

2.2 The Commission requested us to collect evidence to address a number of questions, most of which can be categorised as either relating to:

- enforcement and complaint handling undertaken by National Enforcement Bodies (NEBs); and
- application of the Regulation by air carriers, their agents, tour operators and airports.

2.3 In order to address these questions, we developed a research methodology divided into two parts:

- case study research; and
- cross-EU interviews and analysis.

2.4 The rationale for this division is that enforcement and complaint procedures are specific to Member States and are therefore best evaluated through a case study approach. It was agreed to undertake case studies of complaint handling and enforcement in 16 Member States as part of this study. The case studies also describe state-specific aspects of airline and airport implementation of the Regulation.

2.5 Key airlines cover the whole of the EU rather than restricting operations primarily to one State (for example, the Irish-registered carrier Ryanair operates domestic flights in the UK, France, Spain and Italy). In addition, the issues faced by airports in implementing the Regulation are, in most cases, not State-specific. Questions relating to the application of the Regulation by airlines and airports have therefore been addressed through a cross-EU approach. Information from both elements of the research has been used for the conclusions, and will be used in the development of recommendations.

2.6 Both the case study and the cross-EU research use a mixture of stakeholder interviews and desk research. The desk research has been useful to supplement the information provided by stakeholders, particularly regarding the charges levied by airports for services to PRMs.

Selection of case study States

2.7 The 16 case study states were selected in agreement with the Commission, with reference to the following criteria:

- The Member States with the largest aviation markets (measured by passenger numbers these are UK, Spain, Germany, Italy, France, Greece, Netherlands and Ireland);
- At least some of the Member States that, at the time the study commenced, had not introduced sanctions into national law;
- Member States in which the structure of the NEB is unusual (for example, in the UK, the Equality and Human Rights Commission is responsible for complaint handling);
- Member States in which airlines are based with which we identified significant issues of non-compliance with Regulation 1107/2006 in our 2008 review of Conditions of Carriage (carriers with some particularly non-compliant terms were based in Denmark and Italy); and
- States covering a wide geographical scope and variation in sizes.

2.8 The case study states are:

- Belgium;
- Denmark;
- France;
- Germany;
- Greece;
- Hungary;
- Ireland;
- Italy;
- Latvia;
- Netherlands;
- Poland;
- Portugal;
- Romania;
- Spain;
- Sweden; and
- United Kingdom.

2.9 In order to present a thorough analysis of the operation of the Regulation across the EU we conducted a more limited programme of data collection and stakeholder interviews in the remaining 11 Member States.

Stakeholder selection and inputs

2.10 The stakeholders important for the study were:

- NEBs;
- Airlines;
- Airport managing bodies; and
- Organisations representing disabled people, and people with reduced mobility (PRM organisations).

2.11 In addition to these, we spoke to cross-EU bodies which represented these organisations at a European level.

National Enforcement Bodies

2.12 We interviewed (face-to-face or by telephone) the NEB(s) notified to the Commission in every case study State, and obtained written responses from the NEBs of all other States.

2.13 We obtained the following information from each NEB:

- The legal basis for complaint handling and enforcement in the Member State;
- The degree of compliance by airlines;
- The degree of compliance by airports;
- Statistics on the number of complaints and the process for handling them;
- Issues relating to enforcement; and
- Any other issues.

2.14 Non-case study states were provided with a shorter question list which, while addressing the areas listed above, does so at a less detailed level.

2.15 Engagement of the NEBs was obtained through a combination of written responses, meetings and telephone interviews, depending on whether the State concerned is one of the 16 case study states. The approach adopted for case study NEB is listed in Table 2.1, together with the final status of contact as we drafted this Report.

TABLE 2.1 STAKEHOLDER INTERVIEWS: CASE STUDY NEBS

Member State	Organisation	Form of input
Belgium	SPF Mobilité et Transport	Written response and face-to-face interview
Denmark	CAA-Denmark (Staetens Luftfarsvaesen)	Face-to-face interview
France	DGAC Sous-direction du tourisme	Face-to-face interview
Germany	Luftfahrt-Bundesamt (LBA) BM für Verkehr, Bau und Stadtentw	Face-to-face interview
Greece	CAA, Air Transport Economics Section CAA, Airports Division	Written response and telephone interview

Member State	Organisation	Form of input
Hungary	Nemzeti Közlekedési Hatóság (Directorate for Aviation) Egyenlő Bánásmód Hatóság (Equal Treatment Authority)	Face-to-face interview
Ireland	Commission for Aviation Regulation	Face-to-face interview
Italy	ENAC - Direzione Centrale Operazioni	Face-to-face interview
Latvia	Civil Aviation Agency	Written response and telephone interview
Netherlands	Inspectie Verkeer en Waterstaat	Written response and face-to-face interview
Poland	Civil Aviation Office	Face-to-face interview
Portugal	Instituto Nacional de Aviação Civil	Face-to-face interview
Romania	Autoritatea Nationala Pentru Persoanele cu Handicap Romanian Civil Aeronautical Authority	Face-to-face interview
Spain	Servicio de inspección y relaciones con usuarios	Written response and face-to-face interview
Sweden	Swedish Civil Aviation Authority	Written response and telephone interview
United Kingdom	Equality and Human Rights Commission (England) Civil Aviation Authority	Face-to-face interview

2.16 We obtained responses from all NEBs in the non-case study States, as shown in Table 2.2. We requested written responses from all non-case study NEBs and these were followed up with telephone interviews where necessary for clarification.

TABLE 2.2 STAKEHOLDER INTERVIEWS: NON-CASE STUDY NEBS

Member State	Organisation
Austria	Civil Aviation Authority
Bulgaria	Civil Aviation Administration Ministry of Transport, Information Technologies and Communications
Cyprus	Department of Civil Aviation
Czech Republic	Civil Aviation Authority
Estonia	Consumer Protection Body
Finland	Civil Aviation Authority
Lithuania	Civil Aviation Administration
Luxembourg	Direction de l'Aviation Civile
Malta	Department of Civil Aviation
Slovakia	Slovak Trade Inspection Ministry of Transport, Posts and Telecommunications, Directorate General of Civil Aviation and Water Transport, Air Transport Department
Slovenia	Ministry of Transport, Directorate of Civil Aviation

Airlines

2.17 20 airlines have been selected to include a sample with variation across several criteria. These are:

- One key airline with major operations in each case study State;
- At a minimum to include the top 10 European airlines measured in terms of passenger numbers;
- Also to include a mix of different airline types (legacy, low cost and charter), States of registration, and sizes; and
- At least 2 non-EU airlines.

2.18 The airlines selected, and their relevance to each of the criteria, is shown in Table 2.3. We were originally planning to consider Air France-KLM as one airline, but various differences (for example, in its Conditions of Carriage) have meant that it is more logical to consider it as two airlines, meaning there are 11 airlines under the 'Top 10 passenger numbers' criterion. We have consequently excluded the 11th (Austrian) from the interview sample, although the airline still forms part of the desk research.

TABLE 2.3 AIRLINE SELECTION CRITERIA

Airline	Case study State coverage		Airline type				
	Selected for case study state coverage	Case study states	Non-EU	Legacy	Low cost	Charter	Top 10 passenger numbers
Aegean Airlines	✓	Greece			✓		
Air Berlin					✓		✓
Air France	✓	France / Netherlands		✓			✓
AirBaltic	✓	Latvia			✓		
Alitalia	✓	Italy		✓			✓
British Airways	✓	UK		✓			✓
Brussels Airlines	✓	Belgium		✓			
Delta			✓	✓			
EasyJet					✓		✓
Emirates			✓	✓			
Iberia	✓	Spain		✓			✓
KLM	✓	Netherlands		✓			✓
Lufthansa	✓	Germany		✓			✓
Ryanair	✓	Ireland			✓		✓
SAS	✓	Denmark / Sweden		✓			✓
TAP Portugal	✓	Portugal		✓			
TAROM	✓	Romania		✓			
Thomas Cook						✓	
TUI (Thomsonfly)						✓	

Wizzair	✓	Hungary / Poland	✓	

2.19 We approached all 21 case study airlines requesting either a face-to-face or telephone interview. The methods they chose to respond are shown in Table 2.4 below.

TABLE 2.4 STAKEHOLDER INTERVIEWS: AIRLINES

Airline	Form of input
Aegean Airlines	Written response and telephone interview
Air Berlin	Input through IACA only
Air France	Telephone interview
AirBaltic	Did not respond
Alitalia	Written response
British Airways	Declined to participate
Brussels Airlines	Did not respond
Delta	Written response
easyJet	Face-to-face interview
Emirates	Did not respond
Iberia	Telephone interview
KLM	Face-to-face interview
Lufthansa	Declined to participate
Ryanair	Face-to-face interview
SAS	Written response
TAP Portugal	Face-to-face interview
TAROM	Face-to-face interview
Thomas Cook	Face-to-face interview
TUI (Thomsonfly)	Input through IACA only
Wizzair	Did not respond

2.20 We also consulted the five main associations representing airlines operating airlines within the EU, listed in Table 2.5 below.

TABLE 2.5 STAKEHOLDER INTERVIEWS: AIRLINE ASSOCIATIONS

Organisation	Full Name	Type of airline represented	Form of input
IATA	International Air Transport Association	Legacy	Written response and telephone interview
ELFAA	European Low Fares Airline Association	European low cost	Face-to-face interview
AEA	Association of European Airlines	European legacy	Face-to-face interview
ERA	European Regions Airlines Association	European regional	Face-to-face interview
IACA	International Air Carrier Association	Leisure / charter	Face-to-face interview

Airports

2.21 The 21 case study airports were selected according to the following criteria:

- All of the top 10 European airports in terms of passenger numbers;
- The main airport in each of the 16 case study Member States; and
- A sample of smaller airports.

2.22 The airports selected under each criterion, and the methods they chose to respond, are shown in Table 2.6. Note that three of the top 10 airports were excluded from the case study consultation as they were operated by the same organisations as others in the top 10. These comprise Paris Orly, London Gatwick, Zaragoza and Barcelona airports which, at the time the study was planned, were managed by the same companies as Paris CDG, Heathrow and Madrid Barajas respectively[6]. These airports do still form part of the desk research, however.

TABLE 2.6 AIRPORT SELECTION CRITERIA

Airport	State	Main airport in case study State	Top 10 passenger numbers	Smaller airport	Form of input
Amsterdam	Netherlands	✓	✓		Face-to-face interview
Athens	Greece	✓			Written response and telephone interview
Bologna	Italy			✓	Face-to-face interview
Brussels	Belgium	✓			Face-to-face interview
Bucharest Otopeni	Romania	✓			Face-to-face interview
Budapest	Hungary	✓			Face-to-face interview
Brussels Charleroi	Belgium			✓	Face-to-face interview
Copenhagen	Denmark	✓			Written response and telephone interview
Dublin	Ireland	✓			Face-to-face interview
Frankfurt Main	Germany	✓	✓		Face-to-face interview
Lisbon	Portugal	✓			Face-to-face interview
London Heathrow	United Kingdom	✓	✓		Face-to-face interview
London Luton	United Kingdom			✓	Face-to-face interview
Madrid Barajas	Spain	✓	✓		Face-to-face interview*
Munich	Germany		✓		Not able to obtain a response
Paris Charles De Gaulle	France	✓	✓		Face-to-face interview
Riga	Latvia	✓			Written response and telephone interview
Roma Fiumicino	Italy	✓	✓		Written response and telephone interview

[6] Gatwick ceased to be managed by BAA, the operator of Heathrow, on 2 December 2009

Stockholm	Sweden	✓			Written response and telephone interview
Warsaw	Poland	✓			Face-to-face interview
Zaragoza	Spain			✓	Face-to-face interview*

* Interview with AENA covered all State airports in Spain

Selection of PRM organisations and other passenger groups

2.23 In each case study State we selected a PRM organisation representing all disabilities and impairments at a national level. We initially approached the national council organisations that are members of the European Disability Forum (EDF); however in a small number of cases we were unable to obtain a response from this organisation and had to contact an alternative organisation in their place. The table also includes four cross-EU PRM organisations.

TABLE 2.7 PRM AND PASSENGER ORGANISATIONS BY CASE STUDY STATE

State	Organisation	Form of input
Belgium	Belgium Disability Forum	Telephone interview
Denmark	Danske Handicaporganisationer (DH; Disabled Peoples Organisations Denmark)	Face-to-face interview
France	Conseil Français des personnes Handicapées pour les questions Européennes (CFHE ; French Council of Disabled People for European Affairs)	Telephone interview
Germany	Deutscher Behinderten Rat (DBR; German Disability Council)	Unable to obtain a response
Greece	National Confederation of Disabled People (ESAEA)	Written response and telephone interview
Hungary	National Council of Federations of People with Disabilities (FESZT)	Written response and telephone interview
Ireland	People with Disabilities in Ireland (PWDI)	Face-to-face interview
Italy	Forum Italiano sulla Disabilità (FID; Italian Disability Forum)	Face-to-face interview
Latvia	Latvian Umbrella Body for Disability Organisations (SUSTENTO)	Written response and telephone interview
Netherlands	CG-Raad*	Face-to-face interview
Poland	Polskie Forum Osob Niepelnosprawnych (PFON; Polish Disability Forum)	Face-to-face interview
Portugal	Confederação Nacional dos Organismos de Deficientes (CNOD; National Confederation of Organisations of Disabled People)	Unable to obtain a response
Romania	National Disability Council (CNDR)	Face-to-face interview
Spain	Fundación ONCE*, on request of Comité Español de Representantes de Personas con Discapacidad (CERMI)	Face-to-face interview
Sweden	Swedish Disability Federation (HSO)	Written response and telephone interview
United Kingdom	UK Coalition for Disability Rights in Europe (UKCDRE)	Telephone interview

EU	European Disability Forum	Face-to-face interview
EU	European Blind Union	Face-to-face interview
EU	European Union of the Deaf	Written response and telephone interview
EU	Inclusion Europe	Declined to respond

* Not a national council organisation member of EDF

Selection of other organisations

2.24 In addition to the stakeholders listed above, we contacted a number of cross-EU organisations. These comprised:

- **Passenger organisations:** the European Passenger Federation;
- **Travel agent associations:** ECTAA;
- **Airport association:** ACI Europe; and
- **Advisory bodies:** EASA, ECAC.

2.25 At the level of Member States, there were stakeholders which did not correspond to the categories described so far, but which we believed would provide useful information. These organisations were as follows:

- **Wings on Wheels (UK):** This organisation provides package holidays tailored to the needs of disabled people.
- **Thomas Cook, TUI:** Elements of the Regulation apply to travel agents as well as to airlines.
- **Air Transport Users Council (UK):** Prior to the introduction of the Regulation, this organisation had handled complaints from disabled passengers regarding travel by air, and as a result continued to receive some complaints after the Regulation came into force. In addition, the AUC is the only government-funded body in the EU specifically to represent the interests of air passengers

2.26 The form of input adopted by each stakeholder is shown in Table 2.8.

TABLE 2.8 STAKEHOLDER INTERVIEWS: OTHER ORGANISATIONS

State	Association name	Form of input
EU	ECTAA	Written response
EU	EPF	Did not respond
EU	ACI Europe	Face-to-face interview
EU	EASA	Written information provided
EU	ECAC	Face-to-face interview
United Kingdom	Wings on Wheels	Unable to obtain a response
Germany	Thomas Cook	Face-to-face interview
United Kingdom	TUI	Through IACA only
United Kingdom	Air Transport Users Council	Face-to-face interview

Desk research

2.27 The main objectives of the desk research were:

- To evaluate the extent to which air carriers demonstrate compliance with the Regulation through published information, such as Conditions of Carriage and policies on carriage of PRMs; and
- The extent to which airports have complied with the requirement to develop and publish PRM quality standards, as specified in Article 9 of the Regulation, and the content of these standards.

2.28 Conclusions emerging from the desk research were supplemented by the information collected through stakeholder interviews.

Airlines

2.29 The research methodology employed for this part of the study was based on a review of the websites of the 21 case study airlines listed above. Although the focus was on the English language version of the websites, versions in other languages were checked to check whether additional information was provided.

2.30 Three key sources of information were surveyed from each website:

- Conditions of Carriage, with particular regard to the conditions set out for the carriage of PRMs;
- Other policies on the carriage of PRMs: a more detailed search across the airline's website for any policies and relevant information on PRM travel; and
- Options to notify carriers of assistance requirements.

Airports

2.31 Again, the research conducted for this part of the study was internet-based. The websites of each of the case study airports was surveyed against the following criteria:

- whether the airport publishes quality standards;
- how easy these are to find;
- the content of the standards; and
- whether the airport publishes details of its performance against the standards.

Review of relevant legislation and other documentation

2.32 We also reviewed airline and airport policies with reference to other applicable legislation and guidance. The only other EU-wide legislation which relates to the carriage of PRMs by air is EU-OPS 1 (Commission Regulation 859/2008). In addition, many EU carriers which operate flights to the US are also covered by the corresponding US regulation (14 CFR Part 382, Nondiscrimination on the Basis of Disability in Air Travel); this is significantly different from Regulation 1107/2006 and this has an impact on the operating procedures of some carriers.

2.33 Other current guidance includes:

- ECAC Document 30;
- JAR-OPS 1 Section 1;
- JAA Temporary Guidance Leaflet (TGL) No. 44; and
- UK Department for Transport (DfT), *Access to Air Travel for Disabled Persons and Persons with Reduced Mobility – Code of Practice.*

3. APPLICATION OF THE REGULATION BY AIRPORTS

Introduction

3.1 One of the most fundamental changes introduced by the Regulation was the change in responsibility for provision of assistance to PRMs: where previously these services were provided by airlines, the Regulation requires airports to provide them, and permits them to pass on the associated costs to users, provided this is done in a fair and transparent manner. The Regulation also requires airports handling over 150,000 passenger movements per year to develop and publish quality standards for assistance. The detailed requirements are set out in the following section.

3.2 In order to assess how airports are implementing these requirements, we met or sought responses from a sample of airports selected under the criteria set out above (see 2.21). The information gathered was supplemented by tours of the services provided at certain airports, by interviews with other stakeholders who gave their views on service provision, and by desk research. The desk research included analysis of the charges and quality standards set out by the airports in the sample.

Requirements of the Regulation

3.3 As noted above, the Regulation places responsibility for provision of assistance with the airport, whereas previously assistance had been provided by ground handling companies on the basis of contracts with individual airlines. The Regulation requires each airport to provide a uniform service quality for all airlines that it handles (except where an airline requests a higher level of service). The key requirements for the PRM assistance service are summarised below:

- **Designated points:** Airports are required to designate points inside and outside the terminal building at which PRMs can announce their arrival at the airport and request assistance. These must be developed in cooperation with airport users and relevant PRM organisations, must be clearly signed and must offer basic information about the airport in accessible formats.
- **Assistance:** Airports must provide assistance to PRMs so that they are able to take the flight for which they hold a reservation, providing that they have pre-notified their requirements and arrive with sufficient time before the departure of their flight. If they have not pre-notified, the airport must make all reasonable efforts to enable to them to take their flight. For PRMs on arriving flights, the airport must provide assistance to enable them to leave the airport or reach a connecting flight. The assistance provided should be appropriate to the individual passenger. An airport may contract for these services to be provided by another company, in compliance with quality standards (discussed below).
- **Charges:** An airport cannot charge a PRM for this service, but may levy a specific charge on airport users for it. The charge must be reasonable, cost-related and transparent, and the accounts for these services must be separated from its other accounts. The charge must be shared between airport users in proportion to the total number of passengers carried to and from the airport by each. If an airport wishes to contract for services or levy a charge, both must be done in cooperation with airport users through the Airport Users Committee (AUC).

- **Quality standards:** Airports with over 150,000 annual passenger movements must set and publish quality standards for these services, and decide resource requirements to meet them, in cooperation with airport users and PRM organisations. The standards must take account of relevant policies and codes, such as the ECAC Code of Good Conduct in Ground Handling for Persons with Reduced Mobility (ECAC Document 30). An airline can agree with an airport to receive a higher standard of service, for an additional charge.
- **Training:** All employees (including those employed by sub-contractors) providing direct assistance to PRMs should be trained in how to meet their needs. Disability-equality and disability-awareness training should be provided to all airport personnel dealing directly with the travelling public, and all new employees should attend disability−related training.

Categories of PRM defined by carriers and airports

3.4 The Regulation covers passengers with a wide range of impairments for which the needs for assistance are different. Although each individual is different, airlines and airports find it helpful to apply some categorisation when referring to the needs of different passengers. The most commonly used categorisation is the list of Special Service Request (SSR) codes defined by IATA. These categories are:

- **WCHR:** Wheelchair (R for Ramp). Passengers who are able to ascend and descend steps and move about inside the aircraft cabin, but who require a wheelchair or other assistance for longer distances (e.g. between the terminal and the aircraft).
- **WCHS:** Wheelchair (S for Steps): Passengers who cannot ascend or descend steps, but can move about inside the aircraft cabin. They require a wheelchair for the distances to and from aircraft and must be assisted up and down any steps.
- **WCHP:** Wheelchair (P for Paraplegic). Passengers with a disability of the lower limbs who have sufficient personal autonomy to take care of themselves, but who require assistance to embark and disembark and can move about inside the aircraft cabin only with the assistance of an onboard wheelchair.[7]
- **WCHC:** Wheelchair (C for Cabin Seat). Passengers who are completely immobile, and who can move about only with the assistance of a wheelchair or other means, and require this assistance at all points from arrival at the airport to seating (which may be fitted to their specific needs) on board the aircraft, and the reverse process on arrival.
- **BLND:** Blind or visually impaired passengers.
- **DEAF:** Deaf or hearing impaired passengers, and passengers who are deaf without speech.
- **BLND/DEAF:** Passengers who are both visually and hearing impaired, and who can only move about with the assistance of an accompanying person.
- **DPNA:** Disabled passengers with intellectual or developmental disabilities who need assistance.
- **MEDA:** Passengers whose mobility is impaired due to illness or other clinical reasons, and who are authorised to travel by medical authorities.

[7] This code is not widely used or universally recognised at present

- **STCR:** Passengers who can only be transported on a stretcher.
- **MAAS:** Meet and Assist. All other passengers requiring special assistance.

3.5 Some airlines use different categorisations. For example, Ryanair uses a more detailed classification system with 16 categories that also identify, for example, whether the passenger is travelling with their own wheelchair.

3.6 In addition to the codes above which describe the needs of the passenger, when referring to wheelchair users airlines may also add a description of the type of wheelchair which will be carried. The codes used are WCMP for manual power, WCBD for dry cell battery and WCBW for wet cell battery. These codes are useful for planning the type of assistance which will be necessary to transport them, for example if they require preparation or disassembly.

Services actually provided by airports

3.7 All of the case study airports had implemented the Regulation, and were providing the required services in some form. We were given tours of the services provided at several of the airports we visited. From these, and descriptions of services given in interviews, we have drawn together a description of a typical process by which the services required by the Regulation are provided.

Departures

Pre-notification	Almost all airports and airlines have contracted SITA (a company providing aviation information technology) to provide a telex or email service for the purpose of passing notification of the needs of PRMs (see 4.64). For each series of flights for a given aircraft, any assistance required is communicated via a telex which includes a four letter code describing the category of disability of each PRM on each flight (see 3.4). This message is known as the passenger assistance list (PAL); if requirements change prior to the flight this is updated by a change assistance list, or CAL. Where a request for assistance is made by a PRM at least 48 hours before the published departure time for the flight, the airline is obliged to transmit this information to the relevant airports at least 36 hours before the published departure time.
Recording of notification	This information arrives at a telex server in the dispatch office of the airport PRM service provider. The telex describes: the time of the flight, the flight number, the names of passengers on board requiring assistance, and the category of disability of these passengers. The information from this telex is used to update the service provider's task management system, either via an automatic link, or via manual input. The task management system can be purposely developed task management software, or in some airports a piece of paper containing notes on expected assistance. Information regarding requests for assistance may also arrive via email. Airlines and airports may use email for several reasons: some airlines (such as non-EU charter carriers) may not have a SITA terminal; larger groups (such as operators of cruises) may send an off-line message in addition to PAL/CAL messages.
PRM arrives and is assigned an assistant	Each new request for assistance creates a new task; if a passenger arrives without notification, the task is created on their arrival. The task management software lists PRMs requiring assistance as tasks, and sets out expected arrival times and real-time information about their flights. When the passenger announces their arrival (either via a designated point or a check-in desk), the type of assistance they require is confirmed, and the task is assigned to one or more available assistants. At some airports, assistants carry personal digital assistants (PDAs) which record progress on a particular task; if this is the case, information regarding the passenger to be met will be forwarded to the PDA of the selected assistant. At other airports (for example in Spain) the management of tasks is a manual process. More than one assistant may be assigned if the passenger requires more involved assistance, such as carrying into their seat or is in a stretcher.

PRM is met and needs are confirmed	The assistant meets the passenger at the point at which they announced their presence; when they meet the PRM, they update the dispatch office with their action. This update may be via PDA linking through to the software in the dispatch office, or via calling in. Assistants should be trained in how to approach passengers with different requirement. If the PRM has difficulty with long distances, the airport may use electric carts, or may push the passenger in a wheelchair provided by the airport. The electric carts may be capable of carrying a passenger in an airport wheelchair. The extent of the use of electric carts may be dependent on airport design. PRMs who are blind or visually impaired may require someone whose arm they can hold guide them through the airport. A PRM with an intellectual disability may require information about the airport to be presented to them in a simplified manner, or may require check-in and other procedures to be conducted in a particular manner. The assistant will help PRMs with a reasonable amount of baggage, but only as much as any other passenger would take.
PRM is assisted through check-in and security	The passenger is taken through check-in and security. At check-in, there may be lowered desks for passengers in wheelchairs. At security, there may be a track where the security staff are trained in searching PRMs, including searching wheelchairs, and a screen to provide privacy for the search. Usually it is not possible for wheelchairs to be taken through metal detector arches, and therefore wheelchair users are searched manually. The security track is not typically exclusively for PRMs, but they may receive priority. There may be a dedicated PRM lounge; if there is time before their flight leaves, they will have the option of resting there or if there is time may wish to use the facilities in the departure lounge until called for their flight. Some airports are willing to take PRMs to these facilities (such as restaurants and shops), while others require PRMs to remain in the waiting area allocated. Where the airport is willing to provide this, the assistant arranges a time at which to collect the passenger. Some airports allow PRMs to use the business lounge regardless of class of travel.
PRM is assisted through customs and to gate	Once the flight is ready for boarding, the assistant takes the passenger to the gate. Different methods of assisting a PRM into the aircraft will be used depending on the passenger's needs and on the manner in which the aircraft is embarked (e.g. via airbridge or from the apron). Some PRMs will be able to use either stairs or an airbridge and will not require specific assistance at this point.
PRM is assisted on board aircraft with airbridge	Where passengers board via an airbridge, category WCHC and WCHS PRMs are transferred to the onboard wheelchair at the door of the aircraft. If they have remained in their own chair up to this point, their wheelchair is transferred to the hold; otherwise the airport's wheelchair is returned with the assistant. The onboard wheelchair is narrower to allow it to pass down the aisle, and has straps to hold the passenger safely in the chair. Other categories of PRM board the aircraft on foot, without particular assistance. Depending on the policy of the carrier concerned, PRMs may have to board either first or last.
PRM is assisted on board aircraft without airbridge	Where passengers board via steps, category WCHC and WCHS PRMs are transferred to the onboard wheelchair on the apron before entering the aircraft. They are then lifted up to the aircraft either by an Ambulift8, by a motorised stair-climbing chair or at some airports by manual lifting. Other categories of PRM board the aircraft on foot, and may require assistance to ascend the stairs. If the aircraft is boarded away from the terminal building and passengers are brought to the aircraft by bus, a dedicated PRM vehicle may be used to bring the PRM to the aircraft.
PRM is assisted to seat on board aircraft	On board, the assistant provides the assistance necessary for the passenger to get to their seat. This may include lifting the passenger from the on-board wheelchair into the seat and if, as required by certain carriers, the PRM has to be seated in a window seat, transferring across other seats. The assistant may also help the passenger with storing any baggage in the overhead lockers. Once the passenger is installed in their seat, the airport ceases to have responsibility for providing assistance, and it transfers to the airline.

[8] An Ambulift is a vehicle with a hydraulic platform which can be raised to the level of the flight deck to allow wheelchairs to be pushed on board.

Arrivals

Notification arrives	In addition to arriving via PAL or CAL, notification for arriving passengers may arrive by passenger service message (PSM). This is a list of passengers on board the aircraft requiring particular treatment on arrival, dispatched when an aircraft departs. The message states the points of embarkation and disembarkation, the flight number and date, and lists the names of the passengers requiring particular assistance with a description of the assistance. In addition to PRMs, the PSM lists children travelling alone (unaccompanied minors, or UMs), deportees and returned inadmissible passengers. In some circumstances, no PAL or CAL is received for arriving passengers, and the only notification is via PSM; this reduces the period of notification from 36 hours to the duration of the flight. In some cases no notification is received at all.
PRM is met and assisted to disembark	The information from the PSM is input into the task management system in the same manner as the PAL or CAL. When a flight lands, available assistants are assigned to each of the PRMs on board the flight, and dispatched to meet them at the gate. On landing, if a PRM requires assistance to disembark they will typically disembark once all other passengers have disembarked. The PRM is met at the door of the aircraft or within the aircraft by their assigned assistant. Depending on the code included in the PSM the assistant may have equipment such as wheelchairs, or may be accompanied by another member of staff. If the passenger has their own wheelchair, this is removed from the hold, and the passenger may then be assisted to transfer from the aircraft wheelchair into their own. At some airports the passenger's wheelchair is not returned to them until baggage reclaim, for security reasons.
PRM is assisted from aircraft to point of arrival	The passenger is then assisted through passport control (where there may be a dedicated PRM-accessible track) to the baggage hall, where they are assisted to retrieve their bags. They are then assisted through customs, and the assistant accompanies them as far as is required, up to the designated point of arrival outside the terminal. If it is situated close to the arrival point, they may also assist the PRM to their car if requested.

Connections

Connecting flights	Where a PRM requires assistance to make a connecting flight, the assistance offered varies depending on the length of time between arrival and departure. If there is limited time, assistance is offered as described above to disembark, transfer, and embark the passenger onto their next flight. If there is a significant wait between arrival and departure, the passenger may be taken to a PRM lounge or waiting area, until their departing flight is ready for boarding.

Policies on service provision

Provision for non pre-notified passengers

3.8 The Regulation sets out the assistance which must be provided to PRMs where they have notified the air carrier or tour operator at least 48 hours before the published time of departure of their flight. It also requires that where no such notification is made, the airport should make all reasonable efforts to provide this assistance.

3.9 Of the airports we contacted, most stated that there was little or no difference in the service received by passengers who had not pre-notified, and differences in service quality only occurred when the services were busy. Even in the cases where a choice did have to be made between assisting a pre-notified and non-pre-notified passenger, some airports informed us that they would make decisions on the basis of ensuring all passengers could make their flights, rather than on the basis of notification. Some airports informed us that the level of notification was so low that it was not useful to make any distinction on this basis. Only a small minority of the case study airports stated that a slower service was provided to passengers who did not pre-notify (Table 3.1 below).

TABLE 3.1 AIRPORT SERVICE PROVIDED TO NON-PRE-NOTIFIED PRMS

Airport	Service provided to non-pre-notified PRMs
Amsterdam Schiphol	Equivalent service, priority based on ensuring passengers can make their flights
Athens	Slower service than pre-notified for departures, equal service for arrivals
Bologna	Equivalent service is provided
Brussels	Equivalent service as pre-notified, lower priority when busy
Bucharest Otopeni	Equivalent service is provided (some equipment may not be available)
Budapest	Equivalent service is provided (possible delay of a few minutes)
Brussels Charleroi	Equivalent service, priority based on ensuring passengers can make their flights
Copenhagen	Equivalent service as pre-notified, lower priority when busy
Dublin	Slower service
Frankfurt Main	Equivalent service as pre-notified, lower priority when busy
Lisbon	Standards not defined
London Heathrow	N/A
London Luton	Equivalent service is provided
Madrid Barajas	Equivalent service is provided (possible delay on arrival)
Munich	Equivalent service as pre-notified, lower priority when busy
Paris Charles De Gaulle	Equivalent service as pre-notified, lower priority when busy
Riga	Equivalent service is provided
Roma Fiumicino	Slower service
Stockholm	Slower service
Warsaw	Equivalent service as pre-notified, lower priority when busy
Zaragoza	Equivalent service is provided (possible delay on arrival)

3.10 Airports' estimates of the impact of pre-notification rates on staffing and equipment levels varied considerably. Several airports informed us that while an increase in the rate of pre-notification would improve the quality of the service provided, they would not expect it to significantly affect the number of staff they employed. In contrast, Aèroports de Paris believed that improving rates of pre-notification could allow them to reduce the costs of PRM service provision by 30%-40%. In January 2010, London Heathrow introduced a banded charge which varies the amount paid depending on the level of pre-notification of the airline (see 3.34).

Restrictions on service

3.11 Unlike for airlines, the Regulation does not explicitly state any grounds for airports to restrict the services provided. However, there may be national laws which have bearing on the functions which airport staff are permitted to undertake; for example, we were informed that in Denmark national laws on health and safety did not permit people of above a certain weight limit to be carried up stairs and into an aircraft.

Other issues noted

3.12 All of the case study airports provide the services required under the Regulation. The manner and quality of provision varies among the sample, and there have been a number of incidents of significant service failure, but we identified no fundamental problems with service provision at major airports. However, we were informed that the Regulation had not been implemented at Greek airports other than Athens: at these airports, services are provided to PRMs, but the change of responsibility from airline to airport has not yet been effected; provision of and payment for services is agreed between airlines and ground handling companies, as it was prior to the introduction of the Regulation.

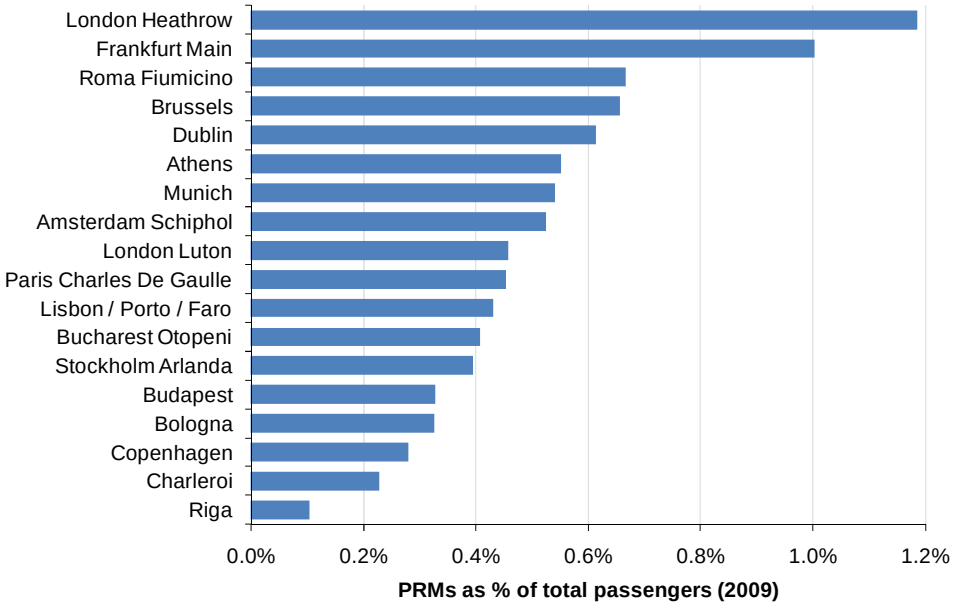
3.13 The views of stakeholders on the provision of services are discussed at the end of this chapter (see 3.76).

Statistical evidence for carriage of PRMs

The proportion of passengers requiring assistance

3.14 The frequency with which PRM assistance services are used varies considerably between airports. Figure 3.1 shows the rate of use at the airports in our sample for which we were provided with data. At London Heathrow 1.2% of passengers are PRMs requiring assistance, while at Riga only 0.1% of passengers require assistance. However, for most airports in the sample, the proportion requiring assistance is between 0.2% and 0.7%. ACI informed us that the higher rates at some airports were the result of the demographics of the passengers flying to these destinations.

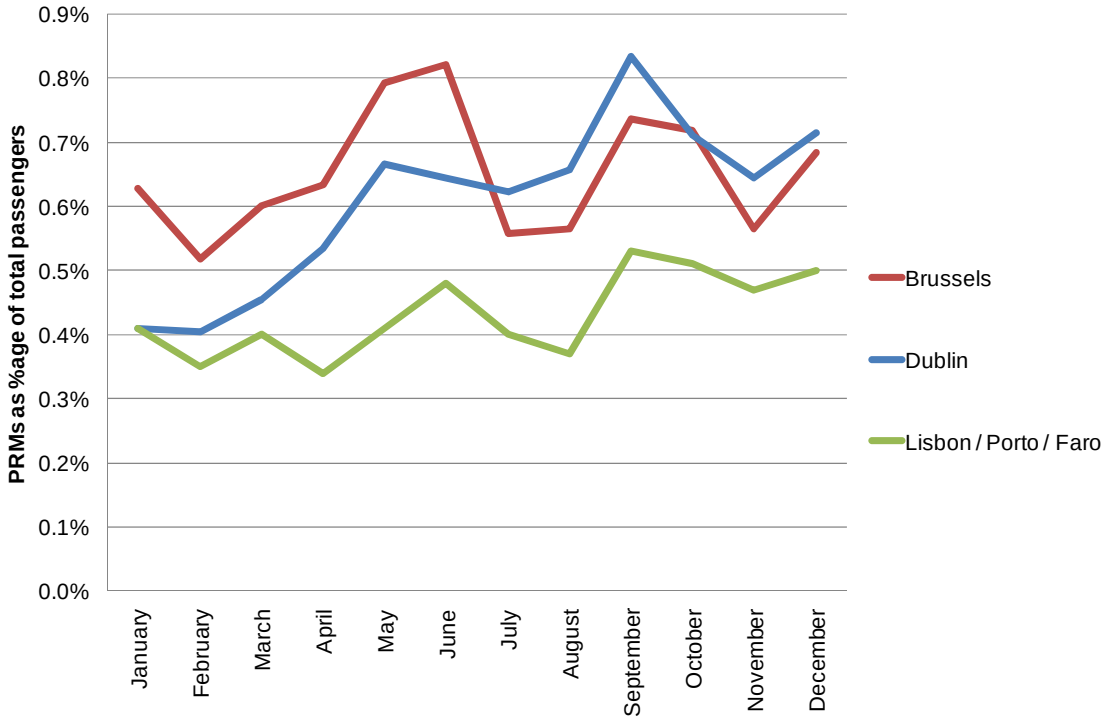
FIGURE 3.1 FREQUENCY OF PRMS REQUESTING ASSISTANCE AT AIRPORTS (2009)



3.15 Some other airports have higher proportions of PRMs requiring assistance, resulting from the demographic profile of passengers using the airports. These include holiday destinations popular with elderly people, such as Alicante, Malaga and Tenerife Sur; and pilgrimage destinations such as Lourdes.

3.16 Based on the information we have received from airports, the profile of PRM travel differs markedly from that of other passengers (see Figure 3.2). Most data indicates that the number of PRMs travelling tends to be lower in relative terms, and at some airports also in absolute terms, during July and August when total air travel is at a peak. At some airports, there appears to be a peak in December and January, however this is not consistent across all the airports for which we have data. Airports informed us that provision of services between April and September can be particularly affected by passengers travelling to cruise ships: these often carry high numbers of PRMs, and since a cruise ship usually disembarks passengers at the same time as it embarks the next load, there is a twofold increase in the number of PRMs travelling through the airport. The winter peak in PRMs is partly due to high rates of injury amongst passengers returning from winter sports holidays.

FIGURE 3.2 FREQUENCY OF PRMS OVER THE YEAR (2009)

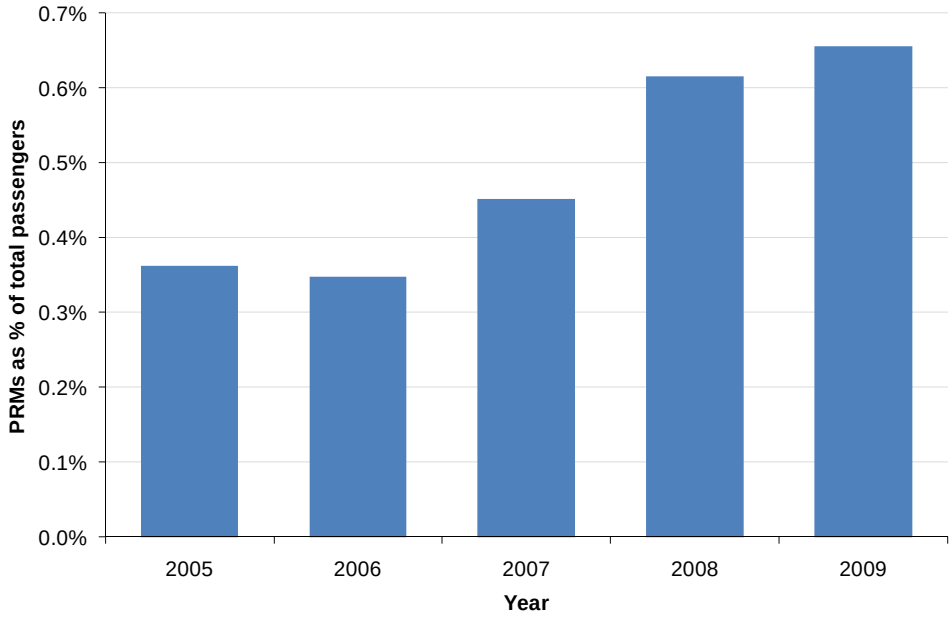


Trend in PRM travel

3.17 Several airports and airlines informed us that the number of PRMs requiring assistance has increased significantly since the introduction of the Regulation. It is difficult to verify this, as airports generally did not provide PRM services before July 2008, and therefore did not have a time series of data available. However, Brussels Zaventum airport introduced a PRM service similar to that required by the Regulation earlier, and as a result was able to provide figures for PRM's travelling between 2005 and 2010. This shows an increasing trend (Figure 3.3): the proportion of passengers

requiring assistance appears stable at approximately 0.35% over 2005 and 2006, and then climbs to 0.66% in 2009. It believed that this was a result of significant abuse of the services.

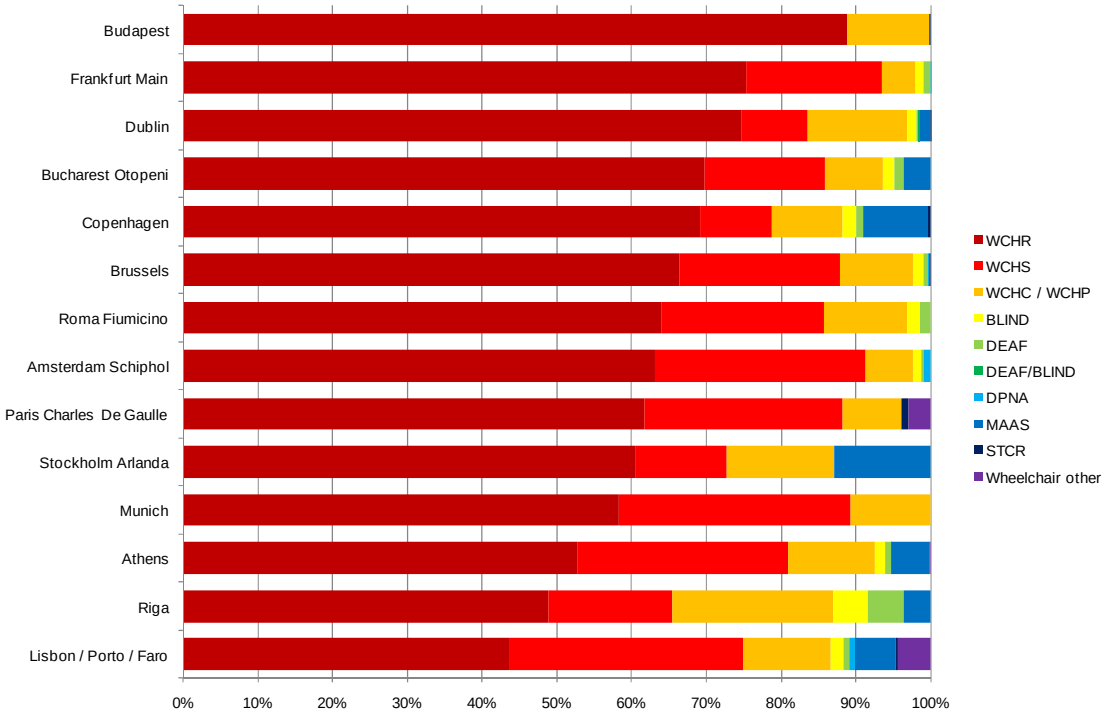
FIGURE 3.3 RATE OF PRMS OBSERVED AT BRUSSELS ZAVENTUM AIRPORT



Types of assistance provided

3.18 Assistance is often divided by airports into WCHC/WCHS (see 3.4), which requires significant time and resources, and others. We requested data on the types of passengers assisted from each of the case study airports and a summary of the data is shown in Figure 3.4. At all airports which provided data, the most frequent category of assistance was WCHR, although the proportion ranged from 44% to 89% (median 64%). The category "Wheelchair other" comprises wheelchair codes which do not fit into the other wheelchair categories: WCMP, manually powered wheelchair; WCBD, dry cell operated wheelchair; and WCBW, wet cell operated wheelchair. We have excluded the codes for medical cases and unaccompanied minors (MEDA and UM respectively) from this analysis, as they are not within the scope of the Regulation.

FIGURE 3.4 VARIATION IN TYPES OF PRMS ASSISTED (2009)



Abuse of services

3.19 Many airports – particularly larger and busier airports – reported that the services they provided for PRMs were sometimes used by passengers who did not appear to have the right to do so under the Regulation. A typical observation was of a passenger who was assisted in a wheelchair from a designated point of arrival through security and customs, and who then walked to the gate unassisted. Several types of passenger who might be motivated to do this were suggested:

- Passengers who feel confused by a large and complex airport, and do not feel that they would able to navigate it successfully;
- Passengers who do not speak the language used for the airport signs and announcements;
- Passengers who have no mobility impairment which prevented them from walking long distances within the airport, but who did not wish to; and
- Passengers (particularly those arrive at the airport with limited time before the departure of their flight) who wish to avoid lengthy queues at emigration, customs and security.

3.20 In addition, some airports reported cases where airlines had requested PRM assistance for passengers such as unaccompanied minors, passengers with excessive cabin baggage, and VIPs. These passengers might previously have been classified ‘meet and assist’ (MAAS) and any assistance required would have been paid for by the airline.

3.21 By its nature, it is hard to establish the true level of this abuse. PRM organisations noted that a passenger's disability may not always be visible. They also noted the perceived stigma attached to travelling in a wheelchair, and believed that many passengers would prefer to avoid this in preference to receiving the services offered under the Regulation.

3.22 The level of abuse reported varied between airports. Copenhagen Airport reported a rate of approximately one passenger per day whom they suspected was not entitled to services under the Regulation, while Brussels reported 20-30 passengers per day. Brussels Airport perceived abuse as a bigger problem than other airports within the sample.

3.23 However, Charleroi Airport informed us that abuse of services had decreased since the introduction of the Regulation, as a result of changes made to procedures. The two changes it identified as having had an impact were:

- requiring passengers who had not pre-notified requirements for assistance to wait; and
- boarding passengers requiring assistance after, rather than before, other passengers, and hence users of the PRM service no longer get first choice of seats on low cost carriers that do not allocate seats in advance.

3.24 These changes had the effect of reducing the number passengers without mobility needs who wished to use the services to avoid queues, and to obtain first choice of seating. However, these policies create some disadvantages for passengers who are entitled to the services.

Organisation of service delivery

3.25 Airport managing bodies may provide the services required under the Regulation themselves, or may contract with other parties to provide the assistance. Any arrangements for assistance to be provided through other parties must be compliant with published quality standards, and must be determined with the cooperation of airport users.

Overview

3.26 15 of the sample of 21 airports provided PRM services through a subcontractor (Table 3.2 below) and, of these, 12 were procured through open tenders. The advantage of procuring this service through an open tender include:

- a specialised provider might more easily be able to provide services of the cost or quality required;
- providing services through subcontractors facilitates the separation of costs of PRM services in an airport's accounts; and
- open tenders allow the airport to demonstrate that the costs are reasonable, as required by the Regulation.

3.27 Some of the largest airports split the tendering of provision into more than one contract, usually through grouping terminals together on a geographical basis.

3.28 In contrast, some of the airports provide the services required under the Regulation through specially trained airport staff. This may be through the creation of new department with this remit, or through extending the remit of a pre-existing department (for example the firefighting department). Airports may also subcontract some services (such as assisting passengers from the gate to the aircraft) to ground handling staff whilst providing other elements of the service themselves.

3.29 We also identified variation in the type of organisation providing services, where this was sub-contracted:

- **Subsidiary company of airport:** This approach is very similar to providing the services in-house, although an advantage is that it is easier for the airport to separate the accounts relating to the provision of PRM services.
- **Ground handling companies:** Airports may be able to realise economies of scope through provision of PRM services by ground handling companies.
- **Specialist PRM contractor:** Among the airports examined for this study, the most frequent type of organisation providing PRM services was a company that specialised in this kind of assistance service. Some such companies provided PRM services only, while a number provide it as part of a range of services. These other services might include cleaning services, facilities management, emergency assistance, and ambulance services.

TABLE 3.2 METHODS OF PROCURING PRM SERVICES AT AIRPORTS

Airport	Approach to procurement	Type of organisation providing PRM services
Amsterdam Schiphol	Open tender	Specialist PRM contractor
Athens	Open tender	3 ground handling companies
Bologna	In-house / non-competitive tender	Airport staff, 2 ground handling companies
Brussels	Open tender	Specialist PRM contractor
Bucharest Otopeni	In-house	Airport staff
Budapest	Open tender	Ground handling company
Brussels Charleroi	In-house	Airport staff
Copenhagen	Open tender	Specialist PRM contractor
Dublin	Open tender	Specialist PRM contractor
Frankfurt Main	Non-competitive tender	Subsidiary of airport
Lisbon	In-house	Airport staff, subcontracted ground handling staff
London Heathrow	Open tender	2 specialist PRM contractors
London Luton	Open tender	Specialist PRM contractor
Madrid Barajas	Open tender	Information not provided at interview
Munich	Open tender	Specialist PRM contractor
Paris Charles De Gaulle	Open tender	2 specialist PRM contractors
Riga	In-house	Airport staff
Roma Fiumicino	Non-competitive tender	Subsidiary of airport

Stockholm Arlanda	In-house	Airport staff
Warsaw	Non-competitive tender	Ground handling company
Zaragoza	Open tender	Information not provided at interview

3.30 Although the PRM service had only been provided by airports for around 18 months at the time of our research, we were informed by a number of airports that they were considering or were in the process of retendering the service. The primary reason given for retendering was that service quality had not been sufficiently high, although some airports cited a higher than expected increase in use of services after the introduction of the Regulation.

3.31 The Regulation also allows[9] for airlines to request a higher level of service than those set out in the quality standards for the airport, and to levy a supplementary charge for this service. However, none of the sample airports or airlines were requesting or providing such a service.

Consultation

3.32 The Regulation requires contracts for the supply of services under the Regulation to be entered into in cooperation with airport users and with organisations representing PRMs. Cooperation with airport users is usually through the airport users committee (AUC). Although this is intended to improve consultation, airlines informed us that in some circumstances it did not do so, citing examples where:

- the proceedings of the AUC were conducted only in the native language of the airport;
- only ground handlers were represented on the committee; and
- one stakeholder has a voting majority on the committee, allowing it to disregard the views of other carriers.

3.33 We were also informed of circumstances where the consultation provided by airports was extensive. London Luton retendered for PRM services in March 2010, and involved airport users (airlines and ground handling companies) at all stages of the tendering process, including the development of the specification, and the evaluation and scoring of bids.

Airport charges

3.34 The Regulation permits airports to fund the provision of assistance through a specific charge on airport users. This charge must be reasonable, cost-related, transparent and established in co-operation with airport users. It must be shared among airport users in proportion to the total number of passengers that each carries to and from the airport (this is typically calculated on the basis of departing passengers). The accounts of the airport relating to provision of PRM services must be separate from its accounts relating to other services, and it must make available to airport users and NEBs an audited annual overview of charges received and costs incurred relating to the provision.

[9] Articles 9 (4) and (5).

3.35 The majority of the case study airports recover costs for PRM assistance through a PRM charge levied on all departing passengers which is specific to the airport and set to fully recover the costs of the PRM service. However, we identified the following key variations in this approach:

- **Uniform charge:** The PRM charges in Spain and Portugal are uniform across the airports operated by AENA and ANA respectively. This approach appears to infringe the Regulation, which requires a specific charge "established by the managing body of the airport", although there is some uncertainty about this due to differences between the English and Spanish language versions of the Regulation. Both AENA and ANA believed that, since the service was provided across a network of airports, it was appropriate that there should be a uniform network charge.
- **Economic regulation:** Many airports are subject to economic regulation of the charges they may levy on airlines. At most of the airports in our sample, the PRM charge is excluded from the regulated price cap, but at Dublin and Brussels Zaventum the PRM charge is included within this. As a result, their flexibility to amend charges (for example to reflect a higher than expected use of PRM services) is constrained: for example, they may require regulatory approval for any changes, or have the level of any increases limited by a charging cap. Charges may also be fixed over the course of a given regulatory period.
- **Pre-existing provision:** Stockholm Arlanda and all other State-owned airports in Sweden provided some elements of the services required under the Regulation prior to its introduction. In Sweden, charges for services for WCHC and WCHS passengers were introduced in 2001 at a rate of 1 SEK (€0.10[10]) per departing passenger; charges have not yet been increased since the Regulation came into force to reflect the wider range of passengers requiring assistance, but we were informed that this is likely to happen in the next year.
- **Non-implementation of the Regulation:** With the exception of Athens, none of the airports in Greece provide assistance for PRMs. Assistance is provided by ground handling companies, and charges are negotiated directly between airlines and ground handling companies, and consequently not made public.

3.36 We were informed by ACI that the proportion of airports which identify this fee separately was 52% across the airports it surveyed, as opposed to 48% which include it in the passenger fee.

3.37 The types of costs which may be recovered using the PRM charge are:

- **Direct assistance costs:** The direct costs of the day-to-day running of the service.
- **Other incidental operating costs:** These may include maintenance, purchase of operating materials, other services, etc.
- **Capital expenditure:** Expenditure to invest in facilities required to provide services, such as mobility equipment and the fitting out of a dispatch office.
- **Administrative expenses:** These may include time spent by airport personnel in running the contract, and project costs such as airport management time in developing the tender.

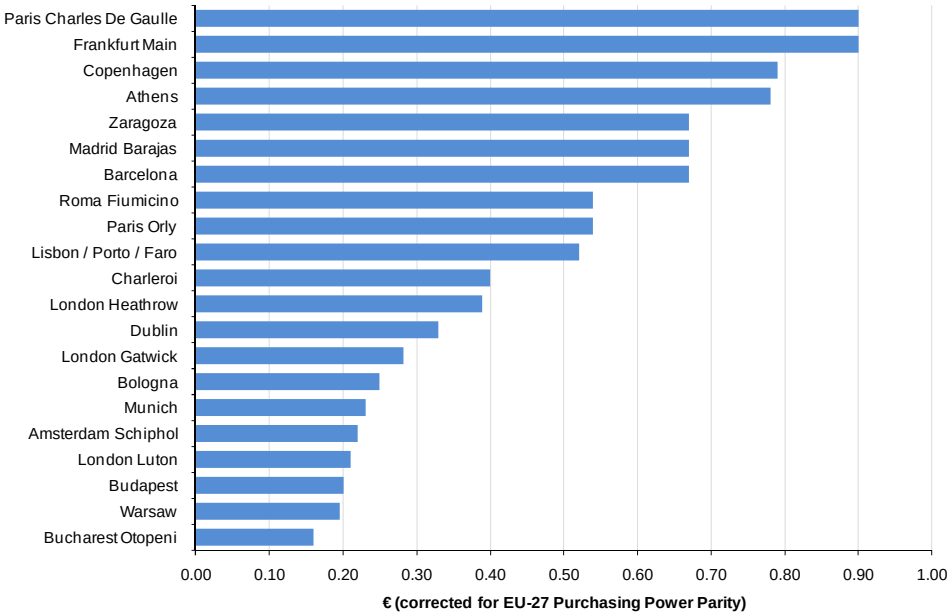
[10] Calculated on the basis of €1 = 9.7 SEK.

- **Other airport fees:** The PRM contractor may have to, for example, rent space from the airport and to pay a fee for doing so. This would also be recovered through the PRM charge.

Level of charges

3.38 Figure 3.5 shows the charges at the case study airports in euros, converted using current (January 2010) exchange rates where required. There is significant variation in the level of the PRM charge between airports, from a minimum of €0.16 in Bucharest to €0.90 at Frankfurt Main and Paris CDG.

FIGURE 3.5 AIRPORT CHARGES PER DEPARTING PASSENGER (€ AT CURRENT EXCHANGE RATES)



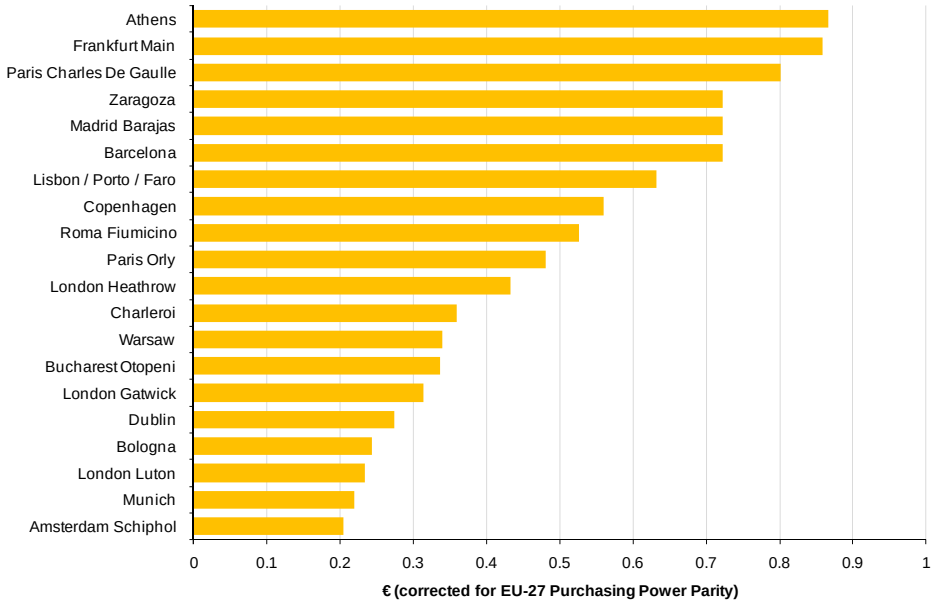
3.39 The variation in charges between airports may result from several factors, including:

- staff cost variation;
- quality standards in place;
- the frequency with which the PRM services are used;
- the proportion of connecting flights; and
- the design of the terminal or airport.

3.40 We discuss each of these possible reasons for variation in turn.

3.41 **Purchasing power parities (PPPs)** can be used to compensate for differences in price levels between States. Figure 3.6 uses Eurostat PPPs for 2008 to convert PRM charges in national currency to euros at average price levels for the EU-27. The harmonisation only very slightly reduces the variation in the charges (measured in terms of standard deviation).

FIGURE 3.6 AIRPORT CHARGES PER DEPARTING PASSENGER, 2009 (€ AT 2008 EU-27 PPP)



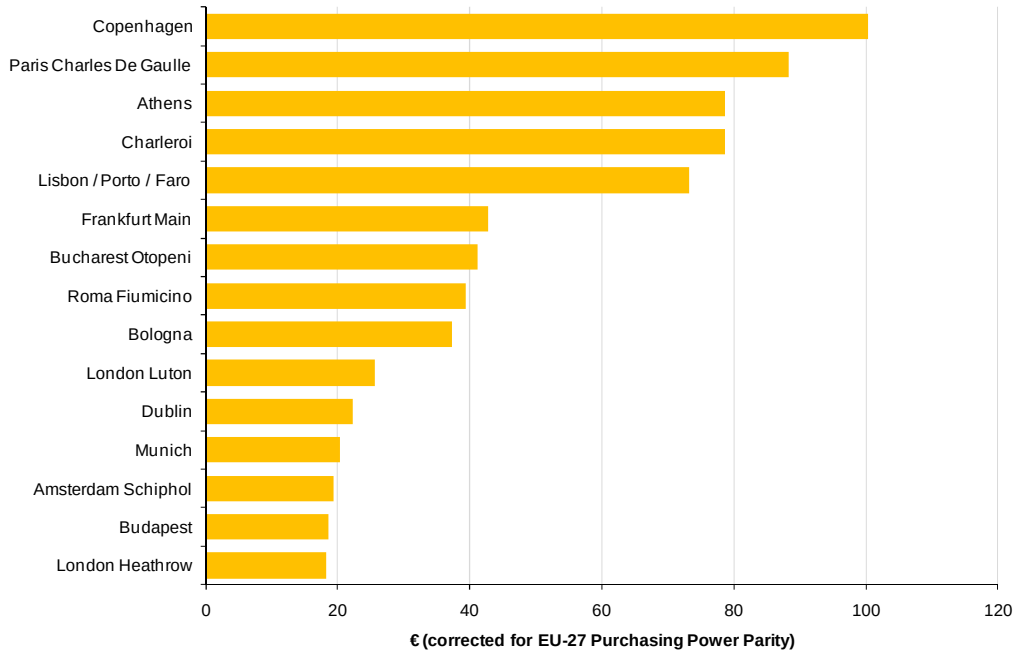
3.42 Although it was not possible to find published data showing the actual **level of service** offered to PRMs at any of the case study airports, the level of service set out in the PRM quality standards might help explain the variation in charges. To test this, we have calculated a weighted average PRM wait time and compared this with the PRM charge at each airport. This analysis suggests little or no correlation: for example, although the London airports state the highest service standards in terms of waiting times, the charges levied are lower than those at many other airports. Similarly, low charges at Bucharest are not reflected in longer proposed waiting times for PRMs requesting assistance.

3.43 It might also be expected that airports with **higher proportions of PRMs** would have higher charges. To examine this we calculated a proxy for the cost of assisting each PRM, for the airports for which we had data. This was obtained by dividing the PRM charge by the proportion of PRMs at each airport, to obtain the revenue gained by the airport for each PRM assisted.

3.44 It should be noted that there are some limitations to this analysis. It calculates revenue per PRM, and for this to be a valid proxy for costs, it must be assumed that charges are accurately cost-reflective, which is not the case in some airports: in Spain and Portugal the charge is uniform across all mainland State-owned airports, and does not therefore reflect local variation in costs; at State-owned airports in Sweden, the charge reflects only the costs of providing services for WCHC and WCHS passengers. For the costs to be cost-reflective it is also necessary that the frequency of use of the service is as forecast when the charges were calculated.

3.45 Figure 3.7 shows the results of the analysis. There is still significant variation between airports; the maximum cost per PRM assisted (€100 at Copenhagen, PPP adjusted) is 5 times the minimum cost (€18 at Bucharest, PPP adjusted). This shows that the variation in the number of PRMs does not fully explain the variation in the charge.

FIGURE 3.7 AIRPORT COSTS PER PRM ASSISTED, 2009 (€ AT 2008 EU-27 PPP)



3.46 The level of variation also does not appear to be accounted for by the **size of the airport**: the charge at London Heathrow is relatively low, while Paris CDG is relatively high.

3.47 Several airports cited **high proportions of connecting passengers** as a factor which increased costs. However, we do not believe that high proportions of connecting passengers would increase the costs of provision: transfer passengers are counted as two passengers in airport statistics and any PRM charge is levied twice, so if the service is less than twice the cost of that for an arriving or departing passenger, such passengers would in fact result in a cost saving relative to other PRMs. This view is supported by the data, where the charge at London Heathrow is relatively low.

3.48 **Terminal design** may impact on the amount of time required to provide assistance, or the efficiency with which it can be provided. For example, Amsterdam Schiphol airport, which has one integrated terminal building and the concourse is generally at the same level, can make extensive use of electric carts to transport multiple passengers together; this is not practical at airports such as CDG.

Changes to charges in 2010

3.49 The charges and costs in this section are based on those current in 2009, as this is the only complete year for which data was available. Where updated charges have been published for 2010[11], we have compared these with those for 2009. Most airports had not made any changes, but Munich and Rome Fiumicino increased charges by 48% and 28% respectively.

[11] IATA Airport, ATC and Fuel Charges Monitor, February revision, published March 2010.

3.50 London Heathrow changed the structure of its PRM charges in 2010. Whereas previously it levied a charge of £0.35 (€0.38) per passenger for all airlines, from 1 January 2010 the charges vary depending on the level of pre-notification. Airlines which pre-notify 85% or more of PRMs are charged £0.42 (€0.46) per departing passenger, while those which pre-notify 45% or less of their passengers are charged £0.83 (€0.91).

Consultation

3.51 Airports are required to determine charges in cooperation with users through airport user committees. The Regulation does not define cooperation further, however, and as a result the form this consultation has taken varies considerably. London Luton informed us that their tender process involved airlines, ground handlers and PRM organisations at all points of the tender process, from developing the specification to evaluating the bids and awarding the contract. In contrast, several airlines informed us that the consultation in Portugal and Spain was limited to the publication of a letter stating the amount the charge per person. We were also informed that consultations on PRM charges were often included in wider general charge negotiations.

3.52 A number of issues were raised regarding this cooperation.

- We were informed by several airports that certain carriers have contested the procedural steps taken by airport managing bodies to establish the charge. This has in at least one case been supported by an NEB taking a strict interpretation of the meaning of 'in cooperation with airport users', as requiring agreement between the airport and the airline both on the tender and the level of the charge. This has led to delays, particularly due to challenges by low-cost airlines, including requests to see cost information, which the airports regarded as unnecessary, after the tender processes were completed.
- Some airlines have blocked the process of approving charges by refusing to participate in the consultation.
- Some airports believed that direct involvement of users in the tender process can be problematic: without signing personal non-disclosure agreements, it may not be possible to share the commercially sensitive information included in tenders; there may also be conflicts of interests between some of the handlers and the tendering parties. However, the example of London Luton discussed above demonstrates that these barriers are not impossible to overcome.

Quality standards

Standards published

3.53 The Regulation requires all airports serving over 150,000 passenger movements per year to set and publish quality standards. Figure 3.8 indicates the proportions of airports publishing quality standards. The following airports had not yet done so:

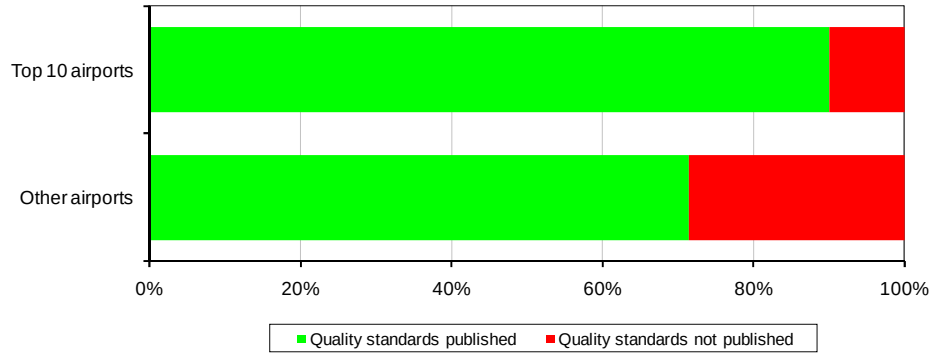
- Amsterdam Schiphol: quality standards are in the process of being re-developed with airlines, and have not been published yet;
- Bologna: standards not yet published;
- Budapest: standards published to airlines and handling companies by letter; and
- Stockholm Arlanda: standards published to airlines but not yet published on its

website; it informed us that the standards would be published soon.

3.54 Three of these airports provided the quality standards to us at interview, but Amsterdam Schiphol and Bologna did not provide any details of their quality standards.

3.55 We found that the largest ten European airports in terms of passenger numbers were more likely to publish quality standards that those outside the top 10.

FIGURE 3.8 PROPORTION OF AIRPORTS PUBLISHING QUALITY STANDARDS



Ease of finding quality standards

3.56 The ease with which the quality standards could be located on airport websites varied considerably. For the airports which published quality standards, some of the main issues encountered were:

- Having to click through an excessive number of links before finding the standards, e.g. the website of Charleroi Airport requires the user to click on five links before the standards can be viewed;
- Locating the standards on the site of the management company rather than within the section or website dedicated to the airport – this was the case for the Spanish airports for which the information is on the main AENA website;
- Using terminology which may not be obvious, avoiding the actual term 'quality standards', e.g. BAA use the term 'Service Level Agreement'; and
- Restrictions on language – Bucharest Otopeni, Brussels Charleroi and the Paris airports only publish quality standards on the local language versions of their websites.

Standards for waiting time

3.57 The standards defined by the case study airports are shown in Table 3.3 and Table 3.4 below. At all of the case study airports for which we were able to obtain standards, these are defined in terms of the percentage of PRMs who should wait for up to a given number of minutes. For example, at Barcelona, 80% of departing passengers who have pre-notified requirements for assistance should wait for 10 minutes or less from the point at which notice is given that they have arrived at the airport. This

approach is consistent with the example standards in Annex 5-C of ECAC Document 30[12], and eight of the airports in the sample (including Copenhagen, Munich and the AENA Spanish airports) follow these exactly.

3.58 There are however variations in both how the standards are structured and the level of the standards. Paris Charles de Gaulle is unusual in that, with the exception of the top 99% bracket, an additional ten minutes is added to the wait time for departing passengers located 'further away'. The published standards do not define how far away this is. Aéroports de Paris also define an additional category, of pre-notification of between 8 and 36 hours, for whom the standards are part-way between those applying to PRMs for which notification was received 36 hours or more before travel ('pre-booked'), and those for which notification was received less than 8 hours beforehand ('non-pre booked'). This is not shown in the table as it is not comparable with the standards offered by the other airports.

3.59 There are also some differences in how the wait time for arriving passengers is measured. At most airports, it is measured from when the aircraft reaches the parking position, but there are the following exceptions:

- From descent of last passenger: Rome Fiumicino;
- From boarding bridge lock: Brussels; and
- Not defined: Athens, Budapest, Lisbon, Stockholm Arlanda.

3.60 The standards proposed for pre-booked departing passengers are generally consistent, at least in terms of the waiting times which percentages are applied to: 10, 20 and 30 minutes are the most commonly used intervals, at 80%, 90% and 100% respectively. For non pre-booked passengers 80%, 90% and 100% apply to 25, 35 and 45 minutes. Better standards are offered by the UK and French airports that we reviewed. This is also reflected in the standards for arriving passengers, with the London and Paris airports targeting zero waiting time for 90-100% of passengers. There is also a clear pattern for arriving passengers, with 80% of pre-notified PRMs waiting no more than 5 minutes, 90% no more than 10 and 100% no more than 20 minutes. Standards are not as high as this for non pre-booked passengers, however.

3.61 Several airports informed us that the standards suggested by ECAC Document 30 for arriving passengers were not short enough to meet airline requirements on turnaround times: if the airports adhered only to these standards, there would be significant operational issues. Some of these airports published standards in line with Document 30, but stated that they actually provided services in much shorter times.

[12] ECAC Policy Statement in the field of Civil Aviation Facilitation, 11th Edition/December 2009.

Other elements of published quality standards

3.62 Some airports define additional standards other than the waiting time targets, generally reflective of the assistance set out in Annex 1 of the Regulation. For example, Charleroi provides detailed information regarding the level of assistance which will be provided for PRMs, for example support for embarking and disembarking the aircraft, or for dealing with customs formalities. Brussels Airport also defines how many assistants will accompany a PRM, depending on their type of disability.

3.63 Some airports also include more general, qualitative targets, less directly related to the assistance offered to an individual PRM. For example, Luton Airport's published standards include responding to 'disabled customer enquiries to offer guidance and advice', and auditing to ensure compliance with all disability legislation. Athens Airport also provides extensive details of the measures it has taken to accommodate PRMs, including disabled-access internet points and a special walkway for partially sighted PRMs.

TABLE 3.3 SCOPE OF QUALITY STANDARDS: DEPARTING PASSENGERS

	Pre-booked / airport informed *% of PRMs who should wait no longer than (minutes)*										Non-pre-booked / airport not informed *% of PRMs who should wait no longer than (minutes)*									
	5	10	15	20	25	30	35	40	45	60	5	10	15	20	25	30	35	40	45	60
Athens		80%		90%		100%							80%		90%		100%			
Barcelona		80%		90%		100%									80%		90%		100%	
Brussels		80%		90%		100%									80%		90%		100%	
Bucharest Otopeni		80%		90%		100%									80%		90%		100%	
Budapest		100%										100%								
Charleroi		80%		90%		100%									80%		90%		100%	
Copenhagen		80%		90%		100%									80%		90%		100%	
Dublin		80%		90%		100%									80%		90%		100%	
Frankfurt Main		80%		90%		100%									Not defined					
Lisbon		80%		90%		100%									Not defined					
London Gatwick	80%	90%	100%									80%	90%	100%						
London Heathrow	80%	90%	100%									80%	90%	100%						
London Luton		90%	95%	100%									90%	95%	100%					
Madrid Barajas		80%		90%		100%									80%		90%		100%	
Munich		80%		90%		100%									80%		90%		100%	
Paris CDG		90%			99%										80%		90%		99%	
Paris Orly		90%			99%				100%			40%			80%				90%	100%
Riga		80%		90%		100%									80%		90%		100%	
Roma Fiumicino		80%				100%									80%			100%		
Stockholm Arlanda		80%		90%		100%									80%		90%		100%	
Warsaw		100%													100%					
Zaragoza		80%		90%		100%									80%		90%		100%	

TABLE 3.4 SCOPE OF QUALITY STANDARDS: ARRIVING PASSENGERS

	Pre-booked / airport informed *% of PRMs who should wait no longer than (minutes)*										Non-pre-booked / airport not informed *% of PRMs who should wait no longer than (minutes)*									
	0	5	10	15	20	25	30	35	40	45	0	5	10	15	20	25	30	35	40	45
Athens		80%	90%		100%									80%		90%		100%		
Barcelona		80%	90%		100%											80%		90%		100%
Brussels		80%	90%		100%									80%		90%		100%		
Bucharest Otopeni		80%	90%		100%										80%		90%			100%
Budapest		100%										100%								
Charleroi		80%	90%		100%											80%		90%		100%
Copenhagen		80%	90%		100%											80%		90%		100%
Dublin		80%	90%		100%									80%		90%		100%		
Frankfurt Main			80%		100%										Not defined					
Lisbon		80%	90%		100%										Not defined					
London Gatwick	100%												80%	90%		100%				
London Heathrow	100%												80%	90%		100%				
London Luton	99%	100%											90%	100%						
Madrid Barajas		80%	90%		100%											80%		90%		100%
Munich		80%	90%		100%											80%		90%		100%
Paris CDG	90%		99%												80%		90%			100%
Paris Orly	90%		99%							100%					80%		90%			100%
Riga			80%	90%	100%											80%		90%		100%
Roma Fiumicino					90%	100%									Not defined					
Stockholm Arlanda		80%	90%		100%											80%		90%		100%
Warsaw		100%														100%				
Zaragoza		80%	90%		100%											80%		90%		100%

Monitoring

3.64 While the Regulation requires larger airports to develop and publish quality standards, it does not require them publish whether they are actually met, and none of the case study airports do so. Nonetheless most airports do undertake some form of monitoring and several provided us with performance statistics. There were a number of approaches to monitoring:

- **Time spent waiting to receive assistance:** This is the most common measure used by airports, as set out above. These times are often measured by time stamps inputted into the personal digital assistants (PDAs) or equivalent devices carried by staff providing assistance to PRMs (discussed earlier). The data recorded can often give wider outputs than solely the time taken to receive assistance, such as time from gate to boarding, or time waiting once disembarked from an aircraft. This approach should give accurate information on the time spent waiting by passengers, but does not address other aspects of quality of service.
- **Spot checks:** Many airports reported that the PRM service manager will undertake frequent unannounced tours of the services and infrastructure provided within the airport. They may check, for example, that the designated points of arrival and departure are functioning correctly. This approach is useful to identify wide-ranging problems but may not be sufficiently systematic to identify all problems.
- **Surveys:** A number of airports reported using surveys to obtain feedback from passengers. Typically, a postcard with survey questions to be completed was given to PRMs at some point during their use of the airport's services, which could be submitted at information desks or at various comment boxes place throughout the airport. These covered questions on the services received, and in some cases assessed the passenger's knowledge of the Regulation. A potential problem with this approach is the lack of accessibility for all passengers.
- **Mystery shoppers:** 'Mystery shoppers' are people (typically PRMs) paid to anonymously receive the service provided by the airport and afterwards give detailed reports or feedback about their experiences. This approach gives a thorough appraisal of the service provided at a particular time.

3.65 Table 3.5 sets out the actions airports have taken to monitor their quality standards. Most airports do not include any external auditing in their monitoring processes; Athens, Bucharest Otopeni, Luton, Madrid Barajas, Zaragoza include some external checks.

TABLE 3.5 AIRPORT ACTIONS TO MONITOR QUALITY STANDARDS

Airport	Measures monitored
Amsterdam Schiphol	Manual checks of numbers of PRMs and service quality
Athens	Audits, including 'mystery PRM' audit; PRM surveys
Bologna	PRM survey; time taken for assistance
Brussels	Time taken for assistance (in real time); passenger complaints
Bucharest Otopeni	Passenger surveys; complaints; external audits by NEB, PRM organisations, Commission, and airlines
Budapest	Monthly reports of time taken for assistance and passenger complaints; daily contact with service provider; 'walk-throughs' of service provided; airline audits

Brussels Charleroi	Passenger complaints received
Copenhagen	Time taken for assistance (in real time)
Dublin	Weekly audits of time taken; annual training audit
Frankfurt Main	Monthly reports of time taken for assistance
Lisbon	Time taken for assistance
London Heathrow	Time taken for assistance; missed flights; flight delays; internal audits; regular meetings with service providers; complaints from passengers and airlines; some of these measures monitored through a 'dashboard'; monthly 'scorecard' review
London Luton	Passenger feedback forms; 'walk-throughs' of service provided; internal and external audit teams of provider; airline and PRM organisation audits
Madrid Barajas	Monthly meetings with service providers and PRM organisation; surveys by service providers; independent surveys; PRM feedback forms
Munich	Monthly reports of time taken for assistance; spot checks; quality service manager as 'mystery shopper'; yearly passenger survey
Paris Charles De Gaulle	Flight delays for which PRM services are responsible; passenger complaints
Riga	Questionnaires to airlines, passengers and others; daily service monitoring by duty managers; internal audits
Rome Fiumicino	Time taken for assistance (in real time); other unspecified monitoring
Stockholm Arlanda	Time taken for assistance; passenger complaints; AOC meetings
Warsaw	Infrequent spot checks of time taken
Zaragoza	Monthly meetings with service providers and PRM organisation; surveys by service providers; independent surveys; PRM feedback forms

3.66 In addition, we found that most NEBs had not undertaken any direct, systematic monitoring of whether airports were meeting quality standards. Table 3.6 sets out the actions NEBs have taken to monitor airport quality standards.

TABLE 3.6 NEB ACTIONS TO MONITOR QUALITY STANDARDS

Member State	Monitoring
Belgium	Inspections of infrastructure and procedures
Denmark	No monitoring, biannual meetings
France	No monitoring
Germany	No monitoring
Greece	Inspections of infrastructure and procedures at Athens, not of regional airports
Hungary	Inspections of infrastructure and procedures, questionnaire on training
Ireland	No monitoring
Italy	Inspections of quality standards including infrastructure, procedures, information, training
Latvia	Inspection of infrastructure, procedures, waiting times, documentation
Netherlands	Inspection of infrastructure and procedures
Poland	No monitoring
Portugal	No monitoring

Member State	Monitoring
Romania	Request annual reports
Spain	Checks of staff training and procedures
Sweden	No monitoring
United Kingdom	Inspections of infrastructure and procedures, attend monthly PRM groups at major airports, less frequently at smaller airports

Complaints to airports

Airport processes for handling complaints

3.67 Most case study airports accepted complaints relating to PRM services in the same way as other complaints. Often airports will accept complaints via email, via information desks at the airport, or via forms which can be filled in and deposited in comment boxes located at various points within the terminals.

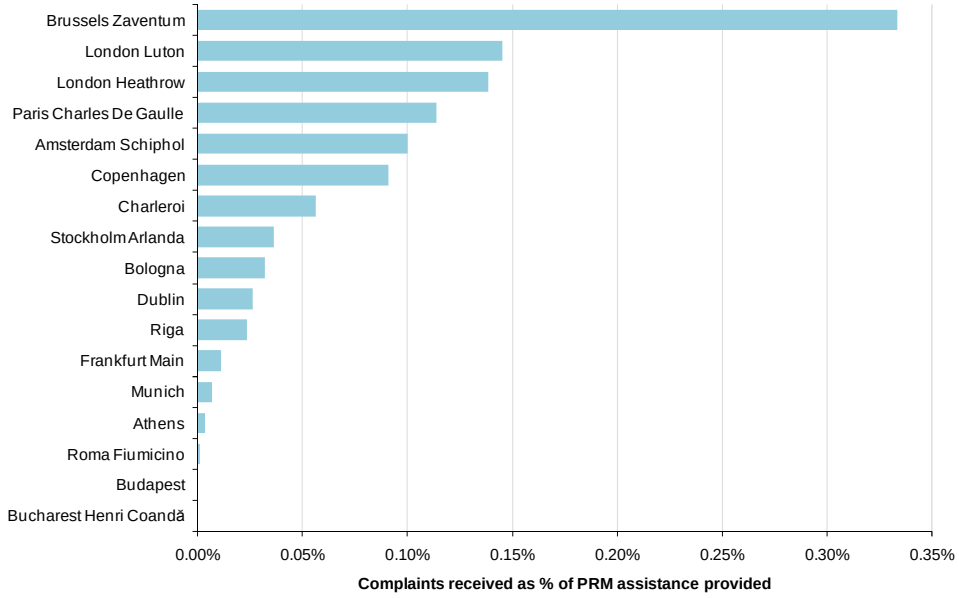
3.68 Typically, complaints are registered in a database which is reviewed by a member of staff on the service quality team. The staff member allocated to the complaint reviews documents relating to the service referred to in the complaint, and talks to the member of staff who provided the service (this member of staff may be employed by either the airport or a contractor). After investigating the complaint, the staff member writes a report including the findings and any response which is sent to the passenger. The service quality manager may review monthly reports on complaints, which will include complaints regarding the PRM service.

3.69 The level of detail to which the complaint handling process is specified varies depending on the volume of complaints received: an airport which handles many complaints may follow clearly defined procedures for handling complaints, while an airport which receives only few complaints may address them on a more ad hoc basis.

Number of complaints received

3.70 For each airport in the case study sample we requested the number of complaints received relating to provision of services to PRMs. We compared the data received with the assistance provided to give a rate of complaints, shown in Figure 3.9. This shows a high level of variation in the number of complaints received. Most of the larger airports have a similar rate of complaints. The highest rate of complaints is at Brussels Zaventum (0.33%, over double the next highest).

FIGURE 3.9 RATE OF COMPLAINTS RECEIVED BY AIRPORTS, 2009



3.71 Some airports note that they have received no complaints regarding the Regulation since its introduction, while during the same period they have received several thousand complaints regarding aspects of their service not covered by the Regulation. This is evidence that their system for receiving complaints is functioning well, but it is not necessarily evidence that there are no problems regarding the implementation of the Regulation. We were informed by several PRM organisations that a mobility-impaired passenger who receives poor service may be reluctant to complain, as they may wish to forget the incident, and since these passengers may face many obstacles during a journey, they may take the view that reporting the more frequent minor incidents is not worthwhile. In addition, the lack of compensation in most Member States means there is little direct incentive to complain.

Training

3.72 The Regulation requires that airports provide training relating to PRMs for their personnel:

- All personnel who provide direct assistance to PRMs, including those employed by subcontractors, must have knowledge of how to meet the needs of various different types of PRMs.
- All airport personnel who have direct contact with the travelling public must have disability-equality and disability-awareness training.
- All new employees must attend disability-related training and personnel must have appropriate refresher training.

3.73 We requested information on the training provided at each of the airports in the sample for the study. As many considered this material confidential, we were not able to obtain many copies of training documents. From the information we have received, the content of the three types of training may typically include the following:

- **Staff assisting PRMs directly:** Most courses described included: theoretical training on rights and obligations under the Regulation, training in awareness of disabilities, and physical training in lifting and other handling of PRMs. Some elements of training may be given to all staff; these could include Ambulift licenses and sign language. It may also include training not directly related to PRMs, such as training in first aid. Not all of the training courses we were given information for included provision for 'soft' elements of interacting with PRMs, such as ensuring that the person providing assistance is at the same height as a wheelchair user when talking to them, or being aware of the type of circumstances which could cause a person with autism to become distressed.
- **Passenger-facing staff:** This training is typically the disability-equality and disability-awareness sections of the training for staff providing direct assistance to PRMs. Several airports ensured that this training was undertaken by all staff working in the airport (including external staff) by making this training a requirement for obtaining the security clearance pass needed to work in the airport. It may include specific training for security staff who perform searches on PRMs, relating for example to how to search a passenger in their own wheelchair, and awareness of the importance to blind passengers of having belongs replaced in exactly the same place within their baggage.
- **Other employees:** The form of this training was often a short video on disability awareness. Some airports did not provide this training, or did not make it compulsory, which appears to be an infringement of the Regulation.

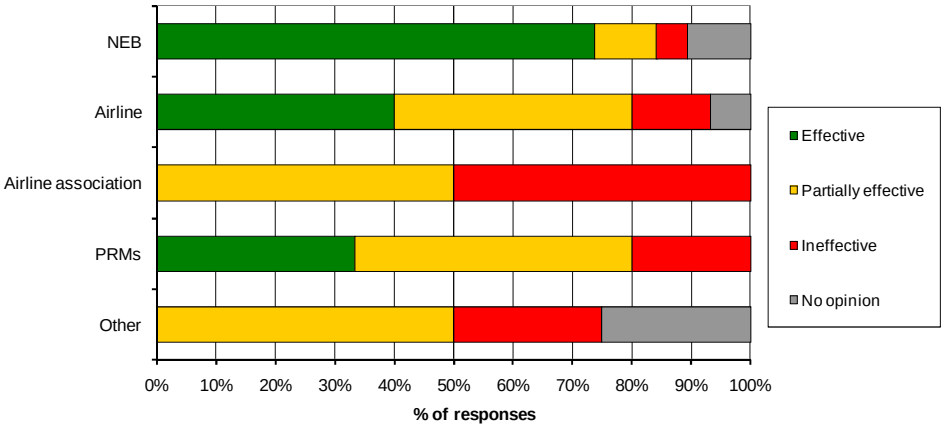
3.74 Training was delivered either internally, by external contractors specialising in training, or by PRM organisations. Several airports informed us that they used a "train the trainer" approach, where employees who have received the training then go on to train other employees. Several airports informed us that their training programmes were compliant with the guidance given in Annex 5-G of ECAC Document 30. A number of airports had involved PRM organisations in their training in some way, including in the development of the training, in its delivery, or through audit and approval. Several airports informed us that they had sought assistance from local PRM organisations but had found this problematic.

3.75 The lengths of the training programmes about which we were given information varied widely. We were given information relating to 6 training programmes for those providing direct assistance to PRMs: of these, 4 lasted 3-6 days, while two lasted 12 days or more. The length of training for passenger-facing staff also varied, with some airports requiring a full day of training whilst others only required the staff member to watch a 20 minute video. Refresher courses also varied considerably in length (between 1 and 4.5 days) and frequency: one airport informed us that it had monthly refresher training, while another required refresher training every 2 years.

Stakeholder views on effectiveness of implementation

3.76 We asked each of the stakeholders we contacted about how effectively they believed airports had implemented the Regulation; views vary considerably between different groups of stakeholders (Figure 3.10 below). Airlines and PRM organisations both believe that there are significant improvements to be made, but over 70% of NEBs believe that the actions of airports are largely sufficient. The rest of this section summarises the views expressed by stakeholders.

FIGURE 3.10 VIEWS OF STAKEHOLDERS ON AIRPORT EFFECTIVENESS



Airports

3.77 Most airports viewed their own actions as effective implementations of the Regulation. The most common problem reported by airports was misuse of the PRM service, however the level of impact of this reported misuse varied considerably between airports. The following other issues were identified by airports:

- Connecting flights: Minimum connection times, while sufficient for other passengers, can be insufficient for a PRM.
- Initial implementation of the Regulation: Several airports informed us that they had had problems with subcontracted service providers; a number had since retendered the service because of unsatisfactory service quality.
- Several airports informed us that they had had difficulty obtaining the cooperation of PRM organisations when developing quality standards.

Airlines and airline associations

3.78 Many airlines reported that quality of service and level of charges varied considerably between airports. This did not necessarily relate to size of airport: some airlines informed us that larger airports tended to provide better assistance, while other airlines informed us that their provision tended to be worse. Few airlines reported significant delays due to PRM services.

3.79 The most common problems with airport implementation of the Regulation reported by airlines related to airport charges. These issues were raised, in particular, by low cost and charter carriers:

- many airlines believed that the method of determining charges was not transparent and that the charges determined by airports were not reasonable or cost reflective;
- many airlines reported that the costs of the PRM service had increased (in some cases significantly) since the introduction of the Regulation, relative to the previous situation when the PRM service was contracted directly by the carrier, generally from its ground handler;

- this increase was believed by several airlines to be a result of overstaffing, or by some as a result of the inclusion of a margin, which they believed to be a contravention of the Regulation;
- at the same time as this perceived increase in cost, many airlines believed the quality of service had decreased, or at best not improved, since the introduction of the Regulation, and that the charges therefore represented poor value for money; and
- some States (in particular Spain and Portugal) have introduced uniform charges for services at State-operated airports, which airlines do not believe are cost-reflective or give value for money.

3.80 Some airlines informed us that they had serious concerns regarding the safety of uses of the PRM assistance services provided by airports, and noted that the airlines have no right to audit or directly influence the service provider.

3.81 Airline associations raised many of the same issues. ELFAA had particularly negative views regarding the assistance provided by airports: it believed that assistance was provided by unskilled staff and that the quality had decreased as a result, and that the cost of provision had tripled at some airports. It also believed that services were poorly synchronised with airline schedules. All of the airline associations from whom we obtained a response raised at least some concerns on all points regarding charges, including whether the costs were reasonable, cost-related and transparent, and whether the cooperation with airlines was sufficient.

NEBs

3.82 Most NEBs believed that airports had implemented the Regulation effectively. Several informed us that they believed there had initially been problems with implementation, but that these were now resolved. Those that believed there were areas which should be improved identified problems with designated points, infrastructure, delays on arrival and provision of information. It is not clear whether the level of supervision by most NEBs would be sufficient to allow an in-depth analysis of airport effectiveness (see 5.42).

PRM organisations

3.83 Most organisations representing disabled people believed there were some issues with the implementation of the Regulation by airports, and identified issues at all points of the process. Most organisations also noted that there was wide variation in the quality of service provided at different airports; several believed that this was a result of variation in the training given. Frequently identified problems included:

- **Mobility equipment is frequently damaged:** Many PRM organisations informed us that understanding of mobility equipment was poor and that training regarding it was insufficient. They believed that this poor understanding amongst airport and ground handling staff contributed to frequent damage. There was an expectation amongst most of the PRMs using wheelchairs that we spoke to that, if they travel by air, there is a high likelihood their chair will be damaged. For disabled people with extremely limited mobility who rely heavily on their wheelchair and may have adaptations particular to their needs, damage to their chair can be extremely distressing.

- **Lengthy waits for disembarkation:** Although the initial disembarking from the plane may be completed within the time set out in the quality standards, the passenger may then have to wait a long period of time in a holding area before the rest of the arrivals procedure is finished.
- **Information provision is poor:** This includes information on the layout of the airport, accessible real-time information on flights, and information on the rights of PRMs.
- **Websites are inaccessible:** We were informed by many organisations that airport websites are frequently inaccessible to visually impaired people.
- **Poor training of staff:** Several organisations reported that the interaction of airport assistance staff with PRMs could be poor. Examples of this included the assumption that all PRMs require a wheelchair, and where the assistance staff talk to a companion of a PRM rather than directly to the PRM.
- **Inability to use own wheelchair:** As discussed above, some wheelchair users with particularly limited mobility may wish to use their own wheelchair for as long as possible. We were informed that many airports do not permit the use of a passengers own chair up to the gate, and that some have a policy of transferring the passenger to an airport chair at check-in.
- **Inadequate provision where connection times are long:** Where there is a wait of several hours between the arrival of one flight and the scheduled departure of the connecting flight, at some airports this may result in a PRM being left unattended for a long period in an area without facilities or assistance.
- **Insufficient time allowed for connections:** The minimum connection time given by airports may not be sufficient to unload, transfer and board a PRM. This is a particular problem at larger, more complex airports with multiple terminals.
- **Parking provision:** A number of issues were raised with the parking spaces made available to PRMs. These included comments on inconvenient location, insufficient capacity, or inappropriate requirements for payment.
- **"Holding areas":** Some airports do not enable PRMs to access departure lounge facilities such as shops or restaurants, and require them to remain in a "holding area" for PRMs. Although such access to facilities is not required by the Regulation, it can significantly improve the experience of air travel of PRMs, and is provided by many airports.
- **Communication of arrival:** Communication of arrival at the airport can be difficult, for example through poor signage for points of communication, or points of communication failing to respond to calls for assistance.
- **Poor provision for the visually impaired:** Many airports do not provide adaptations to allow visually impaired passengers to access the airport independently. These can include tactile surfaces or Braille maps. We were also informed that training on how security staff should search the bags of these passengers was often lacking; it is important that all items are returned to their original location, as otherwise the passenger may have difficulty finding them.

Other organisations

3.84 The other organisations we interviewed raised issues which have been raised by the stakeholder groups already discussed. These included:

- "Teething problems" when the Regulation was first introduced;
- Poor provision of information;

- Variability of training; and
- Falling service levels, in particular falling standards of safety.

Conclusions

3.85 All airports in the sample for this study had implemented the provisions of the Regulation. We were informed that the regional airports in Greece had yet to effect the change from provision by ground handlers to provision by airports, but we were not told of any other airports at which the Regulation has not been implemented. Most of the sample airports had contracted the provision of PRM assistance services to an external company, and several had changed their service provider within 18 months of the Regulation coming into force; this was interpreted by some as a sign that initial procurement and specification had not met actual needs.

3.86 The service provided at the sample airports varies in terms of a number of factors including the resources available to provide the services; the level of training of the assistance staff; the type of equipment used to provide services; the facilities provided to accommodate PRMs (such as PRM lounges). According to the information provided by PRM organisations, there is resulting variability in service quality, although this is difficult to quantify.

3.87 There is also significant variation between airports in the frequency with which PRM services are requested: the level of use of the service varies by a factor of 15 between the airports for which we have been able to obtain data. The type of PRM service requested also varies considerably between airports. Both the frequency of use and the type of service required are likely to be affected by the varying demographics of the passengers using different airports.

3.88 The Regulation requires airports to publish quality standards. Most sample airports had done so, although some had published them only to airlines and other service users. Almost all quality standards followed the example format set out in ECAC Document 30, which defines the percentage of PRMs who should wait for up to given numbers of minutes. Some airports published qualitative measures in addition to these time standards, such as descriptions of the treatment the passenger should expect at all points of the service. However, none of the sample airports had published the results of any monitoring of these quality standards, and whilst most did undertake monitoring in some form, only four had commissioned external checks of the service.

3.89 The Regulation allows airports to levy a specific charge to cover the costs of assistance. All but one of the sample airports had done so. The level of charges varied considerably. We analysed this charge to examine whether variation could be explained by higher frequency of use of the service, differences in price levels between States, or differences in service quality, but there was no evidence that this was the case. The design of the airport may be a further factor influencing the cost of service provision and hence the level of charges.

3.90 Some stakeholders believe that the requirements to select contractors and establish charges in cooperation with users and PRM organisations were not followed thoroughly. Many airlines did not believe that consultation on either element had been sufficient, and this view was shared by some PRM organisations. There were a

number of barriers to effective consultation, including linguistic restrictions and airport user committees which failed to include all interested stakeholders. Consultation with airlines was reported as particularly poor in Spain, Portugal and Cyprus. In contrast to this, we note that several airports stated that they had sought the participation of PRM organisations but had found this difficult to obtain.

3.91 The Regulation requires airports to provide specialised disability training for staff directly assisting PRMs, and whilst all sample airports had done so, there were significant variations in the length and format of this training. The shortest training course among those for which we have data was 3 days long, while the longest lasted 14 days. There was similar variation in the length of training provided for passenger-facing staff who did not provide direct assistance. A number of airports informed us that they did not provide disability-awareness training for staff not in public-facing roles, or only provided it on a voluntary basis.

4. APPLICATION OF THE REGULATION BY AIRLINES

Introduction

4.1 Regulation 1107/2006 also sets out requirements for air carriers relating to their treatment of passengers with reduced mobility (PRMs). This section assesses how airlines are implementing these requirements. Information is drawn from two key sources:

- a detailed review of information published by the case study airline on their websites, against a range of criteria; and
- interviews with representatives of the carriers and other stakeholders.

4.2 This section begins by outlining the obligations imposed on airlines by the Regulation, and evaluates how airlines are implementing these requirements.

Requirements of the Regulation for air carriers

4.3 The Regulation imposes a range of requirements on airlines, which can be summarised as follows:

- **Prevention of refusal of carriage:** The Regulation prohibits airlines from refusing carriage or accepting reservations from PRMs, unless this is necessary to comply with safety requirements, or necessitated by the physical constraints of the aircraft. Where boarding is refused, the provisions of Regulation 261/2004 should apply with regard to refunds or rerouting. Airlines are permitted to require that a PRM be accompanied by a person who is able to provide any assistance that is required (again subject to this being necessary to meet safety requirements), and are required to publish any safety rules which they attach to the carriage of PRMs.
- **Transmission of information:** Airlines are required to take all necessary measures to enable the receipt of PRM assistance requests at all points of sale. Where such requests are received up to 48 hours prior to departure, the airline should transmit the information to the relevant airport(s) at least 36 hours before departure, or as soon as possible if notification is received from the passenger less than 48 hours before departure. Following departure of a flight the airline is also required to provide the destination airport with details of the PRMs requiring assistance on the arriving flight.
- **Assistance:** Annex II specifies the level of assistance which air carriers should provide to PRMs. This comprises carriage of assistance dogs, transport of up to two items of mobility equipment, communication of flight information in accessible formats, making efforts to accommodate seating requests (and seating accompanying persons next to the PRM where possible) and assistance in moving to toilet facilities.
- **Training:** All employees (including those employed by sub-contractors) handling PRMs should have knowledge of how to meet their needs. Disability-equality and disability-awareness training should be provided to all airport personnel dealing directly with the travelling public, and all new employees should attend disability‑related training.

- **Compensation for lost or damaged mobility equipment:** Airlines are required to compensate passengers for lost or damaged mobility equipment or assistive devices, in accordance with national and international law.

Published safety rules

4.4 Article 4(3) requires airlines to publish the safety rules relating to carriage of PRMs. The Regulation does not state in any more detail what these safety rules should cover, but we would expect from the context that this is intended to mean rules relating to where carriers would exercise a derogation under Article 4(1) to allow refusal or limitation of carriage, or for where passengers would have to be accompanied. This would include any rules necessitating limitations on the number of PRMs which can be carried, restrictions on the types of PRM posing specific safety risks, or limitations on their carriage or on that of mobility equipment due to the size of aircraft.

4.5 In some cases the information published by airlines is in the form of a document defined as 'safety rules' or 'information pursuant to Regulation 1107/2006', but more commonly information is provided on a web page (or pages) without these descriptions. The limited use of the 'safety rules' term by airlines may indicate that carriers do not understand what is meant by the term, or that the requirement is open to interpretation. It is also possible that airlines do not have specific PRM safety rules – both KLM and SAS informed us that the same safety rules apply to PRMs as to all other passengers.

4.6 The airlines' Conditions of Carriage may also provide a useful source of information on policy on the carriage of PRMs, and in some cases may provide more detail than dedicated PRM web pages.

4.7 Seven carriers' Conditions of Carriage also refer to other requirements (often described as 'Our regulations' or 'Other regulations') which apply to carriage of PRMs. In the sample we have reviewed, the reference to such regulations does not always specify exactly what the scope of these is or where they are to be found. This may infringe the requirement in Article 4(3) to publish any safety rules affecting PRMs, and may also raise issues of consistency with the Unfair Contract Terms Directive, as the conditions on which bookings are made should be transparent at the time. Whilst some airlines' Conditions state that these regulations are published on their websites, the following case study carriers' Conditions include such references without saying where the information can be found:

- Air Baltic;
- Emirates;
- SAS; and
- TAP Portugal.

4.8 The carriers which provided the most detailed information set out the information listed below, and we would therefore expect a comprehensive PRM web page to provide at least some information on these topics:

- Any limitations on the carriage of PRMs, for example a limit on the number that can be conveyed on a given flight;

- Advance booking requirements for any PRM requiring assistance;
- Conditions under which an accompanying passenger will be required;
- Guidance on the carriage of assistance animals;
- Policies on the carriage of equipment, e.g. wheelchairs, stretchers and oxygen; and
- Any assistance which will be offered on board.

Information actually published by carriers

4.9 Three of the sample airlines (Air Berlin, easyJet and Ryanair) provide either 'safety rules', or a notice specifically stated to be pursuant to Regulation 1107/2006. In a further six cases Regulation 1107/2006 is mentioned in a first sentence of the web page / PRM document, or elsewhere in the text.

4.10 We found that eight of the sample airlines include on their website all the information likely to be required. This was normally in the form of a web page, sometimes with sub-sections, however AirBaltic and KLM provide downloadable documents containing all PRM guidance. Delta also provides a PRM brochure, but this does not contain all the information provided on the PRM web page. In the remainder of cases airlines provide fairly comprehensive web pages, but omit certain items which may appear on other sections of the website (for example in the Conditions of Carriage).

4.11 In some cases we found inconsistencies between the PRM web page and that the information provided in the Conditions of Carriage. For example, Delta's Conditions of Carriage state that 48 hours' advance notice is required for any PRMs who wish to receive special assistance, but the PRM information section states that 48 hours' advance notice is only required if the passenger needs to use oxygen during the flight, requires the packaging of a wheelchair battery for shipment as checked luggage, or is travelling with a group of 10 or more people with disabilities. Austrian Airlines' PRM information emphasises the importance of booking in advance, but does not reflect the stronger wording in the Conditions of Carriage, which state that carriage of PRMs 'is subject to express prior arrangement'. Similarly, the Conditions of Carriage of Alitalia, Brussels Airlines, Delta, Ryanair and Wizzair state that carriage may be refused to PRMs if not arranged in advance; however although the PRM webpage states that assistance should be requested at the time of booking, it is not indicated that failure to do this may result in denial of boarding.

4.12 Some of the rules set out in airlines' Conditions of Carriage do not appear in the PRM information section of the website. For example, Thomsonfly imposes a limit on the number of PRMs or wheelchairs which will be accepted per flight in their Conditions of Carriage, which does not appear on the airline's PRM web page.

Table 4.1 outlines the coverage of the PRM web pages against the criteria set out in paragraph 4.9 above.

TABLE 4.1 INFORMATION AVAILABLE ON CARRIER WEBSITES

Airline	Information provided	Key issues and omissions
Aegean Airlines	'Travel Guide' section of website provides some information on carriage of assistance animals, wheelchairs and oxygen.	No information on advance booking, accompanying passengers or animals Information on wheelchairs is incomplete – conditions of carriage state that spillable batteries cannot be carried. No information on stretchers.
Air Berlin	Information is provided within a section entitled 'Flying barrier-free', and in a safety rules section entitled 'airberlin's safety regulations for the carriage of passengers with restricted mobility (PRMs) in accordance with EC regulation no. 1107/2206' downloadable from the same page. The safety rules discuss the following: • PRM limit • Accompanying persons • Seat allocation • Guide dogs • Information in the event of refusal of carriage	The safety rules do not include advance booking or policies on carriage of equipment. However, with the exception of stretchers this information is provided on the PRM webpage which contains the safety rules.
Air France	Information is provided within a section entitled 'Passengers with reduced mobility'	None
AirBaltic	Detailed information is provided within a document entitled 'Air travel for physically challenged passengers'	None
Alitalia	Limited information across all categories is provided in a section entitled 'No barriers travelling'.	More detailed information on some topics can be accessed only by searching the site for specific terms, e.g. 'stretcher'.
Austrian	Information on most categories is provided in a section entitled 'Barrier-free travel'.	No reference is made to the carriage of stretchers.
British Airways	Information on all categories is provided within a section entitled 'Disability assistance'	None
Brussels Airlines	Reasonably detailed information across all categories is provided in a section entitled 'Special Assistance'.	Information on accompanying passengers, wheelchairs and stretchers is incomplete.
Delta	Detailed information on all categories is provided within a section entitled 'Services for Travelers with Disabilities'. A brochure providing a summary of this information can also be downloaded from the site.	None
easyJet	Detailed information on almost all categories is provided within a notice entitled 'For passengers who are disabled or have reduced mobility (PRM) due to a physical, cognitive (learning) disability or any physical impairment, as defined by current European law, Regulation EC1107/2006 Article 2(a).' In addition detailed information is provided in the 'Carrier's Regulations'.	The information notice on the website is detailed and generally appears complete. There is no reference to provision of oxygen or carriage of stretchers although both are addressed in the Carrier's Regulations.
Emirates	Some information across all categories is provided within the sections 'Health & Travel', 'Special Needs' and 'FAQs'.	The information provided appears to be complete but it is fragmented between these

Airline	Information provided	Key issues and omissions
		three sections, which could be confusing.
Iberia	The website has a general information section entitled 'Passengers with reduced mobility or special needs'. This provides a link to a more detailed information leaflet, downloadable by clicking on a 'No barriers to travel' icon.	The location of the information leaflet is not obvious as it is not listed under 'Information of interest'. Information in the leaflet on accompanying passengers and carriage of mobility equipment appears to be incomplete. There is a document entitled 'Attending to the needs of people with reduced mobility' but this appears to be a general summary of ECAC/ICAO guidance and it is not clear what applies to Iberia.
KLM	Information is provided within a section entitled 'Physically challenged passengers' and in a 'Carefree travel' brochure.	None
Lufthansa	Information on most categories is provided in a section entitled 'Travellers with special needs'.	No information on accompanying passengers or stretchers, although some info is provided in a section on flights to and from the USA.
Ryanair	Detailed information on almost all categories is provided within a notice entitled 'NOTICE PURSUANT TO EC REGULATION 1107/2006 CARRIAGE OF DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY'.	None
SAS	Information on almost all categories is provided within a section entitled 'Special needs'.	No information on accompanying passengers or stretchers
TAP Portugal	Detailed information on all categories is provided within a section entitled 'Special Assistance'.	None
TAROM	Limited information across all categories is provided in a section entitled 'Persons with disabilities'.	Because the information is not detailed it is not clear whether it is complete, e.g. whether all circumstances where passengers need to be accompanied are listed.
Thomas Cook	Information on all categories is provided within a section entitled 'Medical - passengers with Reduced Mobility'.	None
TUI (Thomsonfly)	Some information on most categories is provided within a section entitled 'Passengers with special needs'.	No information on stretchers or oxygen
Wizzair	Limited information is provided within a section entitled 'Passengers with Special Needs'.	No information on assistance animals or stretchers, although both are referred to in the Conditions of Carriage.

Carrier requirements on carriage of PRMs

Safety requirements defined in law or by licensing authorities

4.13 Article 4(1) allows derogations from Article 3 in order to meet safety requirements defined by national or international law, or to meet safety requirements established by the authority that issued the air operator's certificate to the air carrier concerned. The only EU-wide legislation which applies is EU-OPS1 (Commission Regulation 859/2008), which is aligned with JAR-OPS 1 Section 1 guidance previously produced by the Joint Aviation Authorities.

4.14 National health and safety legislation may also provide safety-related grounds for imposing restrictions on the carriage of PRMs – for example cabin crew may not be permitted to lift passengers between their seat and an on-board wheelchair, which would then necessitate an accompanying passenger if it is expected that they will need to leave their seat at any point during the flight.

4.15 All other restrictions are governed by safety requirements established by licensing authorities, which are often (although not always) the same organisation that has been designated as the NEB for the Regulation. The main guidance material relating to carriage of PRMs that licensing authorities should take into account is that originally defined in Section 2 of JAR-OPS 1. Section 2 was not included in EU-OPS1, but ECAC Document 30 states that, pending the adoption of implementing rules related to operations based on the EASA Regulation (216/2008), Member States are allowed to use the Section 2 guidance material, provided that there is not conflict with EU-OPS. To accompany EU-OPS 1, the JAA published an updated version of Section 2 in the form of Temporary Guidance Leaflet (TGL) 44. The section relating to the carriage of PRMS, ACJ OPS 1.260, remains unchanged from the original JAR-OPS 1 Section 2. It states that:

> *1 A person with reduced mobility (PRM) is understood to mean a person whose mobility is reduced due to physical incapacity (sensory or locomotory), an intellectual deficiency, age, illness or any other cause of disability when using transport and when the situation needs special attention and the adaptation to a person's need of the service made available to all passengers.*
>
> *2 In normal circumstances PRMs should not be seated adjacent to an emergency exit.*
>
> *3 In circumstances in which the number of PRMs forms a significant proportion of the total number of passengers carried on board:*
>
> *a. The number of PRMs should not exceed the number of able-bodied persons capable of assisting with an emergency evacuation; and*
>
> *b. The guidance given in paragraph 2 above should be followed to the maximum extent possible.*

4.16 Licensing authorities may require their carriers to impose more stringent restrictions on carriage of PRMs than the 50% limit defined by TGL 44. However, this is rare: the only example identified amongst the case study States is the Belgian Civil Aviation Authority (BCAA), which has set restrictions on the numbers of certain types of PRM, and minimum numbers of accompanying passengers. The numerical limits, which are outlined in more detail in the case study for Belgium in appendix C, are reflected in the conditions imposed by Brussels Airlines. In contrast, some licensing authorities

(for example the UK CAA) have stated that they will not generally approve limits on carriage of PRMs below the 50% defined in TGL 44.

4.17 In the remainder of cases, licensing authorities do not have any defined policy and will consider any restrictions on carriage of PRMs on a case by case basis. Therefore, more stringent restrictions on carriage of PRMs may be proposed by the airlines themselves, included in their Operations Manuals and submitted for approval by the licensing authority. As a result, there are significant variations between airlines, even where operational models and types of aircraft are similar. For example, whilst Wizzair, easyJet and Ryanair have similar operational models and aircraft types, Ryanair has a limit of 4 PRMs who require assistance per aircraft whilst Wizzair has a limit of 28 PRMs and easyJet 50%. Although the limits imposed by the three airlines are all based on safety, it is difficult to imagine that all three could be 'safe' limits. There does not seem to be an evidence base for these limits and a stakeholder suggested to us that, in the event of an emergency, it is impossible to predict whether even 'able bodied' passengers will be in a physical or psychological state consistent with evacuating the aircraft in the expected time; therefore, it was discriminatory to have a PRM limit.

4.18 The policy adopted by many of the legacy carriers is influenced by the United States Department of Transport Regulation, 14 CFR Part 382 (hereafter described as rule 382). The United States Air Carrier Access Act of 1999 made rule 382 apply to non-US carriers on flights to/from the US, and to all flights which are codeshares with US carriers (even flights not to/from the US), except where there is a specific conflict with non-US law. Despite sharing the same aspiration of ensuring equal access to air travel for all, there are significant differences between the US and EU regulations. Rule 382 specifically prohibits airlines from imposing numerical limits on PRMs, on the basis that this practice is discriminatory. Lufthansa and TAP Portugal are the only case study airlines operating to and from the US to publish PRM limits.

4.19 PRM limits have also been challenged on the basis of national law. In 2009, the Madrid Provincial Court ruled that Iberia must change its Flight Operation Manual because it was indirectly discriminatory against disabled people. The case was brought by three deaf people who were refused boarding because they were unaccompanied.

4.20 The Regulation allows airlines to **request that a passenger be accompanied**, but only on the basis of safety. Three carriers cited the UK Department for Transport's *Access to Air Travel for Disabled Persons and Persons with Reduced Mobility – Code of Practice* as the basis for the criteria they use to determine whether a PRM should be accompanied. The document also supports the Regulation in providing guidance to airlines and airports on best practice approaches to the handling and transit of PRMs. The guidance states that an accompanying passenger should only be required "when it is evident that the person is not self-reliant and this could pose a risk to safety". The document defines this as being as passenger who cannot:

- Unfasten their seat belt;
- Leave their seat and reach an emergency exit unaided;
- Retrieve and fit a lifejacket;
- Don an oxygen mask without assistance; or
- Is unable to understand the safety briefing and any advice and instructions given

by the crew in an emergency situation (including information communicated in accessible formats).

4.21 The document also states that passengers who require a level of personal care which cabin crew cannot provide should be told that they should be accompanied. This includes assistance with the following:

- Breathing (reliance on supplementary oxygen);
- Feeding;
- Toileting; and
- Medicating.

4.22 The guidance implies that a passenger should only be required to be accompanied if they are likely to require such assistance during the course of the flight. This is consistent with rule 382, which states that ”concern that a passenger with a disability may need personal care services…is not a basis for requiring the passenger to travel with a safety assistant”.

4.23 The most significant difference between US and EU law relates to the **48 hour advance notification** requirement in the Regulation for passengers requiring assistance. Rule 382 states that requiring pre-notification from PRMs is discriminatory, given that the same requirement is not imposed on other passengers. It does however allow airlines to require 48 hours pre-notification in circumstances where a passenger:

- Requires oxygen on a domestic flight (72 hours notice can be requested on international flights);
- Is travelling in an incubator;
- Requires a respirator or oxygen concentrator to be connected to the aircraft power supply;
- Is travelling in a stretcher;
- Is travelling in an electric wheelchair on an aircraft with 60 seats or less;
- Requires hazardous material packaging, e.g. for an electric wheelchair;
- Is travelling in a group of 10 or more PRMs;
- Requires an on-board wheelchair on an aircraft with more than 60 seats that does not have an accessible toilet;
- Intends to travel in the cabin with an emotional support animal;
- Intends to travel in the cabin with a service animal on a flight of 8 hours or more; or
- Has both severe vision and hearing impairments.

4.24 The Regulation does not define the circumstances under which **medical clearance** can be reflected from a passenger, but rule 382 prohibits airlines from requesting medical certification unless the passenger’s condition poses a ‘direct threat’, which ‘means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services’.

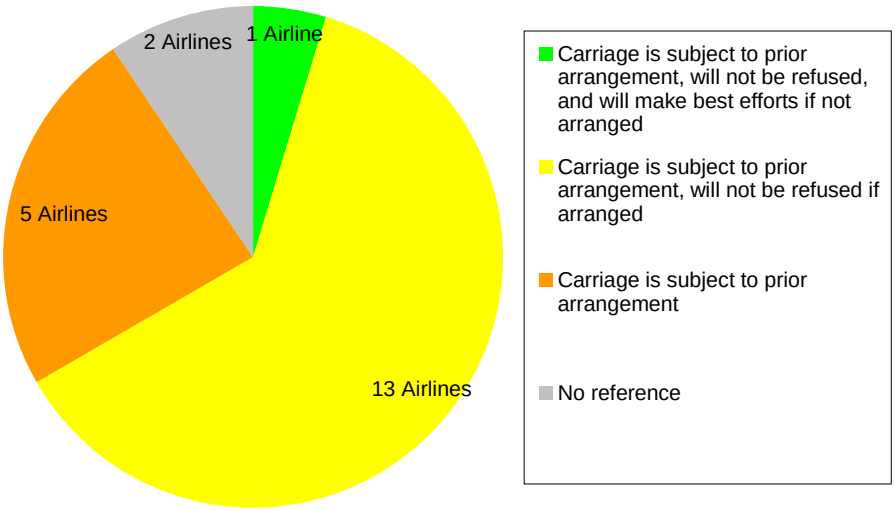
Policy on carriage of PRMs defined in Conditions of Carriage

4.25 The element of carriers' Conditions of Carriage relating to PRMs can be classified into the following six categories:

- **Will not refuse carriage on disability grounds** – all PRMs carried without restriction or requirement for pre-booking;
- **Carriage subject to prior arrangement, but will not be refused if not arranged** – the airline would prefer that advance arrangements are made, but PRMs may nevertheless be carried without this;
- **Carriage subject to prior arrangement and will not be refused if arranged –** PRMs are required to make advance arrangements, and will not be refused carriage on the basis of their disability if advance arrangements have been made;
- **Carriage is subject to prior arrangement** – as above, but without the additional clause on non-refusal of carriage to PRMs who have made arrangements;
- **Non-compliant term** – e.g. airline refuses to carry certain PRMs;
- **No reference** – PRMs not discussed in Conditions of Carriage.

4.26 Figure 4.1 shows the general approach adopted in the Conditions of Carriage of the case study airlines. None of the case study Conditions of Carriage were at the extreme ends of the scale, i.e. explicitly non-compliant terms or carriage of all PRMs without any restriction.

FIGURE 4.1 CONDITIONS ON CARRIAGE OF PRMS



4.27 Most (13) of the Conditions of Carriage of the sample airlines surveyed state a policy of not refusing carriage to PRMs on the grounds of their special requirements subject to arrangements being made in advance, although boarding may still be denied for other reasons. Alitalia adds an additional disclaimer, which states that the PRMs who have made advance arrangements will be carried, unless this is "…impossible due to objective causes of force majeure".

4.28 The advance booking requirement does not necessarily apply to all PRMs. Air Berlin states that the carriage of medical devices and mobility aids can only be guaranteed with up to 48 hours' notice, and visually impaired passengers with guide dogs are also required to make advance arrangements. No reference is made to PRMs not falling within these categories, however.

4.29 Table 4.2 shows the approaches adopted by each of the case study airlines in their Conditions of Carriage. Air Berlin is unusual in that the advance booking requirement appears only to apply to PRMs reliant on mobility aids, medical devices or assistance animals, and it appears that no such requirement exists for other PRMs.

TABLE 4.2 CONDITIONS OF CARRIAGE OF PRMS

Airline	State	General approach
Aegean Airlines	Greece	No reference
Air Berlin	Germany	Carriage of mobility aids, medical devices and assistance animals is subject to prior arrangement
Air France	France	Carriage is subject to prior arrangement, will not be refused if arranged
AirBaltic	Latvia	Carriage is subject to prior arrangement, will not be refused if arranged
Alitalia	Italy	Carriage is subject to prior arrangement, will not be refused if arranged
Austrian	Austria	Carriage is subject to prior arrangement
British Airways	UK	Carriage is subject to prior arrangement, will not be refused, and will make best efforts if not arranged
Brussels Airlines	Belgium	Carriage is subject to prior arrangement, will not be refused if arranged Also state that they will make reasonable efforts even if not arranged.
Delta	Non-EU	Carriage is subject to prior arrangement
EasyJet	UK	Carriage is subject to prior arrangement
Emirates	Non-EU	Carriage is subject to prior arrangement
Iberia	Spain	No reference
KLM	Netherlands	Carriage is subject to prior arrangement, will not be refused if arranged
Lufthansa	Germany	Carriage is subject to prior arrangement, will not be refused if arranged
Ryanair	Ireland	Carriage is subject to prior arrangement, will not be refused if arranged
SAS	Sweden	Carriage is subject to prior arrangement, will not be refused if arranged
TAP Portugal	Portugal	Carriage is subject to prior arrangement, will not be refused if arranged
TAROM	Romania	Carriage is subject to prior arrangement, will not be refused if arranged
Thomas Cook	Germany / UK	Carriage is subject to prior arrangement, will not be

Airline	State	General approach
		refused if arranged
TUI (Thomsonfly)	Germany / UK / Netherlands	Carriage is subject to prior arrangement, will not be refused if arranged
Wizzair	Hungary	Carriage is subject to prior arrangement

Circumstances under which carriage may be refused

4.30 Although all of the case study airlines impose a range of conditions on PRM bookings, only a proportion state explicitly that carriage may be refused if certain conditions are not met. In some cases, an individual PRM travelling cannot control whether the conditions are met, but some conditions can be satisfied if the PRM follows a defined course of action:

- Conditions which individual PRMs cannot control whether they meet include limits on the number of PRMs which can be carried on a given flight, and restrictions posed by the physical size and configuration of specific aircraft
- Conditions which PRMs can take actions to comply with include advance booking (discussed in the preceding section), travelling with an accompanying passenger or obtaining medical clearance.

4.31 The remaining categories are discussed in turn below.

4.32 Under Article 4 of the Regulation carriage can only be refused on safety grounds, or if boarding is physically impossible due to space constraints, a requirement with which most of the case study airlines are compliant. The only condition we have identified which is potentially non-compliant is the requirement for advance booking cited by Alitalia, Brussels Airlines, Delta, Ryanair and Wizz Air.

PRM limits and physical constraints

4.33 Ryanair is the only case study airline to set out numerical limits on carriage of PRMs in its Conditions of Carriage. In addition, Delta's Conditions of Carriage include the vague statement that carriage may be refused to any PRM on the basis of safety.

4.34 Airline PRM web pages provide more information on PRM limits, with several airlines setting out limits:

- Air Berlin;
- AirBaltic;
- Brussels Airlines;
- Lufthansa;
- TAROM (only for PRMs in wheelchairs); and
- Wizz Air.

4.35 Aegean Airlines and TAP Portugal also informed us that they have PRM limits in place, although these are not published. Full details of the PRM limits adopted by each airline are given in Table 4.3. Several of the other case study airlines informed us that they are required to adhere to the limit set out in TGL 44 that the number of PRMs

should not exceed the number of able bodied passengers; this restriction is not included in the table below, although it is possible that some of the unspecified restrictions actually relate to this. Note that other carriers may have unpublished limits which we have not been informed about.

TABLE 4.3 AIRLINE PRM LIMITS

Airline	Published limits	Unpublished limits	Applies to
Aegean Airlines	-	Unspecified restriction	All unaccompanied PRMs
AirBaltic	If number of PRMs exceeds number of cabin crew per flight (typically 3-4 on short haul aircraft)	-	All PRMs, only where PRMs form a large proportion of passengers on flight
Air Berlin	Unspecified limit for safety reasons	-	All PRMs
Brussels Airlines	2 when travelling individually, except on A330-300, where limit of 4. When travelling in group limit ranges from 9 (on BAe 146) to 27 (on A330-300), including escorts.	-	WCHS + WCHC + STCR + BLND + DEAF/BLND, in any combination
Lufthansa	Limit on unaccompanied passengers in wheelchairs: 3 on regional flights (>70 seats); 5 on other flights Limit on no. of wheelchairs per flight: 3 on most intercontinental flights, 2 on continental flights and 1 on regional flights. Also unspecified general limit on limited mobility passengers for care and safety reasons.	-	All unaccompanied PRMs
Ryanair	Limit of 4 per aircraft for safety reasons	-	Passengers with reduced mobility, blind/visually impaired or requiring special assistance.
TAP Portugal	-	Stretcher: 2, except Fokker 100 and Embraer 145; WCHC: 4-10 depending on aircraft; WCHS, blind and deaf: 9, except Fokker 100 and Embraer 145; Incubator: 1, except Fokker 100 and Embraer 145.	See left
TAROM	Limit on passengers requiring wheelchair in		

	cabin: 0 on AT42, 2 on B737 and 6 on A318. No limits on other PRMs		
Wizz Air	Limit of 28 disabled or incapacitated or passengers with reduced mobility, including a maximum of 10 who require a wheelchair from check-in to the cabin seat	-	See left

4.36 Fewer airlines refer to other physical constraints in their Conditions of Carriage, with only AirBaltic and Brussels Airlines indicating that carriage may be refused if the PRM is unable to physically board via the aircraft's doors.

Accompanying passengers

4.37 Article 4(2) of the Regulation allows airlines to require PRMs to be accompanied in order to meet the applicable safety requirements referred to in Article 4(1). As with any numerical PRM limits, requirements for PRMs to be accompanied should be set out in the carriers' Operations Manuals, which again would require the approval of the licensing authority in the relevant Member State.

4.38 Most airlines publish criteria under which a PRM would have to be accompanied. These are again generally safety related, or relate to the level of assistance cabin crew are able to give. Three common themes emerge:

- The PRM has certain specified conditions, e.g. difficulty walking;
- The PRM requires care which the cabin crew are unable to provide (typically this means that the passenger is not self-reliant); or
- The PRM is unable to evacuate the aircraft without assistance.

4.39 Although many airlines make reference to self-reliance criteria there is a difference between those requiring **all** passengers who are not self-reliant to be accompanied; and those which state that passengers who, for example, require help with eating, should be accompanied. In the latter case a passenger could argue that they will not be eating on the flight, and that this criterion is therefore irrelevant. Six of the sample airlines state that all passengers who are not self-reliant must be accompanied, and this is not limited to cases where there is a safety implication. In our view, these airlines may be infringing the Regulation as well as (if they fly to the US) rule 382.

Medical clearance

4.40 The majority of the case study airlines required medical clearance for certain types of PRM, either confirming fitness to travel, or stating a need to carry medical equipment such as syringes or oxygen, although again it is generally not explicitly stated that boarding will be refused if clearance is not obtained. In most cases, the PRM is required to ask their doctor to fill in a medical clearance form, which is then forwarded to the airline's medical department for approval.

4.41 Given the importance of not confusing disability with illness, it might be expected that

the proportion of passengers required to seek clearance before travelling would be minimised. This is the case for most of the case study airlines. Although the types of PRM required to obtain clearance varies, this normally includes those requiring oxygen or stretchers and is not overly restrictive. However, six airlines adopt slightly different policies:

- Lufthansa states that 'In the case of a physical or psychological limitation, you must obtain an assessment of your fitness for air travel from a Lufthansa doctor in advance', although it is stated elsewhere that this does not apply to blind people. Nevertheless, this requirement could potentially encompass many types of PRM, and the requirement to see a Lufthansa doctor is likely to be particularly onerous.
- The policy adopted by Wizz Air, although vague, also has the potential to be quite onerous. The airline reserves the right to require medical clearance in all cases, and will refuse the reservation if this is not obtained.
- Austrian, Iberia (both on the PRM web pages) and Wizzair (in the airline's Conditions of Carriage) all state explicitly that boarding may be refused to passengers on medical grounds if clearance has not been arranged in advance.
- Thomas Cook takes an unusually vague approach in stating that 'Some medical conditions require a fitness to fly certificate'. Passengers who consider themselves to have a condition that will require the authorisation of their doctor are advised to obtain their approval before flying. A telephone number is however provided, where presumably clarification of the conditions requiring medical authorisation can be obtained.

4.42 Policies on denial of boarding, accompanying passengers and medical clearance are summarised in Appendix A. This information is mostly derived from the PRM web pages provided by the airlines, unless explicit reference is made to the conditions of carriage. Any unpublished information provided to us directly by the airline is shown in italics.

Actions to be taken when carriage refused

4.43 Article 4(1) requires that, where a PRM is refused boarding, the airline is required to offer reimbursement or rerouting in line with Regulation 261/2004. Although none of the case study airlines make any references to this in either their PRM web pages or Conditions of Carriage, almost all of the airlines we interviewed confirmed that passengers who have been refused boarding would be offered a refund, rerouting or cost-free cancellation, depending on the circumstances. However, some carriers indicated that this situation would be rare, as refusal would most commonly occur at the booking stage.

4.44 Where boarding is refused, airlines are required under Article 4(4) of the Regulation to immediately inform the PRM of the reasons for the refusal and, on request, should communicate the reasons to the PRM in writing within five working days. Alitalia and Ryanair are the only airlines to refer to this in their Conditions or policies, Alitalia stating in its Conditions of Carriage that in the event of refusal of carriage the passenger may request additional information, and Ryanair stating on its PRM webpage that 'If we are unable to carry a disabled/reduced mobility passenger, we will inform the person concerned of the reasons for refusal of carriage'.

4.45 However, although only two of the case study airlines provide details of the actions

they will take when carriage is refused, again most indicated in their interviews with us that they will provide either written or verbal explanations to passengers who have been refused boarding.

Services provided to PRMs

Requirements defined in law or other guidance

4.46 Annex II of the Regulation requires that airlines provide the following assistance to pre-notified PRMs without additional charge:

- Carriage of recognised assistance dogs in the cabin, subject to national regulations.
- In addition to medical equipment, transport of up to two pieces of mobility equipment per disabled person or person with reduced mobility, including electric wheelchairs (subject to advance warning of 48 hours and to possible limitations of space on board the aircraft, and subject to the application of relevant legislation concerning dangerous goods.
- Communication of essential information concerning a flight in accessible formats.
- The making of all reasonable efforts to arrange seating to meet the needs of individuals with disability or reduced mobility on request and subject to safety requirements and availability.
- Assistance in moving to toilet facilities if required.
- Where a disabled person or person with reduced mobility is assisted by an accompanying person, the air carrier will make all reasonable efforts to give such person a seat next to the disabled person or person with reduced mobility.

4.47 This guidance is reflected in ECAC Document 30 and the UK DfT Code of Practice. The Code of Practice also suggests the following:

- Cabin crew should provide reasonable assistance with the stowage and retrieval of any hand baggage and/or mobility aid whilst in flight.
- Cabin crew should familiarise disabled passengers with any facilities on board designed particularly for disabled passengers. In the case of visually impaired people they should additionally offer more general familiarisation information and such other explanations as may be requested, such as about on-board shopping.
- Other printed material, such as dinner menus, should, where reasonably practicable, be accessible to blind and partially sighted people. Alternatively, cabin crew should explain the material.
- Where video, or similar systems, are used to communicate safety or emergency information, sub-titles should be included to supplement any audio commentary.
- Where possible, films and other programmes should be subtitled for deaf and hard of hearing passengers.
- In selecting catering supplies, air carriers should consider how “user-friendly” the packaging is for disabled people.
- Cabin crew should describe the food, including its location on the tray, to blind and partially sighted passengers.
- During the flight, cabin crew should check periodically to see if PRMs need any

assistance. In the case of those requiring the use of the on-board wheelchair (where one is installed), the staff must be trained in how to assist the passenger to and from the toilet by pushing the on-board wheelchair.

- Passengers' own portable oxygen concentrators should normally be allowed if battery powered, though air carriers will need to check the type of device to ensure it does not pose any technical problems.

4.48 The assistance provided by the case study airlines generally reflects this guidance, although not all provide comprehensive information on the service they provide to PRMs, particularly in terms of general assistance on-board the aircraft.

4.49 Again, there are some conflicts between Regulation 1107/2006 and the US guidance defined in rule 382, which would apply to some flights operated by EU carriers including all flights to/from the US. In particular, the US regulations do not define an upper limit on the number of items of mobility equipment that should be carried. Some additional requirements established by rule 382 include:

- Assistance in moving to and from seats;
- Assistance in preparation for eating;
- All new videos, DVDs, and other audiovisual displays played on aircraft for safety purposes should be high-contrast captioned;
- Passengers should be able to use moveable armrests seats where their condition requires it;
- Seats with additional legroom should be provided for passengers with fused or immobilised legs;

- PRMs should be permitted to use ventilator, respirator, continuous positive airway pressure machine, or portable oxygen concentrator (POC) of a kind equivalent to an FAA-approved POC on all aircraft originally designed to have a maximum passenger capacity of more than 19 seats, unless the equipment does not meet safety requirements or cannot be used or stowed safely in the cabin.

Assistance animals

4.50 Of all the case study airlines which refer to guide dogs, almost all accept them in the cabin free of charge, as required by Annex II of the Regulation, although carriage is also limited by national regulations regarding the transport of animals. However, we identified the following issues with the carriers' published policies:

- Alitalia – assistance dogs are only allowed in the cabin if space is available;
- Emirates – assistance animals can only be carried in the hold;
- TAP Portugal / Thomas Cook / Wizz Air – insufficient information regarding charging and carriage in cabin;
- TUI – assistance dogs carried for a nominal charge. It is not stated whether animals can be carried in the cabin; and
- Air France / EasyJet – not stated whether carriage is free of charge.

4.51 There is some variation in terms of the conditions applied to the carriage of guide dogs; some airlines require a carrying case, muzzle or harness, for example; Austrian,

EasyJet and TAP Portugal require certification of service animal status; and carriage in exit rows is often prohibited. Several airlines state limits on the number of guide dogs that can be carried on a given flight – AirBaltic, British Airways and Ryanair. Other airlines may enforce similar unpublished limits. Full details of airline policies are provided in Appendix B.

4.52 In most cases, the information provided by carriers on which routes service dogs can be carried on is quite vague. Two exceptions are British Airways and Iberia, which include detailed information and links to external websites; in the case of British Airways this is the UK DEFRA (Department for Environment, Food and Rural Affairs) guidance on the Pet Travel Scheme which governs the carriage of assistance animals on flights within and to/from the UK. This includes detailed guidance on travel preparation and a full list of approved routes. The guidance provided by Brussels Airlines is also reasonably detailed, and both Austrian and Thomas Cook provide links to EU and UK regulations respectively, but without detailed supporting explanations.

Mobility equipment

4.53 All the airlines reviewed accept wheelchairs, and in most cases airlines state that there is no charge for this. Three airlines allow at least certain types of personal wheelchair in the cabin, with carriage restricted to the hold or not stated in the remainder of cases. Spillable wet-cell batteries are not accepted by some airlines and where they are accepted this is usually subject to preparation. Where specified, most airlines policies on the carriage of wheelchairs are consistent with the upper limit of two items of mobility equipment per passenger specified in Annex II of the Regulation. Air Berlin is the only one of the case study airlines to define a limit below this.

4.54 Dangerous goods legislation is cited by many airlines as posing a limitation on the range of battery operated wheelchairs which may be carried. However, few airlines provide specific details of the laws and regulations which apply. Austrian does provide references to both Regulation (EC) No 820/2008 and the IATA Dangerous Goods Regulations, the latter accessible via an external link; and Delta provides a link to the US Department of Transportation's Safe Travel information, which provides information to passengers on the carriage of batteries. The Thomas Cook and TUI websites include a reference to the IATA Dangerous Goods Regulations, but without external links. It is worth noting that, although only a fraction of the case study airlines provide this level of detail on their PRM web pages, many may provide such information in their luggage regulations or elsewhere in the Conditions of Carriage.

4.55 Under Article 12 airlines are required to compensate for losses or damage to mobility equipment, up to the limits specified by national and international law, which effectively means the limits defined in the Montreal Convention. This limits any compensation to 1131 SDR (approximately €1260), which would be inadequate for technologically advanced wheelchairs which can cost up to €20,000. However, several airlines have indicated that these limits would be waived in practice, partly to avoid bad publicity associated with provision of insufficient compensation, and also because it is generally agreed that such events are rare. Air France, Iberia, KLM, TAROM, Thomas Cook and TUI informed us that they compensate passengers for the full value of the equipment; with TUI also indicating that all UK airlines have agreed to waive

the Montreal limits. In contrast, one PRM organisation informed us that it was aware of cases where airlines had not waived the limits.

4.56 Almost all stakeholders stated that the Regulation had made no impact on loss or damage to mobility equipment, both in terms of the number of incidents and levels of compensation for loss or damage; although some felt that the training requirements imposed by the Regulation has resulted in improved handling procedures.

Medical equipment

4.57 Oxygen is available on most of the case study airlines, and can either be provided by the airline or the passenger. Where stated, charges range from €100 (Ryanair / Thomas Cook) to €335 (SAS intercontinental flights). Wizzair is the only exception: the airline accepts passengers who need oxygen with medical certification, but does not provide additional oxygen or allow passengers to bring their own onboard. Such restrictions appear to equate to a complete ban on PRMs requiring oxygen.

4.58 Policies on the carriage of stretchers (where stated) tend to be based on aeroplane size, with several operators not accepting stretchers on the smaller planes in their fleet. Most low cost carriers including easyJet, Ryanair, Thomas Cook and Wizzair prohibit carriage of stretchers entirely.

Accessible information

4.59 Only 6 airlines specify the types of accessible information provided for PRMs. This tends to be safety-related, although may also include Braille seat numbers and verbally describing food-related information.

Seating

4.60 Austrian, British Airways, Delta and KLM are the only case study airlines to state on their web pages that PRMs can be allocated any seat most appropriate to their needs, subject to safety regulations restricting access to exit row seats. Where most other airlines discuss their PRM seating policy this is usually in terms of restrictions, again the most frequent being not allowing PRMs to be seated in exit rows. Many airlines provide seats with retractable armrests, although normally only a proportion of the seats on an aircraft are provided with this feature (KLM is the only airline to state that all seats have moveable armrests). British Airways state that passengers will be allocated a bulkhead seat when requested, provided that this is not already allocated to another PRM. Similarly, Delta and Lufthansa also state that customers with service animals (or immobilised legs in the case of Delta) are entitled to bulkhead seats. Again, only a proportion of the airlines (14 out of 21) provide any of this kind of information, so it is unclear what the other case study airlines offer. The results of our analysis are shown in Appendix Table A.2.

4.61 Ryanair requires PRMs to sit in window seats, so that they do not impede the evacuation of other passengers, although this could result in a difficult or uncomfortable transfer to and from the seat for some passengers. Other airlines may adopt similar policies which we were not informed about. Iberia informed us that, although they recommend that PRMs are accommodated in window seats, through

their online booking systems PRMs are able to choose any seat, with the exception of emergency exit rows.

4.62 Several airlines prohibit PRMs from being seated in exit rows 'for safety reasons', but generally do not make a specific reference to the legal basis for this, which in most cases would be EU-OPS1. Air Berlin, Delta and Ryanair are the only airlines to provide details of the regulations on which this prohibition is based – in the case of Delta this is the Exit Seat Regulation, 14 CFR 121.585; and for Air Berlin and Ryanair EU/JAR-OPS 1.260. Thomas Cook and TUI make more vague references to UK CAA regulations as a justification for their seating restrictions.

Restrictions on service

4.63 12 of the case study airlines provide an indication of the level of assistance in-flight provided to PRMs, although mostly in terms of the assistance staff are unable to provide. This generally includes feeding, lifting passengers, administering medication and assisting in personal hygiene or toilet functions. The level of assistance which is provided is generally limited to preparation for eating, assistance in moving around the aircraft and stowing and retrieving luggage.

Pre-notification of requirements

Requirements defined in law or other guidance

4.64 Article 6(1) of the Regulation requires that airlines take all measures necessary to ensure that they are able to receive PRM assistance requests via all normal points of sale. Articles 6(2) and 6(3) state that, where this information is received more than 48 hours before departure it should be transmitted to the relevant airports no later than 36 hours before the flight departs. Requests received after 48 hours should be communicated at the earliest opportunity. Article 6(4) requires that, after departure of a flight, airlines inform the destination airport (if within the EU) of the number of disabled persons and persons with reduced mobility on that flight requiring assistance, and the nature of the assistance required.

Methods by which passengers can pre-notify

4.65 In addition to the requirements of Article 6(1), the Recitals of the Regulation state that all essential information provided to air passengers should be provided "in at least the same languages as the information made available to other passengers". Several airlines do not meet this standard, although the Recitals are in themselves not binding.

4.66 Many of the major airlines provide offices and contact telephone numbers in a number of countries where the official language may not be one of the languages in which the airline website is offered. In most cases it is not possible to assess the languages offered by staff in these offices, and if the website is not offered in this language passengers may in any case have difficulty finding the contact for their country. For these reasons the language category is based on the website languages offered rather than the geographical spread of airline offices.

4.67 Some NEBs highlighted the use of premium rate special assistance telephone numbers as being an issue. Our research indicates that many carriers use phone numbers that do

charge, although rates are usually moderate, with the following exceptions:

- Some carriers, for example AirBaltic, provide international numbers only.
- Ryanair provides national phone numbers in most Member States but the rates in some States are high – for example, €0.50 per minute in Belgium
- Brussels Airlines provides (for calls from the UK) either a Belgian telephone number, or the UK reservations centre which charges £0.40 (€0.44) per minute, although this number centre deals with all reservations, and not just PRM assistance requests.
- SAS provides (for calls from the UK) a UK reservations number, which charges £0.25 (€0.28) per minute, although again this is not PRM-specific.

4.68 Each of these airlines accept notifications online, so passengers could theoretically avoid payment of these charges. However, we are not able to comment on the accessibility of these systems or whether they enable collection of all of the information that would be required in each case – some passengers may still need to use the telephone numbers for these reasons.

4.69 The notification options available to PRMs for the 21 case study airlines are shown in Table 4.4. It should be noted that options presented during the booking process could only be examined up to the point of payment for tickets. Some airlines may provide a notification option after payment has been made, which we would not have identified.

TABLE 4.4 OPTIONS TO NOTIFY CARRIERS OF REQUIREMENTS

Airline	Options provided	Differences between languages of PRM info and main website	Languages for phone calls
Aegean Airlines	Telephone	None	Not stated
Air Berlin	Telephone	None	Not stated
Air France	During online booking process Email / website Telephone	Main site in 15 languages PRM info in 10 languages	Not stated
AirBaltic	Telephone	None	Not stated
Alitalia	Telephone	Main site in 8 languages PRM info in 6 languages	Not stated
Austrian	Email / website Fax	Main site in 22 languages PRM info in 2 languages	Not applicable
British Airways	During online booking process Email / website Telephone	None	Not stated
Brussels Airlines	Email / website Telephone	None	Not stated
Delta	Telephone	None	Not stated
EasyJet	During online booking process Email / website Telephone	None	Telephone numbers only accessible after logging into personal account
Emirates	Email / website Telephone	None	Not stated
Iberia	During online booking process	None	Not applicable
KLM	Email / website Telephone	Main site in 15 languages PRM info in 9 languages	Not stated
Lufthansa	Email / website Telephone	None	Not stated
Ryanair	During online booking process Telephone	None	English French Italian Spanish
SAS	During online booking process Email / website Telephone	Main site in 15 languages PRM info in 12 languages	Not stated
TAP Portugal	Telephone	Main site in 9 languages PRM info in 7 languages	Not stated

Airline	Options provided	Differences between languages of PRM info and main website	Languages for phone calls
TAROM	During online booking process	None	Not applicable
Thomas Cook	During online booking process Telephone	None	Not stated
TUI (Thomsonfly)	Telephone	None	Not stated
Wizzair	During online booking process Telephone	None	Bulgarian Czech English French German Hungarian Italian Polish Romanian Ukrainian

Process for collection and transmission of requests

4.70 Although many case study airlines enable PRMs to make special assistance requests online, this often has to be supplemented by a telephone call to the airline to establish the PRM's exact requirements. Air France informed us that, when notifying online, a 'pop up' window will appear which informs the passenger that they will be contacted by the airline to clarify the assistance required. Similarly, KLM stated that, although they do provide an online notification option, the passenger would still need to call the airline to establish their exact requirements.

4.71 The standard procedure for transmitting assistance requests to the relevant airports is the PAL (Passenger Assistance List), which under Article 6(2) should be sent 36 hours before departure. Additional requests received after this time can be included in the CAL (Change Assistance List) in line with the requirements of Article 6(3). Most requests are transmitted using the standard special assistance codes IATA codes, although some airlines their own codes.

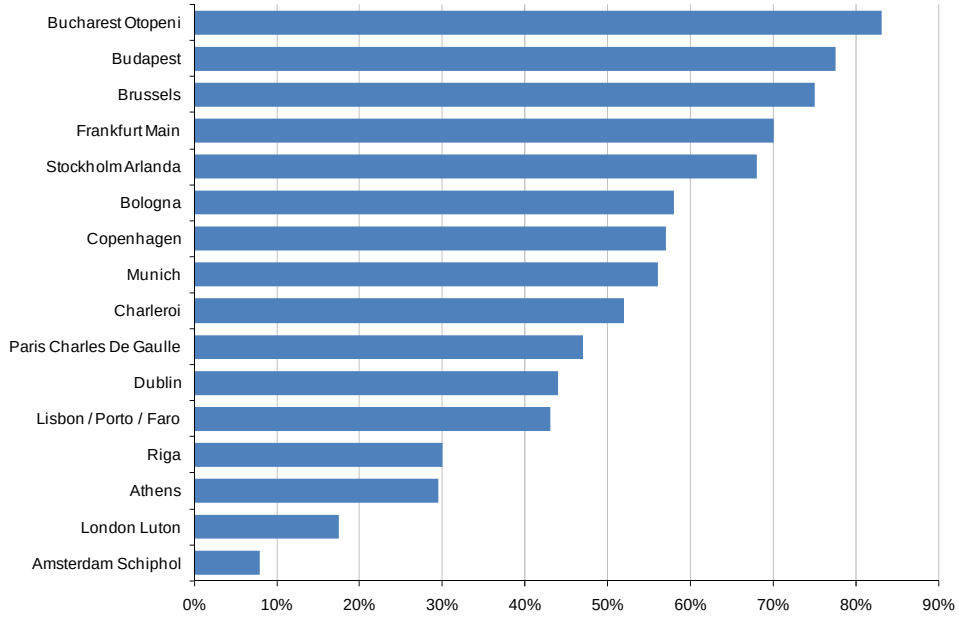
4.72 This information is supported by Passenger Service Messages (PSM) which are automatically generated by all special assistance requests recorded on the Passenger Name List of a given flight (thus complying with Article 6(4) of the Regulation). PSM messages are generated automatically on departure from the origin airport, so can be particularly useful for airports in relation to long haul flights, where there is sufficient time to mobilise staff and equipment before the aircraft arrives. Conversely, PRM messages are of less use in relation to short haul flights, as staffing arrangements cannot be so easily amended at short notice.

Effectiveness of process

4.73 All of the case study airlines interviewed use the standard PAL / CAL / PSM system, although Ryanair informed us that they also have their own system of codes and notifications (discussed in section 3 above).

4.74 Rates of pre-notification vary substantially, as shown in Figure 4.2. It should be noted that the definition of pre-booked assistance may vary between airports – for example Brussels Charleroi airport informed us that its figures for pre-notification includes notification by PSM message, which would not be received prior to the 36 hours specified by the Regulation. A number of other airports did not clarify their definition of pre-notification, including Bucharest and Budapest, which may explain why the percentages here are particularly high.

FIGURE 4.2 PRE-NOTIFICATION RATES BY AIRPORT



4.75 There a number of possible explanations for both the wide divergence of pre-notification rates, and the particularly low values observed at some airports. These include:

- **Passenger factors**, e.g. not being aware of the pre-notification requirement, abuse of the system or not realising that they would need assistance until arriving at the airport;
- **Airline factors**, e.g. not providing sufficient or appropriate means for passengers to pre-notify of their requirements, or failing to transmit assistance requests to airports within the time limits specified in the Regulation;
- **Other factors** – primarily communication and other technological failures.

4.76 Stakeholder views on the possible explanations for pre-notification issues are explored in the relevant section below.

Complaints to airlines

Airline processes for handling complaints

4.77 Most of the case study airlines have dedicated complaint forms and departments for the handling of complaints. Complaints regarding the Regulation do not necessarily require specialised procedures – both easyJet and Ryanair stated that their process for handling complaints was the same as for Regulation 261/2004, and KLM reported that PRM complaints were handled in the same way as all others. The only differences cited by the airlines were that, in the case of easyJet, complaints regarding refusal of boarding were escalated to head office; and KLM informed us that the airline's medical department may need to be involved in more complex cases. Ryanair also informed us that they will amend standard procedures for receipt of complaints where required, for example if a customer needs to complain by phone rather than in writing. KLM stated that to date they have only received complaints by phone, email or letter; and none in Braille / audio tape or other accessible formats.

4.78 Delta reported a more complex procedure, shaped primarily by the requirements of rule 382. The airline is required to designate Complaints Resolution Officials, responsible for providing a 'dispositive response' to customer complaints of an alleged violation, summarising the facts and explaining the airline's determination of the issue. If the complaint relates to the airline's policy and not a specific infringement the airline is still responsible for providing a full and final response and the reasons for its determination.

4.79 The stated time taken by airlines to respond to complaints is variable, and is not related to the airline type or business model.

4.80 Air France, SAS, TAP Portugal reported that they would (at least in theory) be able to accept complaints in any of the languages of the countries which they serve and/or have offices. Aegean Airlines, Ryanair and TAROM reported a more restricted range – despite its destinations including Albania, Egypt, Israel, Serbia, Spain and Turkey, Aegean Airlines stated that it can only accept complaints in Greek, English, German, French and Italian. Likewise, despite both Ryanair and TAROM operating services to 25 countries, the range of languages in which they will accept complaints is limited. Ryanair is only able to accept complaints in English, German, French, Spanish and Italian; and TAROM will only process complaints in Romanian, English, French, German, Spanish and Italian. Thomas Cook stated that, to date, they have only received complaints in English, although they do have a retainer with a language translation service which can be used if required.

Number of complaints received

4.81 Only TAROM and Thomas Cook were able to provide us with PRM complaint statistics. TAROM reported so far receiving no complaints from PRMs; Thomas Cook received 51 complaints in each of 2008 and 2009.

Cost of complying with the Regulation

4.82 The main compliance cost identified by airlines was the airport PRM charge. As discussed in section 3 above, several airlines (mostly low cost and charter carriers)

expressed dissatisfaction with the level of these charges; in contrast, Air France stated that it did not consider the PRM charge to be a real cost, as it was passed directly to passengers. Another legacy carrier stated that the Regulation did not generate any additional costs for it, as it was already complaint with the (generally more onerous) requirements of rule 382.

4.83 An issue raised by Air Berlin and TUI related to the additional costs likely to be associated with providing a cost-neutral special assistance telephone number. The German NEB considers that the special assistance helpline should be free, and the UK DfT Code of Practice also suggests that cost-neutral telephone numbers should be provided for PRMs, which TUI accommodates by requesting that the special assistance helpline calls the passenger back. However, the costs associated with telephone assistance calls are likely to be relatively small, particularly in relation to the staffing costs associated with providing a call centre.

4.84 TUI also highlighted the initial training costs incurred by the Regulation, which have now diminished as the focus shifts to more limited refresher training where required.

Training

4.85 Under Article 11 airlines are required to:

- Ensure that all staff (including those employed by sub-contractors) providing direct assistance to PRMs, have knowledge of how to meet the needs of these persons;
- Provide disability-equality and disability-awareness training to all staff working at airports dealing directly with the travelling public;
- Ensure that, upon recruitment, all new employees attend disability‑related training and that personnel receive refresher training courses when appropriate.

4.86 Most of the case study airlines were able to demonstrate compliance with the training criteria set out in Article 11, although the carriers informed us that training was restricted to passenger-facing staff only. Some examples of the training provided to airline staff are given below.

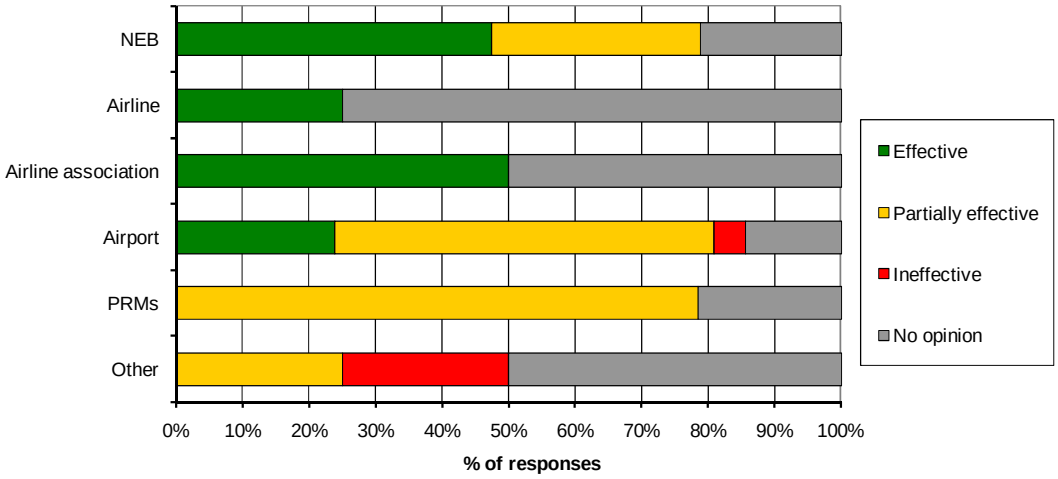
- Major European network carrier: 2.5 hours theory (e.g. responsibilities under the Regulation, how to approach PRMs) and practical (e.g. guiding blind PRMs, lifting to and from wheelchairs) training for crew; 1.5 hours theory for all other passenger-facing personnel.
- US network carrier: annual recurrent training is provided to all Complaint Resolution Officers (CROs); required under 14 CFR Part 382 to ensure effective implementation and to resolve passengers' problems as quickly as possible).
- European low cost carrier: initial and refresher cabin crew training includes PRM training, and the airline has requested that this training should be a requirement in contracts with ground handling staff.
- European low cost carrier: basic training in sign language is included.

4.87 Airlines operating to the US and therefore already compliant with rule 382 stated that few if any changes to their existing training programmes were required to comply with the Regulation.

Stakeholder views on effectiveness of implementation by airlines

4.88 Figure 4.3 summarises stakeholder views on the effectiveness of the implementation of the Regulation by airlines. Although many stakeholders did not express an opinion on this, relatively few stakeholders were dissatisfied. A summary of views of each stakeholder group is given below.

FIGURE 4.3 STAKEHOLDER VIEWS: AIRLINES



Airlines and airline associations

4.89 Unsurprisingly, the majority of airlines did not express an opinion on their own effectiveness in implementing the Regulation, and none felt that implementation was ineffective. Similarly, airline associations either expressed no opinion, or stated that implementation by their members was effective. ELFAA felt that all its members were complying and not refusing carriage. AEA was also generally satisfied that its members were not discriminating against PRMs in any way, but did suggest that there may be issues around the interpretation of the safety rules governing embarkation by PRMs, leading to inconsistencies between its members.

Airports

4.90 Pre-notification was the most frequently cited issue raised by the airports, an issue discussed separately below. The second most common theme emerging across several airports was the alleged non-payment of PRM charges by airlines.

4.91 Alongside the non-payment issue ACI highlighted several other issues relating to agreement of the PRM charges at airports. These included trying to avoid or reduce the charge, for example by requiring excessive levels of detail on the costs of PRM assistance at airports after the tender process had been completed, and refusing to cooperate with consultation meetings. Two airports with high proportions of low cost carrier traffic informed us that some carriers sought to specify the lowest possible levels of service in order to minimise PRM charges.

NEBs

4.92 The majority of NEBs informed us that compliance by airlines was satisfactory.

Although some issues were raised no common themes emerged, suggesting that any issues may be somewhat isolated. The NEBs which stated that implementation by airlines was partially effective were:

- France (DGAC): lack of information, and limited consistency in policies between airlines.
- Germany (BMBVS): use of premium rate telephone numbers by airlines.
- Portugal (INAC): some issues with the explanations provided for refusal of carriage.
- Spain (AESA): notification can incur additional costs for the passenger, airline safety rules are sometimes insufficient, and some airlines claim that passengers with mobility equipment are taking two seats, and charge for this.
- Sweden (CAA): issues around pre-notification (see section below).
- UK (CAA / EHRC / CCNI): lack of consistency in criteria for refusal of carriage. Some airlines charge for reserving specific seats.

PRM organisations

4.93 Satisfaction with implementation by airlines was generally lower among the PRM organisations, although none of the stakeholders informed us that airlines were significantly non-compliant with the Regulation. Inconsistencies in airline policies, accessibility of websites and the level of information provided by airlines emerged as the most frequently cited issues – *Danske Handicaporganisationer* (DH) suggested that less than 5% of airlines' websites were accessible. Two organisations also indicated that they had not seen any PRM safety rules published online.

4.94 Two organisations highlighted issues with medical clearance – this was felt to be requested too frequently, and that an unnecessary level of information was being requested by some airlines. Other issues raised included insufficient training, issues with handling of mobility equipment, seating, and inaccessibility of airport check-in systems. Guide Dogs reported instances where flight crew had not reported allergies which then prevented a passengers with guide dogs from flying, or had not checked that the dog was secure prior to take-off or landing. It was felt that policies of refusing boarding to unaccompanied blind passengers on the basis that they could not evacuate was misguided, given that they were accustomed to not being able to see and could therefore cope more easily in smoky conditions.

4.95 These views were echoed by the European Blind Union (EBU) and the European Disability Forum (EDF). In addition, EBU emphasised continuing difference in the handling of PRM travel between carriers, and felt that booking processes were discriminatory against those without access to a computer (we were informed that requesting assistance by phone can take several hours). The UK PRM organisation informed us that only 30% of the disabled population are online, which would increase this discrimination. EDF also noted that some airlines still only paid up to the Montreal Convention limits in cases of damage or loss of mobility equipment; that insurance for mobility equipment was extremely difficult to obtain; and that establishing liability for damage can be very complex. EDF also believe that the enforcement of numerical limits on PRMs is inappropriate and discriminatory, and that it is unacceptable for carriers to require passengers to be accompanied on self-reliance criteria.

4.96 EDF provided us with some examples of discrimination which had been reported to them. Some examples relating to treatment on-board the aircraft include:

- A blind passenger was not given any safety information in an accessible way, and the cabin crew were unaware of how to assist the passenger when serving a meal, or to communicate with the passenger more generally.
- A passenger was not allowed to check-in online, due to him using a wheelchair. Once on the aircraft he was forced to sit in a window seat at the back of the plane, which he found both discriminatory and difficult, as being tetraplegic meant that it was not easy to access the seat, or to receive assistance in an emergency.
- A passenger was informed that he had to pay extra to bring his prosthetic legs when going on holiday.
- A wheelchair user tried to book a ticket with an airline but noticed on their website that it was clearly indicated that they do not accept passengers using wheelchairs.
- A blind couple travelling with their baby were told that in order to be allowed to travel, they needed to bring an accompanying person, as it was not considered safe that the couple were responsible for their baby on board.
- A blind passenger was asked by a member of cabin crew in a rude manner whether she really was entirely blind.

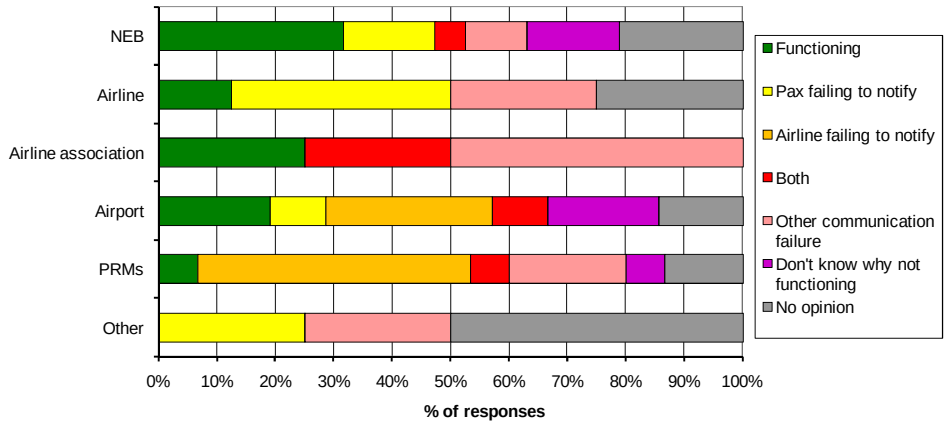
Other organisations

4.97 Key issues raised by other organisations were the application by some carriers of limits on the numbers of PRMs that could be carried, and that these limits could be further reduced based solely on arbitrary decisions by pilots. In addition, ECAC felt that information should be simplified for passengers with learning disabilities. However, ECTAA highlighted the improvements which airlines, tour operators and travel agents had made to their websites and booking procedures to enhance PRM travel.

Stakeholder views on effectiveness of pre-notification systems

4.98 Figure 4.4 shows stakeholder views on the effectiveness of the pre-notification system and reasons cited for low rates of notification. Most stakeholders believed that this system was not functioning well, although the explanations cited by each stakeholder group vary.

FIGURE 4.4 STAKEHOLDER VIEWS: PRE-NOTIFICATION



4.99 The NEBs were generally the most optimistic about how the pre-notification system was working, with fewer than half identifying problems. Where they did express a view on the cause of pre-notification issues it was most commonly that the passenger was the cause. The Irish NEB suggested that awareness of the Regulation and the need to pre-notify to receive assistance was low amongst PRMs who were not members of representative groups. Most of the PRM groups felt that the airlines were the primary cause of problems with the pre-notification system, for a variety of reasons:

- Poor design and accessibility of airline websites makes it difficult for passengers to pre-notify;
- Airlines have been unwilling to make the significant investments required to ensure an effective system; and
- Airlines have been ineffective at transmitting special requests (e.g. dietary needs) between staff and departments.

4.100 The majority of airlines believed that the main issue in terms of pre-notification was that passengers were themselves failing to notify of their assistance needs. Several airlines and airports suggested a possible explanation as being that, although they may not normally consider themselves as being in need of special assistance, some travellers (especially infrequent flyers and the elderly) may find they need this once in the airport and having to walk long distances to reach their flight. Low rates of pre-notification were also attributed partly to abuse of the system, as it was believed that 'genuine' PRMs would usually pre-notify.

4.101 However, the majority of airports stated that the most significant problem was failure by airlines to pass on notifications, or erroneous notifications. Several highlighted the large differences in pre-notification rates between airlines: some airlines are able to achieve high rates of pre-notification (60-80%) whereas others have very low rates

(10% or less). Non-EU airlines were often stated to be worse, with flights from North Africa and India often cited as being particularly problematic, both in terms of the low levels of pre-notification and the high numbers of PRMs on these flights. Aéroports de Paris stated that passengers travelling from some north African airports would be charged for assistance if pre-notifying, even though the European airport provided assistance free of charge. US flights also pose difficulties for airports as US carriers are generally not allowed, under rule 382, to request details of assistance requirements in advance; however, the relative length of these flights means that PSM messages are usually received 7-10 hours in advance of arrival.

4.102 Several airports also indicated that charter carriers had particularly low rates of pre-notification. This was attributed by some carriers to low rates of notification by travel agents – in many cases agents may have an incomplete knowledge of the full range of wheelchair codes, often simply observing that the passenger is using a wheelchair and then allocating the WCHR special assistance code.

4.103 Communication failures were also cited by a number of stakeholders, sometimes a result of the confusion generated by the IATA special assistance codes themselves, particularly unnecessary requests for wheelchairs. Although technological failures may have been a problem when the Regulation was first implemented, these did not emerge as a significant current issue.

Conclusions

4.104 The main obligation that the Regulation places on carriers is that it prohibits refusal of carriage of PRMs, unless this is necessary to meet national or international safety rules or requirements imposed by the carrier's licensing authority, or is physically impossible due to the size of the aircraft or its doors. We found that most carriers comply with this, although some make carriage of PRMs conditional on advance notification, which does not appear to be consistent with the Regulation. In addition, a small number of carriers impose requirements for medical clearance which appear to be excessively onerous.

4.105 There are significant differences in policies relating to carriage of PRMs between carriers – even between carriers with similar aircraft types and operational models. The most significant difference is that some carriers impose a numerical limit on the number of PRMs that can be carried on a given aircraft. These can be quite low: some carriers have limits of 2-4 PRMs on a standard single-aisle aircraft such as an Airbus 319. In most cases, these requirements are defined in carriers' Flight Operations Manuals, which have to be approved by the relevant licensing authority; often, although not always, this is the same organisation that has been designated as the NEB. In some cases the PRM limits are required by the licensing authority, but in most cases, they are proposed by the carrier and approved by the authority. Whilst the rationale for these limits is safety, there does not seem to be an evidence base for them, and they are specifically prohibited by the equivalent US regulation on carriage of PRMs (14 CFR part 382).

4.106 The Regulation also allows carriers to require that PRMs be accompanied, subject to the same safety-based criteria. We found that a number of carriers require PRMs to be accompanied where they are not 'self-reliant', which can mean that the PRM cannot (for example) eat unaided. In our view this may be an infringement of the Regulation because there is no direct link to safety; for those carriers that fly to the US, it is also an explicit breach of the US PRM rules. Other carriers require PRMs to be accompanied where they are not self-reliant **and** this has a safety impact (for example, if the PRM could not exit the aircraft unaided in an emergency); this is consistent with the Regulation.

4.107 The Regulation also requires carriers to publish safety rules relating to the carriage of PRMs, although it does not specifically state what issues these safety rules should cover. We found that carriers all published some PRM-related information but in some cases there appeared to be significant omissions from this information.

4.108 Annex II of the Regulation sets out various requirements for services which have to be provided to PRMs by carriers. Evidence for the extent to which this is provided is limited, and restricts a fair assessment of compliance with these requirements. There is however sufficient evidence to conclude that the vast majority of case study airlines are complying with the requirement to carry up to two items of mobility equipment free of charge. Some PRM representative groups were critical of the effectiveness of airlines in implementing the Regulation, and we were informed of some particularly bad passenger experiences, but it is difficult to assess how common such occurrences are.

5. ENFORCEMENT AND COMPLAINT HANDLING BY NEBS

Introduction

5.1 This section summarises the complaint handling and enforcement process undertaken by National Enforcement Bodies (NEBs). We set out the following information:

- an overview of the NEBs, describing the types of organisations they are and the resources they have available;
- the legal basis for complaint handling and enforcement in each State;
- statistics for the number of complaints received, the nature of the complaints, and the outcomes, and for sanctions that have been issued;
- the typical process for complaint handling and enforcement in each State, and outline a number of common issues and difficulties;
- a summary of the activities of NEBs to monitor the implementation of the Regulation; and
- an overview of other activities undertaken by NEBs in relation to the Regulation, such as interactions with other stakeholders and promotional activity.

5.2 Most of the information within this section is provided for the NEBs in all Member States. The detailed information relating to the complaint handling and enforcement process, and to monitoring and other activities undertaken by the NEB, has been collected for the case study States only. Further detail on complaint handling and enforcement in the 16 case study States is provided in the case studies, in Appendix C.

Requirements of the Regulation relating to States and NEBs

5.3 The Regulation requires each Member State to designate a National Enforcement Body (NEB) responsible for the enforcement of the Regulation regarding flights departing from or arriving at airports within its territory, and to inform the Commission of this designation. This body is required to ensure that the rights of PRMs are respected, and in particular that the quality standards defined by Article 9(1) (see 3.53) are respected. It must also ensure that the provisions of Article 8 are respected. More than one body may be designated. To allow NEBs to enforce the Regulation, Member States must set out penalties for infringements of the Regulation, which must be effective, proportionate and dissuasive.

5.4 These bodies must also accept complaints from PRMs where they are dissatisfied with the service they have received under the Regulation and have been unable to obtain satisfaction by complaining directly to the service provider. If a body receives a complaint for which a body in another State is competent, it must forward the complaint to the other NEB. Other bodies may be designated specifically for the purpose of receiving complaints.

5.5 Member States should also inform PRMs about their rights under the Regulation, and the possibility of complaint to the bodies above.

Overview of the NEBs

5.6 Most of the NEBs (68%) are Civil Aviation Authorities. The other NEBs are government departments, independent statutory bodies or consumer protection authorities. Some Member States have designated more than one NEB. In these States, the responsibilities of the NEBs are divided in two ways:

- according to which type of organisation the enforcement relates to: in France, there are separate bodies for complaints handling and enforcement relating to airlines and airports, and to tour operators; and
- according to task: in the UK, there are separate NEBs for complaints handling and for enforcement.

5.7 In Belgium, there are three NEBs and an additional body responsible for handling complaints; the case of Belgium is unique, as the Flemish- and French-speaking regions are administered separately. For some of the States, there is a body which acts as the NEB but which has not yet been explicitly designated (see 5.13).

5.8 No States have designated a separate body for the enforcement of Article 8.

5.9 Table 5.1 lists the NEBs, the nature of the organisation, and where there is more than one NEB in a State, the role of each organisation. The table is divided into case study and non-case study States.

TABLE 5.1 ENFORCEMENT BODIES

State	Enforcement Body	Nature of organisation	Role
Belgium	Belgian CAA	CAA	Enforcement and sanctions
	Departement Mobiliteit en Openbare Werken	Regional government department	Enforcement and sanctions
	Service public de Wallonie, direction générale opérationnelle de la mobilité et des voies hydrauliques	Regional government department	Enforcement and sanctions
	Passenger Rights Department of Federal Public Service of Mobility and Transport	Federal government department	Complaints handling
Denmark	Statens Luftfartsvæsen (SLV)	CAA	-
France	Direction Générale de l'Aviation Civile (DGAC)	CAA	Airlines and airports
	Ministry of Economy, Industry and Labour, Division on Competition, Industry and Services	Government department	Tour operators
Germany	Luftfahrts-Bundesamt (LBA)	CAA	-
Greece	Hellenic Civil Aviation Authority (HCAA): Airports Division	CAA	Airports
	Hellenic Civil Aviation Authority (HCAA): Air Transport Economics	CAA	Airlines and tour operators

Hungary	Equal Treatment Authority (ETA)	Independent statutory body	Complaint handling, enforcement relating to PRM complaints
	National Transport Authority Directorate for Aviation (NTA)	CAA	Other enforcement
Ireland	Commission for Aviation Regulation	Independent economic regulator	-
Italy	Ente Nazionale Aviazione Civile (ENAC)	CAA	-
Latvia	CAA, Aircraft Operations Division	CAA	-
Netherlands	Transport and Water Management Inspectorate (IVW)	CAA	-
Poland	Civil Aviation Office (CAO) Commission on Passengers' Rights	CAA	-
Portugal	National Institute for Civil Aviation (INAC)	CAA	-
Romania	Autoritatea Naţională pentru Persoanele cu Handicap (ANPH)	Independent statutory body	All Articles except 8
	Autoritatea Areonautică Civilă Română (AACR)	CAA	Article 8
Spain	Agencia Estatal de Seguridad Aérea (AESA)	CAA	-
Sweden	Swedish Transport Agency, Civil Aviation Department	CAA	-
UK	CAA	CAA	Enforcement
	EHRC	Independent statutory body	Complaints handling in UK except Northern Ireland
	CCNI	Consumer protection authority	Complaints handling in Northern Ireland
Austria	Federal Ministry of Transport, Innovation and Technology	CAA	-
Bulgaria	CAA	CAA	-
Cyprus	Department of Civil Aviation	CAA	-
Czech Republic	Civil Aviation Authority	CAA	-
Estonia	Consumer Protection Board	Consumer protection authority	-
Finland	Finnish Transport Safety Agency	CAA	-
Lithuania	Civil Aviation Administration	CAA	-
Luxembourg	Direction de l'Aviation Civile	CAA	-
Malta	Civil Aviation Directorate	CAA	-
Slovak Republic	Slovak Trade Inspectorate	Consumer protection authority	Consumer protection
	Civil Aviation Authority	CAA	Safety aspects
	Ministry of Transport, Post and	Government	Implementation, including airline

	Telecommunications	department	conditions of carriage and aspects of airport operations
Slovenia	Civil Aviation Directorate	CAA	-

5.10 Most of the bodies designated as NEBs under Regulation 1107/2006 are also designated as NEBs under Regulation 261/2004. The States which have different NEBs are shown in Table 5.2.

TABLE 5.2 STATES WHERE NEBS ARE DIFFERENT UNDER REGULATIONS 1107/2006 AND 261/2004

State	NEB(s) under Regulation 1107/2006	NEB(s) under Regulation 261/2004
Finland	Finnish Transport Safety Agency	Consumer Ombudsman & Agency
		Consumer Disputes Board
		Finnish Civil Aviation Authority
Hungary	Equal Treatment Authority (ETA)	Hungarian Authority for Consumer Protection
	National Transport Authority Directorate for Aviation (NTA)	National Transport Authority Directorate for Aviation
Latvia	CAA, Aircraft Operations Division	Consumer Rights Protection Centre
Romania	Autoritatea Naţională pentru Persoanele cu Handicap (ANPH)	National Authority for Consumer Protection
	Autoritatea Areonautică Civilă Română (AACR)	
Slovak Republic	Slovak Trade Inspectorate	Slovak Trade Inspectorate
	Civil Aviation Authority	
	Ministry of Transport, Post and Telecommunications	
Sweden	Swedish Transport Agency, Civil Aviation Department	Konsumentverket
		Allmänna reklamationsnämndens
UK	CAA	CAA
	EHRC	Air Transport Users Council
	CCNI	

5.11 Only BCAA is shown as a notified NEB for Belgium in the list published by the Commission. As a result, we were not made aware of the existence of the other Belgian NEBs until our interview with BCAA, and therefore did not seek responses from them; in addition, at the time of our research for this project, BCAA had not held meetings with the other regional departments. For these reasons, we therefore have only limited information on their operations, and the data relating to Belgian NEBs in this report refers only to BCAA.

Separation of regulation from service provision

5.12 There is no requirement in the Regulation that the NEB be independent from service providers. However, in our view, it is inappropriate for the NEB also to be a service provider, as it would be difficult for it to act independently in undertaking

enforcement in relation to an infringement that it was itself committing. The only case we have identified where an NEB is also a service provider is the Greek NEB, HCAA, which is also the operator of the regional airports in Greece. This is a significant issue because, as identified in section 4 above, the most significant failure to implement the Regulation that we have identified is that it has not been implemented at the HCAA airports.

Legal basis for complaint handling and enforcement

5.13 Most Member States have complied with the obligations set out in Articles 14 and 16 to designate an NEB and introduce sanctions into national law, with the exception of:

- **Poland:** No sanctions have yet been introduced; a proposed amendment which includes fines is before the Polish parliament, but has not yet been passed.
- **Slovenia:** As yet no body has been designated, and no sanctions have been introduced.
- **Spain:** Enforcement relies on a law which predates the Regulation and hence does not refer explicitly to it. As a result, sanctions for infringements of Regulation 261/2004 (which have an equivalent legal basis) have been challenged by airlines. In most cases, the courts have upheld the right of the NEB to impose sanctions, but cases have not as yet reached the Supreme Court, and in one case a court has ruled that the NEB was not competent to impose sanctions. This is discussed in detail in the case study for Spain (appendix C).
- **Sweden:** No sanctions have yet been introduced; a proposed amendment which includes fines is before the Swedish parliament, but has not yet been passed. The proposed amendment does not define the levels of fines.

5.14 There are a number of States where sanctions have not been introduced for all potential infringements of the Regulation:

- Bulgaria, which does not define penalties for Article 8;
- Estonia, where sanctions have only been introduced for carriers;
- Luxembourg, which only defines explicit fines for Article 4; and
- Romania, where the law defining responsibilities makes the CAA responsible for enforcing compliance with Article 8, but does not endow it with the powers to do so.

5.15 In several Member States, enforcement is dependent on more than one law; for example, the law defining how the NEB must operate and the procedure for imposing sanctions may differ from the law introducing sanctions. There may also be other laws – typically defining rights to equal treatment – which may apply at the same time as the Regulation. Table 5.3 below summarises the relevant legislation in the case study States. More detailed information is provided in the case studies in Appendix C.

TABLE 5.3 RELEVANT NATIONAL LEGISLATION

State	Summary of relevant legislation
Belgium	• Articles 32 and 45-52 of Law of 27 June 1937
Denmark	• Air Navigation Act, Articles 149(11) and 149a define sanctions

France	• Article 330-20 of the Civil Aviation Code, as amended by Decree 2008-1445 of 22 December 2008: gives the Minister of Civil Aviation the power to impose sanctions
Germany	• Air Traffic Licensing Regulation (Luftverkehrszulassungsordnung): defines LBA as the NEB and that breaches of the Regulation are considered an offence. • Air Traffic Law (Luftverkehrsgesetz): defines that breach of EU Regulations relating to air traffic is an offence, and defines the fines applying. • Law on Administrative Offences (Gesetz über Ordnungswidrigkeiten): defines the administrative process that must be followed in order to impose sanctions.
Greece	• Letter of 1 December 2006 (reference 6310/A/10909) from Permanent Representation of Greece to Commission designates NEB; National Aviation Law 1815/1988 sets out fines
Hungary	• Act CXXV of 2003 defines role and sanctions of ETA • Act CXXX of 2003, and Article 4 (2) of Government Decree No 362/2004 define complaints handling procedure • Act XCVII of 1995 on Air Traffic, implemented by Government Decree No. 141/1995 defines role and sanctions of NTA • Ministerial Order 97/2005 makes NTA responsible for approving airport charges • Act CXL of 2004 defines procedure for imposing fines and sets out administrative penalties
Ireland	• Section 45(a) of the Aviation Regulation Act 2001 as inserted by the Aviation Act 2006: defines basis for enforcement and sanctions • Statutory Instrument SI 299/2008: transposes the Regulation into law
Italy	• Legislative Decree 24/2009 of 24 February 2009: defines process to be followed by ENAC and fines that can be imposed
Latvia	• Air Navigation Order (2007): designates NEB • Administrative Violations Code: defines fines
Netherlands	• Resolution to set up the Transport and Water Management Inspectorate (Instellingsbesluit Inspectie Verkeer en Waterstaat), Article 2, paragraph 1, item d: sets up the NEB • Civil Aviation Act (Wet luchtvaart), revised December 2009, Article 11.15, section b, item 1 and Article 11.16, paragraph 1.e.3: defines circumstance under which sanctions may be imposed • General Administrative Law Act (Algemene wet bestuursrecht), chapter 4 (process to impose sanctions) and chapter 5 (level of fines).
Poland	• Aviation Act (Article 21.2(3)): designates NEB • Administrative Procedure Code: defines procedures to be followed • No sanctions yet defined - draft amendment to Aviation Act (Articles 205a, 205b, 209a, 209b) will set out fines
Portugal	• Decree Law 241/2008: designates NEB and defines level of fines which can be imposed for each infringement • Decree Law 10/2004: defines standard scale of fines
Romania	• Decree 27/2002: requires all government bodies to be able to receive complaints • Decision 787/2007: defines penalties (except for Article 8) • Decree 2/2001 (approved and modified by Law 180/2002): defines framework for imposing penalties
Spain	• Royal Decree 184/2008: designates NEB • Aviation Security Law (Law 21/2003): basis for enforcement and sanctions • Royal Decree 28/2009: defines inspection regime • Law on Public Administrations and Administrative Procedures (Law 30/1992): defines operational procedures for the NEB

	• Regulation on Procedures for the Imposition of Sanctions (Royal Decree 1398/1993): defines process for imposing sanctions
Sweden	• Förordning (1994:1808) om behöriga myndigheter på den civilia luftfartens område (ordinance on competent authorities in civil aviation): designates the NEB • No sanctions yet defined, but some are set out in a proposed amendment Regeringens proposition 2009/10:95- Luftfartens lagar • Prohibition of Discrimination Act may also apply in some circumstances (e.g. infringements of Articles 3 and 4)
UK	• Statutory Instrument 2007/1895: designates NEBs, defines penalties and introduces a right to compensation for injury to feelings resulting from an infringement • Enterprise Act 2002: defines civil powers for NEB, including power to apply for an injunction ('stop now order') and power to seek binding undertakings
Austria	• Austrian Civil Aviation Law
Bulgaria	• Civil Aviation Act, Art. 81a
Cyprus	• Civil Aviation Act N 213(I)/2002
Czech Republic	• Civil Aviation Act (No 49/1997), § 93 Articles 7 (a) - (l) and 8 • Administrative Code (No 500/2004)
Estonia	• Consumer Protection Act • Aviation Act §58 and §60
Finland	• Finnish Aviation Act (1194/2009) - Section 157 (Conditional fines and conditional orders of execution) • Conditional Fine Act (1113/1990)
Lithuania	• Paragraph 2 of Article 70 of the Act of Aviation No. VIII-2066 (O.J. 2000, No. 94-2918; 2007, No. 59-2279): designates CAA as NEB • Code of Administrative Violations, Article 115: defines penalties
Luxembourg	• Law of 31st January 1948, art 43, modified by the law of June 5, 2009, Article 1 (19)
Malta	• Civil Aviation (rights of Disabled Persons and Persons with Reduced Mobility) Regulations (LN234/07) as amended by (LN 411/07)
Slovak Republic	• Act No 128/2002 (State Inspections Act): defines powers of NEB to conduct inspections, impose preventative measures, and impose sanctions • Act No 250/2007 on Consumer Protection: provides legal framework for NEB's consumer protection activities
Slovenia	• Not yet implemented

Sanctions allowed in national law

5.16 There are significant differences between the States in the maximum sanctions for infringements of the Regulation that can be imposed under national law (Table 5.4). The highest defined maximum sanctions are in Spain (€4.5 million) but in Denmark, Finland, Netherlands and the UK unlimited fines can be imposed, and in Cyprus the maximum fine is 10% of the turnover of the carrier. In Austria, Belgium and Denmark sanctions may also include a prison sentence.

5.17 However, in many States, sanctions are low, and in some States maximum sanctions are close to or below the costs that a service provider may in some circumstances avoid through non-compliance with the Regulation. In these States, it is possible that the sanctions regime may not comply with the requirement in Article 16 for dissuasive

sanctions to be introduced by Member States; however, without data on the costs of compliance we are unable to assess this. Maximum sanctions are particularly low (less than €1,000) in Estonia, Lithuania and Romania.

5.18 In most States, fines are determined by the NEB, taking into account various factors relating to the case, including the circumstances and conditions of the case, any reasons given for non-compliance, its impact on the passenger and the size of the company. In some States, fines may be imposed which relate directly to the financial impact of the alleged infringement:

- in Germany, additional fines may be imposed to recover any financial gains to the service provider which resulted from its non-compliance; and
- in the Netherlands, reparatory fines can be imposed, which require the service provider to make good any financial loss incurred by the passenger.

TABLE 5.4 MAXIMUM FINES

State	Maximum sanction (€)	Explanation/notes
Belgium	€4,000,000 (criminal and administrative)	In addition up to 1 year's imprisonment if a criminal prosecution
Denmark	Unlimited fine	In addition up to 4 months' imprisonment
France	€7,500	Maximum sanction 'per failing', which is not defined. Can be imposed on a per-passenger basis to give a higher total sanction. Can be doubled if repeated within a year.
Germany	€25,000	Additional fines can be imposed to recover the economic advantage that the carrier has obtained from infringement
Greece	€250,000	Minimum sanction is €500. Fines are generic, and do not refer specifically to the Regulation
Hungary	€22,600 (ETA) €11,300 (NTA)	Minimum sanction €189 for ETA. In addition penalty of up to €3,774 for failure to cooperate with an investigation.
Ireland	€150,000	Maximum €5,000 if the case is heard in a District Court. Fines only applicable on failure to comply with a Direction.
Italy	€120,000	Maximum depends on Article infringed and reduced by two thirds if paid within 60 days. Minimum fines of €2,500-€30,000.
Latvia	€2,800	Fine can be applied per passenger that complains. Law makes no direct reference to the Regulation, and it is possible that penalties could be open to legal challenge.
Netherlands	Reparatory fines: unlimited Punitive fines: €74,000	Reparatory fines should be in proportion to the amount of loss and to the severity of the violation. Punitive fines are per infringement and are not multiplied by number of passengers affected. IVW are conducting a study which will define policy on punitive fines.
Poland	Not yet defined, but proposed to be €1,875	Fines vary depending on Article infringed. Fines are variable for infringements of some Articles, but otherwise are fixed. Fines are cumulative per Article and per passenger that complains, so maximum could be a multiple of this. Minimum fines €47-€1,875.
Portugal	€250,000	The maximum and minimum fines depend on the infringement ('light', 'serious' or 'very serious'), the size of the

		company, and whether the infringement was intentional or negligent. Minimum fine €350-4,500.
Romania	€608	Maximum depends on Article infringed. Per Article breached and per passenger. No penalties available for Article 8. Minimum fines €195-€243.
Spain	€4,500,000	For most infringements maximum would be €4,500
Sweden	Not yet defined	Proposed amendment does not define levels of fines
UK	Unlimited fine	Maximum fines depend on Article breached; for many Articles the maximum fine is €5,600. Unlimited fines must be imposed by Crown Court, for serious cases.
Austria	€22,000	In addition up to 6 weeks' imprisonment
Bulgaria	€5,100	No penalties available for Article 8. Minimum fines €1,020.
Cyprus	€8,000 or 10% of operators turnover	-
Czech Republic	€192,000	-
Estonia	€640	Only applies to carriers
Finland	Unlimited fine	Fines are conditional on the period of time during which a condition is unfulfilled, and should be in proportion to company's size, amongst other factors
Lithuania	€870	Minimum sanction €290. Per case, not per passenger.
Luxembourg	€10,000	Fine of €10,000 for violation of Article 4, of €5,000 for failure to provide information, but no other sanctions given.
Malta	€2,300	Criminal procedure
Slovak Republic	€66,000	Depending on number of passengers affected and whether it is repeated
Slovenia	Not yet defined	-

Statistics for complaint handling and enforcement

5.19 Most NEBs had received very few complaints in relation to the Regulation. Of the 27 NEBs, 8 had received no complaints, and 26 had received less than 50. 80% of all complaints to NEBs had been received by the UK NEBs. Although, the UK has the largest aviation market in Europe, and therefore would be expected to receive a higher number of complaints, in 2009 it received over ten times as many complaints as Germany or Spain, the next largest markets. This may be a result of the right in the UK to claim compensation for infringements of the Regulation, discussed below.

5.20 Of those NEBs that had received complaints, most were not able to give a breakdown. Table 5.5 therefore gives a brief description of the types of complaints received.

TABLE 5.5 COMPLAINTS RECEIVED

State	2009	Total	Description/notes
Belgium	1	1	Poor quality of assistance
Denmark	0	0	-
France	5	24	Transport of insulin and other liquids; denied boarding and requirements to be accompanied; damage to mobility equipment
Germany	22	34	Assistance by the carrier (55%), at the airport (18%), refusal of reservation (14%), denial of boarding (14%)
Greece	3	4	Denial of boarding; carriage of oxygen; handling of passengers
Hungary	0	1	Denial of boarding
Ireland	14	18	Conditions imposed on travel e.g. seating or carriage of oxygen.
Italy	36	40	48% refusal to embark PRMs; most of remainder lack of assistance at airports
Latvia	0	0	-
Netherlands	5	6	IVW was only competent for 1 complaint
Poland	2	2	Both related to airports outside Poland
Portugal	16	34	Not provided
Romania	0	0	-
Spain	35	46	Not provided
Sweden	3	5	Denied boarding, assistance dog policy
UK	356	883	Allocation of appropriate seating; timely provision of assistance on landing; and communicating requests for assistance on arrival at the airport.
Austria	1	2	Treatment of injured passengers
Bulgaria	0	0	Denied boarding
Cyprus	1	3	Not provided
Czech Republic	0	0	-
Estonia	0	0	-
Finland	3	4	Seating, oxygen, movement within cabin
Lithuania	0	0	-
Luxembourg	0	1	Boarding denied to deaf passengers
Malta	1	1	Carriage of guide dogs
Slovak Republic	0	0	-
Slovenia	0	1	Denied boarding
Total	499	1110	

5.21 In addition, NEBs in several States had received questions which were not complaints, regarding, for example, airline seating policy.

Sanctions applied

5.22 At the time the interviews for this study were conducted, no sanctions had yet been applied for infringements of the Regulation. At the time of drafting this report, three States were in the process of applying sanctions:

- France had opened proceedings to impose fines in one case;
- Portugal had opened proceedings to impose fines in two cases; and
- Spain had opened proceedings to impose fines in five cases.

5.23 Two other States had taken other actions to encourage compliance:

- Hungary wrote to an airline requiring it to correct its policy, and published this letter; and
- the UK has threatened several organisations with sanctions, and has taken other actions to encourage compliance, including writing to airlines, and setting out its requirements for compliance.

The complaint handling and enforcement process

Overview of the process

5.24 The complaint handling process is broadly similar in each NEB, however, since most NEBs receive very few complaints, the process for handling them is often not defined in detail. A typical process is as follows:

- complaints are recorded (since the number of complaints is frequently very low, this may be in a spreadsheet or a filing system rather than in a database);
- most undertake an initial filter of the complaints, to remove those that are not related to the Regulation, where the passenger has not first sought redress from the service provider, or where there is no *prima facie* case of an infringement;
- complaints relating to flights departing from other States are forwarded to the NEB of the State which is competent to handle the complaint;
- the complaint is investigated through contacting service providers to request information and/or justification for their actions; and
- a decision is made on the complaint.

5.25 The complaint handling process is different for complaints submitted to one of the UK NEBs (see box below). Otherwise, the main differences between the processes in different Member States are in the following areas, which are discussed in more detail below:

- the nature of the ruling or decision issued to the passenger, in particular whether the ruling is binding;
- under what circumstances the investigation of the complaint may lead to sanctions; and
- the process by which sanctions may be imposed and collected.

Complaint handling in the UK (excluding Northern Ireland) by EHRC

The legislation implementing penalties for infringements of the Regulation in the UK also grants a right to compensation for injury to feelings resulting from an infringement. This is in line with UK disability rights legislation in other sectors. As a result of this, the process for complaint handling is structured around conciliation, with a possible civil claim for compensation if conciliation fails. In other States there is no right to compensation and therefore no reason to offer conciliation proceedings.

The EHRC handles complaints relating to incidents which occurred in the UK excluding Northern Ireland. When a complaint is submitted to the EHRC and an initial evaluation shows it to be potentially valid, a letter is sent to the service provider which summarises the complaint and requests comments. This letter also explains the conciliation process, and asks if the service provider would be willing to participate. The responses are evaluated to see whether they appear to justify the actions of the service provider, but there is no technical or operational investigation, for example, to establish whether any claims made by a service provider are true.

If the complaint remains unresolved, the EHRC will consider referring the case for conciliation. If both parties agree, conciliation is provided independently, and may result in a voluntarily binding agreement on both parties. This agreement may include financial compensation, or may include non-financial reparations such as an apology.

If a service provider does not wish to participate in conciliation, the EHRC may suggest to the passenger that they initiate legal proceedings, which may result in payment of compensation. The EHRC may also consider offering litigation support for cases where it believes that the outcome could help clarify the application of the Regulation.

Complaints related to incidents occurring in Northern Ireland are handled by CCNI. This follows a procedure similar to most other NEBs, including an investigation of the facts of the case, but if this procedure fails to resolve the complaint to the passenger's satisfaction, the passenger can seek financial compensation under UK national law.

Languages in which complaints can be handled

5.26 Most NEBs are able to handle and reply to complaints written in the national language and English, but in many cases NEBs were not able to handle complaints in other Community languages. The languages in which NEBs can receive complaints, and respond to passengers, are shown below.

TABLE 5.6 LANGUAGES IN WHICH COMPLAINTS ARE HANDLED

State	Languages in which complaints may be written	Languages in which the NEB will reply to the passenger
Belgium	Flemish, French, English	Flemish, French, English
Denmark	Danish, English, German	Danish, English
France	French, English, Spanish	French only
Germany	German, English	German, English
Greece	Greek, English, French, German, Spanish, Italian	Greek, English
Hungary	Hungarian, English, German, Italian, other languages where possible	Hungarian, English, German, Italian
Ireland	English, French, German, Spanish, Italian	English, Spanish
Italy	Italian, English, French, Spanish, German	Italian, English, French, Spanish

Latvia	Information not provided at interview	Information not provided at interview
Netherlands	Dutch, English; sometimes also French and German	Dutch, English; sometimes also French and German
Poland	Polish, English, German, French	Polish, informal translation to English provided
Portugal	Portuguese, Spanish, English and French	Portuguese, Spanish, English and French
Romania	Romanian, English	Romanian, English
Spain	Spanish, English	Spanish, English
Sweden	Swedish, English	Swedish, English
UK	English, but would make arrangements to handle any other languages	English, but would make arrangements to handle any other languages

Time taken

5.27 Many NEBs informed us that they had received too few complaints to be able to draw conclusions on the average time taken to handle them (see Table 5.7 below). Several other States had received very few complaints, but had a legal limit on time to respond set by national law. Of those that were able to estimate the actual time taken to resolve complaints, most reported wide variation: for example, Italy reported variation between 1 and 6 months. The longest time taken to resolve complaints was reported in the UK, where complaints may take up to 6 months, and there are instances where complaints have taken longer than this to resolve; as a result the passenger has no longer been able to claim for compensation under UK national law (see 5.25).

TABLE 5.7 TIME TAKEN TO RESOLVE COMPLAINTS

State	Average time taken	Explanation/Notes
Belgium	Too few complaints to estimate time	
Denmark	Too few complaints to estimate time	No complaints yet received, but in principle 2-3 months
France	Varies significantly	If the case goes to CAAC, it will take longer. Overall, durations are similar to under Regulation 261/2004
Germany	Too few complaints to estimate time	Complaints are handled faster than for Regulation 261/2004, which take 3-4 months
Greece	30 days	Response time is set by law and is generic across all complaints to HCAA
Hungary	75 days	Response time is set by law and is generic across all complaints to ETA
Ireland	3-4 months	Awaiting responses (from service providers or Commission) lengthens the average time taken, so many cases handled quicker than this
Italy	30 days to 6 months	Depends on investigation required and response of service provider
Latvia	Too few complaints to estimate time	
Netherlands	Too few complaints to estimate time	Same procedure as for Regulation 261/2004: in principle 3-6 months
Poland	Too few complaints to estimate time	Likely to be quicker than for Regulation 261/2004
Portugal	Too few complaints to estimate time	May be faster than for Regulation 261/2004

Romania	30 days	Time limit set by law
Spain	Too few complaints to estimate time	Always less than six months, and delay is due to service providers. Shorter than equivalent complaints under Regulation 261/2004.
Sweden	At most 6 weeks	This is a non-binding target for the CAA; little information at present on how well this has been met.
UK	EHRC: Up to 6 months, can take longer CCNI: Up to 6 weeks	EHRC: Wide variation in time taken. Process is driven by 6 month time limit for court cases for compensation under SI. CCNI: Wide variation in time taken.

Responses issued to passengers

5.28 All of the NEBs in the case study States provide PRMs who complain with an individual response. As there is no right to compensation, the extent to which an NEB can offer assistance to obtain redress is limited; most responses state a decision on whether the NEB considers the Regulation to have been infringed, but do not state whether any payment should be made to the PRM, for example for loss due to denied boarding. The UK is an exception, for the reasons given in above. Most responses from NEBs do not have specific legal status, however in Hungary the response is legally binding, and in the Netherlands non-compliance with a decision may lead to a fine.

5.29 Almost all States would undertake some form of investigation of a complaint. The exception to this is the UK (excluding Northern Ireland), where the body responsible for handling complaints does not take an investigative role, although the CAA does investigate the facts of a proportion of cases. As discussed above, the UK process is structured around claims for compensation and the NEB sees its role as to facilitate conciliation, where the service provider is incentivised to voluntarily provide some form of compensation, or risk having a court award compensation against it.

5.30 Table 5.8 summarises the responses issued to the passenger.

TABLE 5.8 RESPONSES ISSUED TO PASSENGERS

State	Nature of response issued
Belgium	Individual non-binding evaluation sent to both service provider and passenger
Denmark	Non-binding individual evaluation provided to PRM and service provider
France	Individual response provided by DGAC summarising the conclusions of the investigation and its opinion on the case
Germany	Individual response giving the result of the investigation and their conclusions
Greece	Individual response giving the result of the investigation and their conclusions
Hungary	ETA issues legally binding decision to both passenger and service provider
Ireland	CAR writes to each passenger to summarise conclusions and whether incident was an infringement of the Regulation
Italy	ENAC writes to each complainant to inform them of its conclusions
Latvia	No specific procedures established, but passengers would be issued with an official letter communicating the final decision

Netherlands	Formal decision issued to both passenger and carrier. Not legally binding, but non-compliance may lead to a fine.
Poland	Formal decision issued to both passenger and carrier
Portugal	Individual response summarising correspondence with service provider and reasons for decision.
Romania	Individual response is sent to the passenger, setting out any infringements of the Regulation and any corrective measures taken by ANPH
Spain	Individual response, including response from carrier and AESA's view on it, and information on how passenger can obtain redress
Sweden	Individual non-binding response summarising correspondence with service provider and reasons for decision.
UK	EHRC: Does not investigate complaints, and therefore does not have standard format for output. Conciliation process may result in form agreeing actions to be taken. CCNI: Individual opinion letter sent to passengers.

Circumstances in which sanctions may be imposed

5.31 There are also significant differences between the States as to whether and when sanctions are imposed.

5.32 Some NEBs, including one of the Hungarian NEBs, Italy, Portugal, and Romania, always impose sanctions in the case that an infringement is found, even if it is a minor or technical infringement which does not significantly inconvenience passengers. If the amendments to the Aviation Act are passed in their current form, the Polish NEB will in future apply fines for every infringement. The German NEB must also take some action whenever an infringement is identified, although it has discretion to choose between a warning letter and a fine. If it chooses a fine, this has to be proven to the same standard of evidence required for criminal cases, and the NEB is therefore unlikely to impose sanctions if the infringement is 'not significant'.

5.33 In other States, the policy is to impose sanctions far less frequently:

- In two States (Belgium and Greece), a sanction would only be imposed where a service provider fails to take corrective action when required to do so by the NEB. In Ireland, this is the case for infringements of some Articles. In Spain, this is the general policy of the NEB but it could in theory impose sanctions without first warning the service provider.
- Several States have a policy of imposing sanctions where there is evidence of serious or systematic infringements, including Denmark, and the Netherlands.
- The UK will consider prosecution of a service provider where it fails to comply with CAA requests for corrective action, or for wilful non-compliance. Any case to be taken to prosecution must proven to a criminal standard of evidence, despite the due diligence defence available in UK law. The UK NEB believed that this would less difficult than under Regulation 261/2004, as Regulation 1107/2006 is more prescriptive.

5.34 The policies of the case study States on imposition of sanctions are shown in Table 5.9 below.

TABLE 5.9 POLICY ON IMPOSITION OF SANCTIONS

State	Policy on imposition of sanctions	Explanation/Notes
Belgium	Applied for serious or systematic violations (allows opportunity for corrective action first). Public prosecutor decides whether to bring criminal case; if not, BCAA may then decide whether to impose administrative sanctions.	If prosecutor brings criminal case, BCAA may not impose administrative sanctions
Denmark	Applied for serious or systematic offenses; minor offences would receive a caution, which would not be made public	
France	In consultation with CAAC. Ultimate decision made by the Minister responsible for Civil Aviation on the advice of CAAC.	Cases would only be considered by CAAC if referred by DGAC
Germany	If a complaint is upheld, imposes warning letter or sanction; LBA has flexibility to decide which	Procedure is a mix between administrative and criminal procedures: level of proof required is equivalent to a criminal case but case is decided by LBA
Greece	First send a letter of caution; if service provider infringes again, then impose penalty.	
Hungary	Choice of actions (including fines and non-pecuniary measures) which may be applied by ETA, depending on nature of case. NTA has same choice of actions but must take some form of action. Fines also imposed for non-cooperation with cases.	Fines for non co-operation can be imposed even where there was no infringement found
Ireland	CAR would consider prosecuting if a service provider did not comply with a Direction, or if it identified a breach of Articles 3 or 6 (2)	CAR can consider issuing a Direction if issue identified during an inspection, or if a service provider does not rectify a case when required to do so
Italy	Applied in every case of an infringement, identified either by investigation of complaint or inspection	Amount of fine considers facts of the case. Appeals and collection process can be lengthy, up to 7 years
Latvia	At discretion of NEB	More specific policies to be developed when Administrative Violations Code amended.
Netherlands	In principle sanctions could be applied for every violation, but IVW policy is to apply them only for severe or repeated infringements	Appeals process includes several stages, and may take in principle up to 2 years
Poland	When in force, will be applied in every case of an infringement	No sanctions yet in place
Portugal	Applied for every confirmed infringement, identified either through complaint or inspection	
Romania	Applied for every confirmed infringement	Amount of fine considers facts of the case. Any sanctions must be imposed through the Social Inspectorate; specific methodology is in development. AACR cannot impose fines for violations of Article 8.
Spain	Whenever an infringement is identified, the service provider receives warning, with a period in which to rectify the issue; if it fails to	

	do so, AESA can impose a sanction.	
Sweden	Sanctions not yet defined	
UK	Applied when service provider fails to comply with CAA requests for corrective action, or for wilful non-compliance	In addition, standard of evidence required for criminal prosecution, and 'due diligence defence' means that it must be proved that senior management of carrier had intended not to comply

Process to impose sanctions

5.35 In most Member States, the process to impose sanctions is an administrative procedure undertaken by the NEB, and the decision to impose sanctions is made by the NEB alone. Service providers, and in some cases also passengers, can appeal to the courts.

5.36 The exceptions to this are the following States:

- In Germany, the procedure is similar to the administrative procedures applying in other States, but the standard of evidence required is equivalent to that in criminal cases.
- In Slovakia, the procedure is also similar to the administrative procedures in other States, but with the key difference that (as for Regulation 261/2004) an on-site inspection is required before a sanction can be issued. A consequence of this is that sanctions cannot be imposed on carriers that are not based in Slovakia.
- In Denmark, Ireland, Malta and the UK[13], sanctions are imposed under criminal law and therefore a criminal prosecution is required.
- In France, cases are referred by the NEB (DGAC) to an administrative commission (the CAAC) that meets twice per year. This makes a recommendation to the Minister of Civil Aviation, who takes the ultimate decision about whether a sanction should be imposed, and the level of any sanction.
- In Belgium, sanctions can be imposed under criminal law but administrative fines to an equivalent level are also available.
- In Austria, administrative fines can be imposed, but in aggravated cases a prison sentence of up to 6 weeks may also be imposed, under criminal law.

5.37 Some States have administrative fines to encourage compliance, which can be applied when a service provider fails to respond within a certain time; these include Hungary and Latvia.

Application of sanctions to carriers based in other Member States

5.38 A number of NEBs face difficulties in applying sanctions to carriers that are not based in their State. This arises because national law either:

- does not permit application of sanctions to carriers not based in the State; or
- requires administrative steps to be taken in order to impose a sanction, which are

[13] Issues regarding the imposition and collection of fines in the UK are discussed in further detail in the Evaluation of Regulation 261/2004, SDG for European Commission, February 2010.

either difficult or impossible to take if the carrier is not based in, or does not have an office in, the State concerned.

5.39 The problem is particularly significant in relation to carriers based in other EU Member States, as opposed to non-EU carriers. In many Member States where sanctions are imposed through an administrative process, national law requires a notification of a sanction, or the process to start imposition of a sanction, to be served at a registered office of the carrier, or on a specific office-holder within the carrier. Non-EU (long haul) carriers will usually have an office in the each of the States to which they operate, and this can be a condition of the bilateral Air Services Agreements which permit their operation; however there are no such requirements on EU carriers, which are free to operate any services within the Union.

5.40 We discussed this issue in detail in our recent report on Regulation 261/2004, and in most cases the issues are equivalent, because the process to impose the sanction is the same. However, since the research for that report was conducted, there have been changes affecting the imposition of fines on non-national carriers in two States:

- **Greece:** Until 2008, the legal process for serving a fine required that a writ was accepted by a representative in Greece of the company being fined. As a result, HCAA faced difficulties in imposing fines on non-national carriers that had not established an office in Greece. To resolve this problem, in May 2008 HCAA adopted a regulation on airline representation, requiring all non-national airlines to have representation agreements with their local representatives. This was withdrawn shortly after it came into force, as the restrictions it imposed violated Regulation 1008/2008 on common rules for the operation of air services in the Community. The difficulties in imposing sanctions on non-national carriers therefore remain.
- **Germany:** German national law requires LBA to prove that the notification of any sanction had been issued to a named person within the carrier; as these carriers often do not have offices or legal representation in Germany, at the time of the research for the study on Regulation 261/2004 it was often not possible to meet this requirement. LBA now believes that this problem has been resolved and expects to test this application within six months.

5.41 The problems with application of sanctions to carriers not based in the Member State are summarised in Table 5.10. Since no fines have yet been imposed for infringements of the Regulation, many of the procedures and issues described below have not been tested in practice. However, often the procedures for imposing fines are equivalent to those for Regulation 261/2004 and therefore where possible we have drawn conclusions on this basis.

TABLE 5.10 ISSUES WITH APPLICATION OF SANCTIONS TO CARRIERS NOT BASED IN THE STATE

State	Whether it is possible to impose sanctions	Explanation/Notes
Belgium	Yes in principle	In principle there are no problems although this has not been tested as yet as no sanctions have been imposed. BCAA believed the best approach would be through cooperation with other NEBs, but the scope of the Regulation could limit this.
Denmark	Yes, although only if the incident occurred on Danish territory	No sanctions have been imposed and therefore this has not been tested. Restriction to Danish territory means that a small proportion of incidents would not be covered, i.e. incidents occurring mid-flight on board a non-Danish carrier which had departed from or was landing at a Danish airport.
France	Yes	Sanctions have been imposed on foreign carriers without any difficulties for other Regulations, so in principle should not be a problem. Notification can be sent by registered mail, and by fax if it is not possible to obtain a receipt from the registered mail.
Germany	Yes in principle	Sanctions must be served on a named person within the airline, which caused problems when issuing fines for Regulation 261/2004. LBA believe this is now resolved, and that it should be sufficient to obtain a signed receipt either by registered mail or by a courier, or issue the sanction through the German embassy in the State concerned
Greece	Uncertain	In summer 2009 national legislation came into force on airline representation, requiring a representation agreement for all non-national airlines. This allowed HCAA to impose financial penalties on all carriers but has now been repealed. The same difficulties in imposing fines on non-national carriers are now present: the legal process of serving a fine requires that a representative of the airline in Greece accept the writ, and there are therefore difficulties in imposing fines on non-national carriers that have not established an office in Greece.
Hungary	No	ETA is only able to handle discrimination cases regarding companies based in the territory of the Republic of Hungary.
Ireland	Yes in principle	Notification of a Direction can be served at the carrier's registered office, which does not have to be within the State. Any proceedings would require proof of incorporation of an airline which could be accepted by the Irish courts.
Italy	Yes but slower / more complex	ENAC would use the process set out in Regulation 1393/2007 to serve notifications on carriers which do not have offices in Italy, but this is likely to be slow/complex. For fines imposed under Regulation 261/2004, this has been short-cut in some cases by the Italian embassy/consulate in the State serving the notification directly.
Latvia	No	The Latvian Administrative Violations Code only allows for sanctions to be imposed on 'legal persons'. This is defined as including foreign individuals but not foreign companies.
Netherlands	Yes	IVW must prove that the company being fined has been notified, for example by proving receipt of the letter setting out the fine. The law states that if IVW can prove it has sent the fine, it is up to the other party to prove it has not received it.
Poland	Yes	Notifications are sent by registered mail or courier to the head office of the carrier – there is no limitation provided a receipt is obtained. A receipt from a courier company is considered sufficient.

Portugal	Yes	No specific constraints on imposing sanctions. Procedure equivalent to that for national carriers.
Romania	No	Notification of any penalty must be made by mail with a receipt, or by physically presenting it in the presence of a witness. If an airline does not have a legal representation in Romania, this cannot be done.
Spain	Yes	Notifications are sent by registered mail – there is no limitation provided a receipt is obtained. In theory collection of sanctions is problematic if carrier does not have an office in Spain, but this has not yet proved a problem.
Sweden	Sanctions not yet defined	Proposed amendment to Civil Aviation Act is unlikely to allow this, as no other Swedish legislation does so.
UK	Yes in principle	In principle there are no problems although this has not been tested as yet as no sanctions have been imposed. As sanctions could only be imposed through a criminal process, this would be undertaken by the criminal courts system not the NEB.

Monitoring undertaken by NEBs

5.42 While the Regulation does not explicitly require NEBs to undertake monitoring of compliance with the Regulation, it does require them to take measures to ensure that the rights of PRMs are respected, including compliance with the quality standards required by Article 9 (1).

Monitoring of airport quality of service

5.43 Two NEBs, Denmark and Germany, had undertaken no actions to directly monitor airport service quality. Denmark holds biannual meetings with stakeholders including PRM organisations, airport managing bodies and airlines, but does not undertake any first-hand monitoring of service quality at airports.

5.44 NEBs in all but two of the case study States had undertaken some inspections of airports. Many undertook yearly inspections of the major airports, although some inspected airports more frequently: the Hungarian NEB inspects Budapest airport three times per year, and Spain had conducted 152 inspections since the introduction of the Regulation. Some had only undertaken one inspection, when the Regulation came into force; these included France, the Netherlands, Romania and Sweden.

5.45 Most inspections focus on checks of the systems and procedures in place to provide service. These checks included confirming the signage and functioning of the designated points of arrival, training records, and the written procedures followed by staff providing the service. Most did not assess the passenger experience; those that did were Latvia, Sweden and the UK. These checks included site visits accompanied by representatives of PRM organisations to check actual waiting times and infrastructure such as designated points.

5.46 In addition to inspections, there were a number of other approaches to monitoring quality of service, including:

- attending the PRM steering committees of larger airports on a monthly basis (UK);
- holding biannual meetings with stakeholders including PRM organisations (Denmark); and

- sending annual surveys on implementation of the Regulation to airports (Romania).

5.47 Table 5.11 summarises the actions NEBs have taken to monitor airport service quality.

TABLE 5.11 NEB ACTIONS TO MONITOR AIRPORT QUALITY OF SERVICE (EXCLUDING INDIRECT MONITORING)

State	Direct monitoring of airport quality of service
Belgium	Inspection and audit of subcontractors at Brussels Airport, covering part of Regulation
Denmark	Biannual meetings with stakeholders including PRM organisations, airport managing bodies and airlines
France	One inspection of Paris Charles De Gaulle
Germany	None
Greece	Inspections of all airports (including 3 at Athens) for compliance with quality standards (although no quality standards set at any airport other than Athens)
Hungary	Regular inspections (Budapest 3 per year, smaller airports once) covering systems and equipment; questionnaire requesting number of complaints received and training given; approves safety license of PRM service provider, including check of quality standards
Ireland	2 inspections at each airport under jurisdiction
Italy	Regular inspections by staff based at airports, reviewing equipment and procedures, application of quality standards, and provision of training
Latvia	Inspections for compliance with quality standards: checking 'time stamps', site visits to measure actual waiting times. Meetings two times a year to discuss standards.
Netherlands	Audit of systems at major Dutch airports in 2007/2008. Further investigations will be driven by complaints.
Poland	Surveys of all airports, covering: quality standards, training records and programmes, documentation of cooperation with PRM organisations and airport users. Documentation checked by inspections.
Portugal	Yearly inspections of major Portuguese airports, covering designated points and information, but excluding staff training and assistance provided.
Romania	Inspection of Bucharest Otopeni, in cooperation with Social Inspectorate. Annual surveys of airports on several topics, including training, accessible information and procurement.
Spain	152 inspections relating to the Regulation
Sweden	Inspection of Stockholm Arlanda with PRM organisation, including checks of designated points and signage. No such checks of smaller airports.
UK	CCNI: Annual PRM site visits at airports; quarterly meetings with airports. CAA: Physical inspections of airports combined with discussions with service providers. Attends airport-PRM consultative committees monthly for London Heathrow, Gatwick, Luton and Stansted, and for Manchester less frequently.

5.48 For most of the NEBs we spoke to, resource constraints were not an issue: most NEBs received few complaints, and did not undertake significant additional activity which would require additional resources. Where inspections of airports for compliance with the Regulation were undertaken, they were frequently combined with other inspections and did not therefore require significant additional resourcing. The case study States which informed us that they would undertake more inspections if they

had more resources were France and Ireland.

Monitoring of airline quality of service and policy regarding carriage of PRMs

5.49 Most NEBs did not inform us of any monitoring of airline service quality they had undertaken, and stated that they had not investigated or challenged any airline policies on carriage of PRMs.

5.50 The most pro-active approach to airline service quality was that of the Spanish NEB, which in 2009 undertook 409 inspections on passenger rights. The other NEBs which informed us of reviews of airline quality of service took a number of approaches:

- approval of ground handler training (Greece);
- reviewing operating manuals (Latvia, Poland);
- reviewing websites for accessibility (Latvia, Netherlands); and
- annual surveys on airline implementation of the Regulation (Romania).

5.51 Table 5.11 summarises the actions NEBs have taken to monitor airline service quality and policies on carriage of PRMs.

TABLE 5.12 NEB ACTIONS TO MONITOR AIRLINE QUALITY OF SERVICE AND POLICY

State	Monitoring of airline quality of service and policy on carriage of PRMs
Belgium	Developed advisory document which sets limits on PRM carriage by Belgian carriers
Denmark	No review of service quality. Discussion of hypothetical reasons for refusal of embarkation discussed at stakeholder meetings
France	None
Germany	No review of service quality.
Greece	Training of ground handlers is approved by HCAA
Hungary	Reviews requirements and Conditions of Carriage for compliance with Regulation
Ireland	Reviewed airline policies on carriage of PRMs
Italy	None
Latvia	Inspections of both main Latvian airlines: reviewed operating manuals, websites and records. Would use unannounced inspections if infringements identified.
Netherlands	Consultations with EDF to check accessibility of airline websites
Poland	NEB reviewed airline's operating manual as a result of one case
Portugal	None
Romania	Annual surveys of airlines on several topics, including refusal of carriage, training and accessible information
Spain	409 inspections in 2009 on passenger rights, including checks on information provided to passengers and compliance with conditions of carriage
Sweden	Reviewed policies on carriage in cooperation with Swedish Work Environment Authority; awaiting EASA report before defining policy on PRM limits
UK	Requested and reviewed information from airlines on the rationales for their policies

5.52 In addition, many NEBs are also the licensing authority for carriers registered in the State, and therefore have to approve carriers Operating Manuals. Where this is the case, these NEBs have to approve, and therefore could determine, carriers' policies on carriage of PRMs and requirements to be accompanied.

5.53 We have identified that in some cases the licensing authority does have specific policies on carriage of PRMs which must be reflected in carriers Operating Manuals. The stated rationale for these policies is safety, but these policies vary significantly between States, and have not been demonstrated to be evidence-based. In most cases, the licensing authorities do not have specific policies and will approve those proposed by the carriers, subject to these being reasonably based on safety. Most NEBs and licensing authorities have not done anything to challenge policies on carriage of PRMs proposed by carriers, and this has resulted in significant differences in policies between carriers. This issue is discussed in more detail in section 4 above.

Monitoring of airport charges

5.54 As noted previously (see 5.6), no Member State has designated a separate body for enforcement of Article 8 of the Regulation, and several have not yet passed legislation to allow penalties to be imposed for infringements of this Article.

5.55 7 out of 16 case study NEBs had undertaken no direct monitoring of the charges levied by airports for providing services under the Regulation, or of the consultation which airports are also obliged to undertake when setting such charges.

5.56 The NEBs for Hungary and Italy had undertaken audits of the charges levied, while a number of NEBs had undertaken high level reviews of expenses and charges (including Greece, Latvia, Poland and Romania). The Netherlands and Portugal had undertaken benchmarking exercises against other airports.

5.57 Table 5.11 summarises the actions NEBs have taken to monitor airport charges under the Regulation.

TABLE 5.13 NEB ACTIONS TO MONITOR AIRPORT CHARGES (EXCLUDING INDIRECT MONITORING)

State	Direct monitoring of airport service charges
Belgium	None
Denmark	None
France	None
Germany	None
Greece	Annual review of expenses and charges
Hungary	Approves airport charges; in-depth audit of costs and charge for Budapest
Ireland	Charges included within regulated price cap. CAR has investigated level of consultation on charges.
Italy	Charges set by ENAC in cooperation with airports and airlines
Latvia	High-level check of charge
Netherlands	Reviews against other airports with advice of Netherlands Competition Authority.

Poland	Review of charges (by other CAO department)
Portugal	Benchmarking exercise across European countries, but no auditing or analysis of whether charges are cost-reflective
Romania	Checks for: existence of charges; separation of accounts; annual report on expenses and revenues. No checks on whether reasonable or cost-reflective (but in the process of recruiting staff with economic skills).
Spain	None
Sweden	None, but review is planned.
UK	None

Other activities undertaken by NEBs

Interaction between NEBs and with other organisations

5.58 Given the low number of complaints received by NEBs, interaction with other stakeholders is important to maintain an awareness of any issues arising. Table 5.14 summarises the interactions between NEBs and other organisations.

TABLE 5.14 NEB INTERACTION WITH OTHER ORGANISATIONS

State	Form of any interaction between NEB and other organisations
Belgium	None
Denmark	Biannual meetings with stakeholders, including airports, airlines and PRM organisations
France	No information provided at interview
Germany	No information provided at interview
Greece	Meetings with PRM organisations to help define quality standards, joint accessibility reviews of regional airports
Hungary	Biannual meetings with PRM organisations
Ireland	No information provided at interview
Italy	Round table discussions to develop advisory guidance, good relationship with PRM organisation
Latvia	CAA attends quarterly PRM steering committee at Riga Airport with PRM organisations
Netherlands	Consultations with EDF to check accessibility of airline websites
Poland	Worked with PRM organisation to improve CAO understanding of problems faced by PRMs
Portugal	One day seminar for aviation industry stakeholders on Regulations 261/2004 and 1107/2006. Did not include representatives of PRM organisations.
Romania	NEB and PRM organisation cooperated with Bucharest Otopeni to develop quality standards
Spain	No information provided at interview
Sweden	Approximately monthly contact with PRM organisations, including biannual aviation focus group
UK	CCNI: Worked with Equality Commission of Northern Ireland to support introduction. CAA: Attends monthly PRM steering committees at major UK airports with PRM organisations, receives guidance from government advisory committee on disabled travel.

Promotional activity undertaken by NEBs

5.59 The Regulation requires Member States to inform PRMs of their rights and the possibility of complaints to NEBs. Relatively few NEBs have made significant efforts towards this: of the case study NEBs, only Romania and UK had undertaken nationwide campaigns to promote awareness of passengers' rights under the Regulation, and even in the UK, the PRM organisation we spoke to was not aware of the campaign the UK NEB had conducted.

5.60 Other NEBs had undertaken less direct promotional activity, including the following:

- publishing of leaflets to be distributed at airports (Belgium, Germany);
- holding a conference (Germany); and
- actions to promote awareness of the Regulation to PRM organisations and other stakeholders, but which did not directly inform passengers (Denmark, Italy, Netherlands, Poland).

5.61 A number of NEBs had published information on their websites. While such information can be useful, if a passenger is unaware that they have rights, or is aware they have rights but unaware of the role the NEB plays in enforcing them, they are unlikely to find and read NEB websites. Table 5.15 lists the activities undertaken by NEBs.

TABLE 5.15 NEB ACTIVITY TO PROMOTE AWARENESS OF THE REGULATION

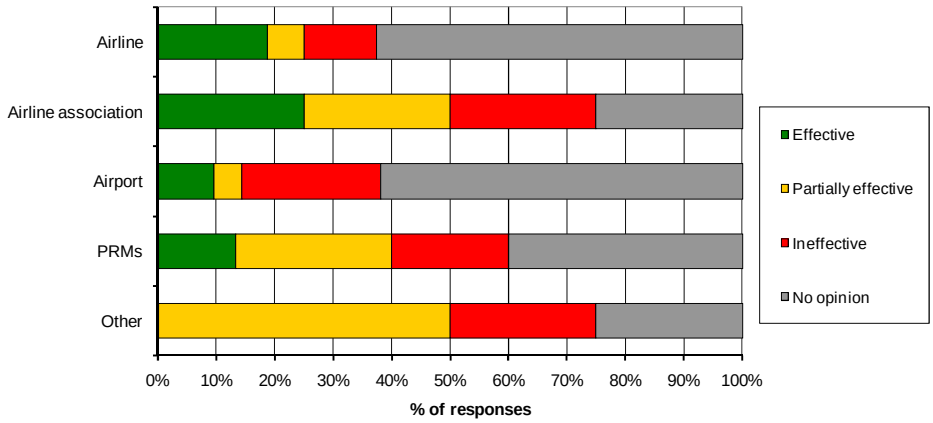
State	Actions taken by NEBs to promote awareness of the Regulation
Belgium	Leaflets sent to Brussels Airport; also available on the BCAA website.
Denmark	Letters to stakeholders on obligations under Regulation sent out when it was passed.
France	No information provided at interview. Section on website with information on Regulation.
Germany	BMBVS published a leaflet on Regulation in 2008 and held a conference with PRM organisations and the association of German air carriers; published information on website.
Greece	Information on the Regulation (including videos) placed on website.
Hungary	Information on the Regulation (including videos) placed on website.
Ireland	No information provided at interview. Section on website with in-depth information on Regulation.
Italy	Guidance on implementing the Regulation developed with and circulated to airports, airlines and PRM organisations. No direct promotional activity to passengers.
Latvia	Published PRM complaint form on website.
Netherlands	Contact with Dutch Association of Travel Agents to improve awareness and ensure correct allocation of IATA codes.
Poland	Provided information regarding the Regulation to PRM organisations.
Portugal	No information provided at interview. Section on website with information on Regulation.
Romania	Public awareness campaign with main PRM organisations, including dedicated website, posters and leaflets distributed throughout the country, through airports, carriers, travel agents and municipal bodies.
Spain	No information provided at interview. Section on website with information on Regulation.

Sweden	No information provided at interview. Section on website with information on Regulation. PRM org states well-publicised initially but not since.
UK	EHRC: distribution of guides on rights under Regulation; advertised in national media CCNI: distribution of guides on rights under Regulation, covered in regional media; advertorial piece in newspapers; exhibitions at relevant events.

Stakeholders views on complaint handling and enforcement

5.62 We asked each of the stakeholders we contacted about how effectively they believed NEBs had enforced the Regulation; there is some variation between different groups of stakeholders (Figure 3.10 below). A high proportion of stakeholders (over 60% of airports and airlines) have no opinion on how well NEBs have been enforcing the Regulation; often, the reason given for this response was that the stakeholder had had no interaction with the NEB in question. The proportion which believes that NEBs have not been enforcing the Regulation effectively is broadly consistent across stakeholder groups, at 20%-25%.

FIGURE 5.1 VIEWS OF STAKEHOLDERS ON NEB EFFECTIVENESS



5.63 In this section, we discuss the particular issues raised by each group of stakeholders.

Airlines and airline associations

5.64 Most airlines did not express strong views on whether NEBs had enforced the Regulation effectively, and did not give specific examples of areas where NEBs were performing well or poorly. One airline expressed frustration with the lack of action taken against airports, in particular relating to excessive charges and to lack of focus on safety.

5.65 Of the airline associations we spoke to, AEA believed that effectiveness of enforcement varied by State. IACA believed that in general NEBs were unfairly targeting airlines and not airports. Regarding specific NEBs, it believed that the UK complaint-handling NEB was bringing cases which were factually inaccurate, and that there was insufficient distinction between NEBs and service providers in Spain and Portugal.

Airports

5.66 A higher proportion of airports than airlines believed that NEBs were ineffective. Two airports believed actions needed to be taken by NEBs to raise the proportion of pre-notifications for assistance. One airport believed that the NEB should take more action to inform passengers of their rights and obligations. Three airports informed us that they had had no interaction with their NEBs, and two stated that their interactions with NEBs had been unsatisfactory: one informed us that the NEB was slow and unresponsive, and the other stated that it was not clear which organisation was their NEB. Only one airport informed us that it had good and close cooperation with its NEB.

NEBs

5.67 As there have been very few complaints received under the Regulation, there have also been very few complaints which have required forwarding to other NEBs. Therefore, the NEBs have no information on the effectiveness of other NEBs via their responses to forwarded complaints.

PRM organisations

5.68 13% of PRM organisations believed that NEBs were enforcing the Regulation effectively. Those that believed that NEBs were functioning ineffectively or only partially effectively believed that too little action was being taken, either through active monitoring of the services provided or through taking actions to remedy poor service. Four of the PRM organisations we spoke to had had little or no interaction with their NEB.

Other organisations

5.69 The other organisations we spoke to noted the following issues with regard to enforcement:

- lack of consistency of approach between NEBs, particularly in terms of whether they believe it is their role to handle complaints;
- unwieldy complaints systems; and
- unreasonable requests made by NEBs.

5.70 One organisation also believed that some NEBs were taking a sensible line between the demands of PRMs and of service providers.

Conclusions

5.71 Member States are required to designate a body responsible for enforcing the Regulation regarding flights from or arriving at its territory. They may also designate separate bodies responsible for handling complaints, and for enforcing Article 8. All Member States except Slovenia have designated an NEB, which in most cases is the Civil Aviation Authority and is the same organisation that is responsible for enforcement of Regulation 261/2004. In a number of States, the Regulation is not explicitly referred to in the law designating the NEB, and in Spain, the imposition of sanctions has been challenged, in one case successfully, on the basis that the NEB was not competent to impose the sanction.

5.72 There is no requirement in the Regulation that the NEB be independent from service providers and we have identified one case where it is not: the Greek NEB, HCAA, is also the operator of the airports other than Athens.

5.73 Member States are also required to introduce penalties in national law for infringements of the Regulation, which must be effective, proportionate and dissuasive. All States except Poland and Sweden have introduced sanctions into national law, although there are a number of States where sanctions have not been introduced for infringements of all Articles. In the UK, national law grants rights additional to those given in the Regulation: passengers who suffer injury to feelings as a result of an infringement of the Regulation may seek financial compensation from the service provider.

5.74 There is significant variation in the level of the maximum sanctions which can be imposed for infringements, and in some States the fines may not be at a high enough level to be dissuasive. While some States allow unlimited fines to be imposed and may also impose a prison sentence, maximum sanctions in Estonia, Lithuania and Romania are lower than €1,000.

5.75 The Regulation allows any passenger who believes that the Regulation has been infringed, and is dissatisfied with the response they have received from the service provider, to make a complaint to the appropriate body (usually an NEB). However, very few complaints have been received under the Regulation: to date, since the introduction of the Regulation, 1,110 complaints have been received, compared to a total of 3.2 million passenger assisted in 2009 across a sample of 21 EU airports. 80% of all complaints were received by the UK NEBs; none of the NEBs in the other 26 Member States has received more than 50 complaints.

5.76 Where an NEB identifies an infringement (through a complaint or other means) it may choose to enforce the Regulation by imposing sanctions. No sanctions have yet been imposed, but France, Portugal and Spain have opened proceedings to impose fines. However, in a number of States, there are likely to be significant practical difficulties in imposing and collecting sanctions, in particular in relation to airlines registered in different States.

5.77 Many NEBs had taken at least some action, other than the monitoring of complaints, to assess whether service providers were complying with the Regulation. NEBs in 14 of the 16 case study States had undertaken at least one inspection of airports for compliance with the Regulation, however most inspections have focused on checks of systems and procedures, and did not assess the actual experience of PRMs using the service provided by the airport. NEBs for 9 of the 16 States had undertaken no direct monitoring of the charges levied by airports for providing PRM services, although Hungary and Italy informed us that they had undertaken in-depth audits of the charges levied at airports.

5.78 Member States are required to take measures to inform PRMs of their rights under the Regulation, and the possibility of complaining to appropriate bodies. Of those that provided information, relatively few NEBs had made significant efforts to promote awareness of the Regulation by passengers; only two informed us of national public awareness campaigns they had undertaken.

5.79 Awareness of the NEBs performance appeared in general to be poor: most stakeholders contacted for the study held no opinion on the effectiveness of enforcement by NEBs, and many informed us that this was because they had had no interaction with them.

6. STAKEHOLDER VIEWS ON POLICY ISSUES

Introduction

6.1 This section summarises views expressed by stakeholders in the course of our consultation exercise on key policy issues, including whether any changes should be made to the scope or content of the Regulation, and what any changes should be.

6.2 Stakeholders also expressed views on the application of the Regulation by airports, carriers, and the complaint handling and enforcement process; these views are summarised in the relevant chapters above.

Whether changes should be made to the Regulation

6.3 We asked all of the stakeholders that we interviewed whether they considered that any changes should be made to the Regulation.

6.4 Half of the airports we interviewed believed that the Regulation should be changed. Several suggested that the definition of PRM was too broad, and that this was contributing to abuse of services. It was also suggested that the Regulation be amended to require proof of disability, and that the Regulation should also be amended to improve the functioning of pre-notification (for example by making it mandatory). ACI supported these positions. The airports which did not believe the Regulation should be amended, or had a neutral opinion, thought that any lack of clarity in the Regulation could be addressed through information from the Commission.

6.5 In addition, around half of the airlines we interviewed also believed that the Regulation should be changed, however this was for different reasons to those given by airports. A number of airlines believed that it should be possible for them to choose to provide the service themselves or that responsibility should lie with airlines, arguing that as customer-focussed organisations they are better able to do this. Of the airline associations, only ELFAA argued for this amendment. One airport strongly agreed with this position, however most believed that the allocation of responsibility should not be revised, as if airlines were to provide their own service, the incentive to reduce costs would result in unacceptable reductions in service quality. Airlines also supported amendments to clarify the definitions of PRM and mobility equipment, and to improve pre-notification.

6.6 Most of the NEBs we interviewed did not have a clear opinion on whether the Regulation should be amended. Seven NEBs believed that the definitions of terms such as PRM and mobility equipment should be clarified, and two of the NEBs in the case study sample supported changes which would allow airlines to opt out of the Regulation and provide the services themselves.

6.7 Slightly over half of the PRM representative organisations we interviewed believed that the Regulation should be amended. Amendments were suggested to address the following issues:

- limits on number of PRMs which can safely be carried;

- allocation of seating;
- requirements on compensation payable for damaged mobility equipment, and improvements to its handling; and
- provision of information.

6.8 EDF suggested that compensation should be introduced, as this would incentivise more complaints and therefore improve service. Those that did not believe the Regulation should be amended either believed that the Regulation had not been in force for long enough to assess its efficacy, or that poor implementation was the cause of any problems identified.

The content and drafting of the Regulation

6.9 We outline below some of the main detailed issues that have been raised by stakeholders. Few stakeholders believed that there were significant issues with the drafting of the Regulation that made it difficult to implement, however many stakeholders outlined issues relating to insufficient definition.

Definition of terms

6.10 The issue most commonly raised, particularly by airports and NEBs, is the definition of PRM set down in the Regulation. Many stakeholders believe this is too broad and opens the service to abuse, both by passengers and by airlines. A number of airports believed that airlines were using the wide definition to allow them to avoid costs: passengers who were previously classified as MAAS (including unaccompanied minors, VIPs and passengers with language issues), and therefore paid for by the airline, are now classified as WCHR and the cost is borne by all airlines. Some airports believed this could be resolved by setting out a clear definition of MAAS.

6.11 The definition in the Regulation could include a wide range of passengers who some stakeholders do not believe were the intended beneficiaries of the Regulation, including:

- obese passengers;
- stretchers;
- medical cases; and
- passengers who had sustained injuries (whose travel is often paid for by their travel insurance).

6.12 Some stakeholders believed that the definition of PRM was so broad that it could be considered to include passengers which the Regulation was clearly not intended to cover, such as passengers whose intellectual and sensory capacities were temporarily impaired by excessive consumption of alcohol.

6.13 Several stakeholders believed this issue could be resolved by requiring some proof of need for assistance in order to receive assistance, for example in the form of a disability ID card. This was opposed by some PRM organisations.

6.14 Stakeholders also considered that a number of other terms were not sufficiently defined. These included:

- **Mobility equipment:** The reference in Annex II to mobility equipment states that it should include electric wheelchairs but does not define the term any further. Stakeholders had differing views on what should be included in this: several airlines believe that it should refer only to equipment that is required to make it possible to travel by air, but a number of PRM organisations believed it should include items which make the *purpose* of the trip possible. This could include, for example, joists for lifting passengers in and out of seats.
- **Medical equipment:** Several stakeholders believed there was insufficient clarity on which items were classified as medical equipment and which as mobility equipment. It was also uncertain whether airlines could any limits (for example on weight) on its carriage.
- **Accessible formats:** It was reported that the requirement for designated points of arrival and departure to offer basic information about the airport in accessible formats did not define what was required, for example, whether all such points should include a map in Braille of the airport.
- **Safety rules:** Article 4(3) requires airlines to make publicly available the safety rules that it applies to the carriage of PRMs, and any restrictions on the carriage of PRMs or mobility equipment. Several stakeholders informed us that such documents were not defined, and it was not clear what this term referred to.

Lack of clarity in the Regulation

6.15 In one case, the requirements of the Regulation appear contradictory. Several NEBs noted that the responsibility for enforcement defined in Article 14 contradicts that specified in Recital 17. Article 14 states that NEBs are responsible for enforcement regarding flights departing from or arriving at airports within their State, while Recital 17 places responsibility on the NEB of the State which issued the carrier's operating license.

6.16 Stakeholders identified a number of other provisions where they considered the description of obligations was insufficiently clear, including:

- **Article 7:** Under this Article, airports are required to provide assistance to PRMs holding reservations so that they able to take their flight, however, it does not define what an airport is required to provide to a PRM who does not hold a valid reservation. In addition, it does not define the airport's liability when a PRM misses their flight, in particular where the passenger has not pre-notified their requirement for assistance.
- **Article 11:** One airport had been the subject of a legal challenge by an airline regarding the inclusion within its PRM service charge of the costs of providing training under Article 11(b) to subcontractors at the airport. The airline contended that since the paragraph did not refer to subcontractors (unlike Article 11(a)) the airport was not obliged to provide such training. Several airports believed that the requirement under this Article to provide disability-related training to all new staff (not just those whose role required them to interact with PRMs) was unnecessary. In contrast, some PRM organisations believed that training should be explicitly extended to Commanders of aircraft, to enable them to make better-informed decisions on whether to embark PRMs. PRM organisations also noted

that it was not clear whether airports were required to provide training on specific procedures for handling mobility equipment; as damage to mobility equipment is perceived to be a significant issue, they believed this requirement should be explicitly included.

- **Article 12:** Several PRM stakeholders raised concerns that the compensation referred to in this Article would be consistent with the Montreal Convention, and that the limits under the Convention were insufficient for some mobility equipment, such as technologically advanced wheelchairs (see 4.55). Although this had not been an issue to date – in almost all cases that we were informed of, airlines waived the limits – it creates uncertainty for wheelchair users travelling by air. This is heightened by the reported difficulties in obtaining insurance for such equipment.
- **Annex I:** A number of airlines raised concerns regarding the allocation of liability when boarding a passenger. For example, they did not believe that liability was clear in the case that an accident occurs on board an aircraft when airport staff are present. Some airports raised concerns regarding liability for damage to wheelchairs while in their care. In addition, the services which should be provided to transfer passengers and the measures which should be taken to accommodate assistance dogs are not defined.

6.17 Regarding training, some stakeholders raised the issue of the legal weight of ECAC Document 30, particularly Annex 5-G which sets out recommended guidance for training regarding PRM services. While this is referred to in the Regulation as a policy which should be considered when developing quality standards, the same reference is not made in Article 11 where training requirements are defined.

Conflicts with 14 CFR Part 382

6.18 As discussed in section 4 above, the US regulations on carriage of PRMs (14 CFR Part 382) apply to European carriers operating flights to/from the US, and other flights where these are operated as codeshares with US carriers. There are a number of differences between these rules and the Regulation, the most significant of which is the allocation of responsibilities for assistance: the Regulation requires airports to arrange the provision of services to PRMs, while under the US legislation it is the airlines that have this responsibility. This has caused difficulties for carriers who are required to comply with legislation that conflicts, although the US legislation does allow carriers to apply for a waiver where there is a conflict of laws.

Pre-notification

6.19 The requirement to pre-notify requests for assistance and problems in doing so were raised by many stakeholders (see 4.98). Stakeholders held differing views on how this should be improved. Several airlines (in particular those with operations to the US, where requiring pre-notification is usually prohibited) believed that the requirement to pre-notify should be removed; they believed that the resulting increases in costs of provision would be marginal, as most resourcing requirements could be planned on the basis of observed variation in demand (over the course of a year, a week or a day as appropriate). This approach was supported by some PRM organisations. In contrast, a number of airports believed that pre-notification should be made compulsory, and

this proposal was opposed by some PRM organisations.

Level of detail

6.20 Almost all stakeholders informed us that there was significant variation in the services provided under the Regulation. This is partly a result of the approach taken by the Regulation, which does not seek to define in detail the services to be provided. In contrast, the equivalent US rules set out in detail all aspects of the services to be provided, in effect setting out procedures to be followed by all service providers.

6.21 Several stakeholders have raised the lack of detail in the Regulation as an issue, and believe that a more prescriptive approach would lead to greater harmonisation of the services provided. In particular, they believed that the services set out in Annexes I and II and the training required under Article 11 should be defined with greater precision.

Conclusions

6.22 We asked each stakeholder we contacted for the study whether they believed that changes should be made to the Regulation. Slightly more thought that there should be changes than did not, but there was not a clear majority in favour of changes. The reasons given for making changes and what those changes should be varied depending on the stakeholder.

6.23 No significant problems were identified with the drafting of the Regulation, although there is a conflict between Recital 17 and Article 14. In general, stakeholders had not found it difficult to follow the provisions of the Regulation. The most common issue raised with regard to the text of the Regulation is that the definitions used are not sufficiently precise; in particular, the definition of PRM is believed by airports and some airlines to be too broad, and this is believed to make it difficult for them to take action to counter abuse. The Regulation is much less precise about the policies and procedures that have to be followed, particularly by air carriers, than the equivalent US regulation on carriage of PRMs, 14 CFR Part 382.

6.24 In addition, many stakeholders pointed out the significant differences between the Regulation and 14 CFR Part 382, which applies to European carriers on flights to/from the US and other flights operated as codeshares with US carriers. One of the most significant is the requirement to pre-notify requirements for assistance was raised as an issue, particularly by airlines operating to the US, and by airports where the rates of pre-notification were low. Two different approaches were proposed to address the perceived problem. Some airlines (primarily those flying to US) proposed removing the requirement to pre-notify, which would resolve the conflict with US legislation; this was opposed by airports on the grounds that it would reduce service quality and increase cost. Some airports proposed making pre-notification compulsory; this was opposed by some PRM organisations on the grounds that it would reduce the freedom of PRMs to travel.

7. FACTUAL CONCLUSIONS

Introduction

7.1 This section summarises our conclusions in relation to how effectively airports and airlines are providing the assistance required by the Regulation, and how effectively Member States and National Enforcement Bodies (NEBs) are undertaking their roles specified in the Regulation.

Implementation of the Regulation by airports

7.2 We selected a sample of 21 airports for detailed analysis for the study, and reviewed how they had implemented the Regulation, through desk research and through interviews with representatives of airport management and other stakeholders.

7.3 Prior to the introduction of the Regulation, assistance at airports was provided by airlines and usually contracted from ground handlers. The Regulation places responsibility for provision of this assistance with the airport management company. We found that all airports in the sample for this study had implemented the provisions of the Regulation, although we were informed by airlines and other stakeholders that the regional airports in Greece had yet to effect the change from provision by ground handlers to provision by airports. We were not informed by stakeholders of any other EU airports at which the Regulation has not been implemented.

7.4 Most of the sample airports had contracted the provision of PRM assistance services to an external company, generally selected through a competitive tender process. However, several airports had changed their service provider within 18 months of the Regulation coming into force; this was interpreted by some as a sign that the service initially specified and procured had been inadequate. One major hub airport acknowledged that it had had significant problems with a PRM service provider.

7.5 The service provided at the sample airports varies in terms of: the resources available to provide the services; the level of training of the staff providing assistance; the type of equipment used to provide services; and the facilities provided to accommodate PRMs (such as PRM lounges). According to the information provided by PRM organisations, this results in variability in service quality. PRM representative organisations, airlines and some airports cited a number of examples of poor quality or even unsafe provision of services at airports, although it is not possible to infer how regular these occurrences are. Overall, most stakeholders believed that the Regulation had been implemented effectively by airports.

7.6 There is also significant variation between airports in the frequency with which PRM services are requested: the level of use of the service varies by a factor of 15 between the airports for which we have been able to obtain data, although in most cases between 0.2% and 0.7% of passengers requested assistance. The type of PRM service requested also varies considerably between airports although in all cases the largest category is WCHR (passengers who cannot walk long distances but can board the aircraft, including using stairs, unaided). Both the frequency of use and the type of service required are likely to be affected by the varying demographics of the passengers using different airports; PRMs account for the highest proportions of

passengers at holiday airports, such as Alicante, and airports serving pilgrimage destinations, such as Lourdes.

7.7 The Regulation requires airports to publish quality standards. Most of the sample airports had done so, although some had published them only to airlines. Almost all quality standards followed the example format set out in ECAC Document 30, which defines the percentage of PRMs who should wait for up to given numbers of minutes. Some airports published qualitative measures in addition to these time standards, such as descriptions of the treatment the passenger should expect at all points of the service. However, none of the sample airports had published the results of any monitoring of these quality standards, and whilst most did undertake monitoring in some form, only four had commissioned external checks of the service.

7.8 The Regulation allows airports to levy a specific charge to cover the costs of assistance. All but one of the sample airports had done so. The level of charges varied considerably: the highest charges of the sample airports were at Paris CDG and Frankfurt. We analysed the charges to examine whether variation could be explained by higher frequency of use of the service, differences in levels of wages and other costs between States, or differences in service quality, but there was no evidence that this was the case. The design of the airport is a further factor influencing the cost of service provision and hence the level of charges: the assistance service can be provided at lower cost at an airport such as Amsterdam Schiphol, which is on a single level and has one integrated terminal building, than at an airport with a more complex configuration such as Paris CDG.

7.9 Some stakeholders believe that the requirements to select contractors and establish charges in cooperation with users and PRM organisations were not followed thoroughly. Many airlines did not believe that consultation on either element had been sufficient, and this view was shared by some PRM organisations. There were a number of barriers to effective consultation, including linguistic restrictions and airport user committees which did not adequately represent all air carriers. Consultation with air carriers was reported as particularly poor in Spain, Portugal and Cyprus. In contrast to this, we note that several airports stated that they had sought the participation of PRM organisations but had found this difficult to obtain.

7.10 The Regulation requires airports to provide specialised disability training for staff directly assisting PRMs, and whilst all sample airports had done so, there were significant variations in the length and format of this training. The shortest training course among those for which we have data was 3 days long, while the longest lasted 14 days. There was similar variation in the length of training provided for passenger-facing staff who did not provide direct assistance. A number of airports informed us that they did not provide disability-awareness training for staff not in public-facing roles, or only provided it on a voluntary basis.

Implementation of the Regulation by air carriers

7.11 We selected a sample of 20 air carriers for the study. We reviewed how they had implemented the Regulation, both through review of their published policies, procedures and Conditions of Carriage, and through interviews with the carriers themselves and with other stakeholders.

7.12 The main obligation that the Regulation places on air carriers is that it prohibits refusal of carriage of PRMs, unless this is necessary to meet national or international safety rules or requirements imposed by the carrier's licensing authority, or is physically impossible due to the size of the aircraft or its doors. We found that air carriers largely comply with this, although some state in their Conditions of Carriage that carriage of PRMs is conditional on advance notification. In our view, this is not consistent with the Regulation, which does not allow for a derogation on the prohibition of refusal of carriage on the basis that the passenger has not provided advance notification. In addition, we found that a small number of carriers impose requirements for medical clearance which appear to be excessively onerous and to be worded to include PRMs as well as passengers with medical conditions.

7.13 We found significant differences in policies relating to carriage of PRMs between carriers – even between carriers with similar aircraft types and operational models. The most significant difference is that some carriers impose a numerical limit on the number of PRMs that can be carried on a given aircraft. These can be quite low: some carriers have limits of 2-4 PRMs on a standard single-aisle aircraft such as an Airbus 319. These limits are not required by any international or European safety rules, although in some cases they are required by the licensing authority for the carrier concerned; often, although not always, this is the same organisation that has been designated as the NEB. However, in most cases, these requirements are defined by carriers in their Flight Operations Manuals; although the licensing authority has to approve this, it appears that in most States, little has been done to challenge the limits proposed by carriers. Whilst the stated rationale for these limits is safety, there does not seem to be a clear evidence base for them, and they are specifically prohibited by the equivalent US regulation on carriage of PRMs (14 CFR part 382).

7.14 The Regulation also allows carriers to require that PRMs be accompanied, subject to the same safety-based criteria. We found that a number of carriers require PRMs to be accompanied where they are not 'self-reliant', which can mean that the PRM cannot (for example) eat unaided. In our view this may be an infringement of the Regulation because there is no direct link to safety; for those carriers that fly to the US, it is also an explicit breach of the US PRM rules. This type of condition is also, in our view, unreasonable for short haul flights for which passengers could decide to (for example) not eat or drink during the flight. Other carriers require PRMs to be accompanied only where they are not self-reliant **and** this has a safety impact (for example, if the PRM could not exit the aircraft unaided in an emergency or put on an oxygen mask without assistance); this is consistent with the Regulation.

7.15 The Regulation also requires carriers to publish safety rules relating to the carriage of PRMs, although it does not specifically state what issues these safety rules should cover. We found that carriers all published some PRM-related information, but few published a notice specifically described as being the safety rules related to carriage of

PRMs. In some cases there appeared to be significant omissions from the information published by carriers: for example, some of the carriers which imposed a numerical limit on the number of PRMs which could be carried did not publish this.

7.16 Annex II of the Regulation sets out various requirements for services which have to be provided to PRMs by carriers. Evidence for the extent to which this is provided is limited, and restricts a fair assessment of compliance with these requirements. There is however sufficient evidence to conclude that the vast majority of case study air carriers are complying with the requirement to carry up to two items of mobility equipment free of charge. Some PRM representative groups were critical of the effectiveness of airlines in implementing the Regulation, and we were informed of some particularly bad passenger experiences, but it is difficult to assess how common such occurrences are.

Enforcement and complaint handling by NEBs

7.17 Member States are required to designate a body responsible for enforcing the Regulation regarding flights from or arriving at its territory. They may also designate separate bodies responsible for handling complaints, and for enforcing Article 8. All Member States except Slovenia have designated an NEB. In the majority of States, the NEB for this Regulation is the same organisation as the NEB for Regulation 261/2004, in most cases the Civil Aviation Authority. In a number of States, the Regulation is not explicitly referred to in the law designating the NEB, and in Spain, the imposition of sanctions has been challenged, in one case successfully, on the basis that the NEB was not competent to impose the sanction.

7.18 Member States are also required to introduce penalties in national law for infringements of the Regulation, which must be effective, proportionate and dissuasive. All States except Poland and Sweden have introduced sanctions into national law, although there are a number of States where sanctions have not been introduced for infringements of all Articles. There is significant variation in the level of the maximum sanctions which can be imposed for infringements, and in some States the fines may not be at a high enough level to be dissuasive. While some States allow unlimited fines to be imposed and may also impose a prison sentence, maximum sanctions in Estonia, Lithuania and Romania are lower than €1,000.

7.19 The Regulation allows any passenger who believes that the Regulation has been infringed, and is dissatisfied with the response they have received from the service provider, to make a complaint to the appropriate body (usually an NEB). However, very few complaints have been received relating to the Regulation: to date, since the introduction of the Regulation, 1,110 complaints have been received, compared to a total of 3.2 million passengers assisted in 2009 across the case study sample of 21 EU airports. There is also a significant disparity in which States had received complaints: 80% of all complaints about infringements of the Regulation were received by the UK NEBs; none of the NEBs in the other 26 Member States had received more than 50 complaints.

7.20 In the UK, national law grants rights additional to those in the Regulation: passengers who suffer injury to feelings as a result of an infringement of the Regulation may seek financial compensation from the air carrier or airport concerned. This is in line with

disability rights legislation applying to other sectors in the UK. A consequence of this is that the process for handling complaints is significantly different in the UK from other Member States, because passengers may have a right to claim compensation from the carrier or airport concerned. At least in part, this also explains the significantly higher number of complaints in the UK compared to the other Member States.

7.21 Where an NEB identifies an infringement (through a complaint or other means) it may choose to enforce the Regulation by imposing sanctions. No sanctions have yet been imposed, but the NEBs for France, Portugal and Spain have opened proceedings to impose fines. In most States, the process to impose sanctions is equivalent to that for Regulation 261/2004. In a number of States, there are likely to be significant practical difficulties in imposing and collecting sanctions, in particular in relation to airlines registered in different Member States. This is due to the same reasons identified in our recent study for the Commission of Regulation 261/2004[14]: either specific limitations in national law on imposition of sanctions on foreign companies, or administrative requirements which cannot be met if the carrier is based outside the State. This means that, in these States, the system of sanctions cannot be considered to be dissuasive as required by the Regulation.

7.22 There is no requirement in the Regulation that the NEB must be separate from the service providers that it has to regulate. The only case we have identified where the NEB is also a service provider is Greece, where HCAA is the operator of the airports other than Athens, as well as the NEB. Although not an infringement of the Regulation, this is a breach of the principle of separation of regulation and service provision. As noted above, the most significant failure to implement the Regulation that we have identified is at the HCAA airports, and HCAA has not imposed a sanction on itself for this failure to implement the Regulation.

7.23 Many NEBs have taken at least some action, other than the monitoring of complaints, to assess whether service providers were complying with the Regulation. NEBs in 14 of the 16 case study States have undertaken at least one inspection of airports for compliance with the Regulation. However, most inspections have focused on checks of systems and procedures, and did not assess the actual experience of PRMs using the service provided by the airport. NEBs for 9 of the 14 States have undertaken no direct monitoring of the charges levied by airports for providing PRM services, although Hungary and Italy informed us that they had undertaken in-depth audits of the charges levied at airports.

7.24 Member States are required to take measures to inform PRMs of their rights under the Regulation, and the possibility of complaining to appropriate bodies. Of those that provided information, relatively few NEBs had made significant efforts to promote awareness of the Regulation by passengers; only two informed us of national public awareness campaigns they had undertaken, and even in one of these States, a key national PRM organisation was not aware that the public campaign had taken place. Awareness of the NEBs performance appeared in general to be poor: most

[14] Evaluation of Regulation 261/2004; Steer Davies Gleave on behalf of European Commission, February 2010

stakeholders contacted for the study held no opinion on the effectiveness of enforcement by NEBs, and many informed us that this was because they had had no interaction with them.

Other issues that have arisen with the Regulation

7.25 Stakeholders also pointed out a number of other issues with the Regulation. Whilst few significant problems have been identified with the drafting of the Regulation, the following issues were identified:

- there is a conflict between Recital 17 and Article 14, regarding which NEB is responsible for enforcing the Regulation in relation to air carriers;
- the definition of PRM used in the Regulation is very broad, and could be interpreted to include some categories of passenger who it might not have been intended to cover (such as obese passengers, or even passengers temporarily incapacitated due to excess alcohol consumption); and
- the Regulation does not specify in detail the policies or procedures that have to be followed by air carriers, particularly if compared to the equivalent US regulations, and this has resulted in significant differences in policies between carriers.

7.26 In addition, stakeholders emphasised the significant differences between the Regulation and the equivalent US regulations on carriage of PRMs (14 CFR part 382). These can cause difficulties for air carriers, as part 382 applies to non-US carriers on flights to/from the US and all other flights that are operated as codeshares with US carriers (even if not to/from the US). The most significant differences are:

- in most circumstances, part 382 does not permit carriers to request pre-notification;
- part 382 does not allow limits on the number of PRMs on an aircraft and limits the circumstances in which an accompanying passenger may be required; and
- part 382 places the responsibility for provision of PRM assistance services on the air carrier, whereas the Regulation places this responsibility on the airport.

Conclusions

7.27 Overall, despite difficulties with service provision at some airports, the services required by the Regulation have been implemented at most European airports and compliance with the Regulation appears to be relatively good. Most stakeholders considered that the quality of service provision had improved since the introduction of the Regulation, although some airlines strongly disagreed with this.

7.28 The key issue we have identified with the implementation of the Regulation is that there are significant differences between carriers in their policies on carriage of PRMs. This arises in part from the fact that the Regulation does not specify in detail the services to be provided and the procedures to be followed, in particular if compared to the equivalent US regulations on carriage of PRMs. The Regulation allows carriers to refuse carriage or require a passenger to be accompanied on the basis of safety requirements, but these requirements are not specified in law, and therefore there are significant differences in interpretation of these requirements.

8. RECOMMENDATIONS

Overview

8.1 This section sets out our recommendations relating to how to improve the operation and enforcement of the Regulation. We present first a number of recommendations which would improve the operation of the Regulation without requiring any changes to be made to the text. However, we believe some changes are necessary which could only be implemented through amendments to the Regulation.

Measures to improve the operation of the Regulation

8.2 This section sets out measures to improve the operation of the Regulation. It covers the following:

- improvement in the operation of PRM services at airports;
- issues relating to the carriage of PRMs by airlines;
- actions to be taken by or in relation to NEBs; and
- guidance on PRM services and carriage which should be produced by the Commission, in consultation with other parties.

Airports

8.3 All airports in the sample for the study had implemented the provisions of the Regulation in some form, although as the Regulation does not precisely specify the quality of service to be provided, PRM organisations have reported this as being variable. We do not recommend any significant changes, and recommend a number of measures which will help airports to move towards consistency of service.

Maintain allocation of responsibility

8.4 Several airlines (primarily those operating low-cost business models) argued in their submissions to the study that they should be permitted to provide or contract their own PRM assistance services, as they could provide it more cost-efficiently than airports. We believe that this could create an incentive to minimise the service provided and hence would risk a reduction in service quality. Whilst there were initially significant issues with the quality of PRM service provision at certain airports, most stakeholders believed that these issues had now been addressed, and therefore we recommend that allocation of responsibility for PRM services to airports should **not** be amended.

Monitor misuse of services

8.5 A number of airports (in particular larger and busier airports) reported that the services they provided for PRMs were sometimes used by passengers who did not appear to have the right to do so under the Regulation. There was no consensus amongst airports about how significant this issue was. This variation in perception of the problem, combined with the nature of the problem itself, makes it difficult to accurately assess its extent. We recommend that the Commission monitor reports of misuse of services, so that it is alerted if the problem becomes more consistently serious.

Improve provision of information

8.6 Several PRM organisations informed us that provision of information on accessibility by airports could be improved. In particular, we were informed that many PRMs would find it helpful to have access to information, in a consistent format, regarding the accessibility of airports to which they were travelling. This could be provided through a webpage on an airport's website included, for example:

- the maximum likely walking distance within the airport;
- locations of any flights of stairs;
- the means used for access to aircraft (airbridge or stairs);
- any facilities available for PRMs;
- appropriate contact details for PRM services both for airlines and the airport[15].

8.7 Whilst some of this information is often available on airport websites, it can be difficult to find and is not always complete. To address this, we suggest that ACI could develop a single website which would either include all of this information or alternatively provide links to the specific pages on airport websites which include this information.

Share best practice on contracting of PRM service providers

8.8 We identified two issues with the process for selection of PRM service providers:

- several airports which had subcontracted PRM services had re-tendered within 18 months of the Regulation entering into force, as there were significant issues with the operation of the service; and
- many airlines informed us that they did not believe the extent of consultation from airports was sufficient.

8.9 To address these issues, we recommend that the Commission, in co-operation with ACI, develop and distribute best practice advice on contracting for services, including:

- **Content and structure of the contract:** This could include the level of detail at which contract terms relating to services should be specified, and any penalties for failure to meet required standards. It could be provided in the form of a sample contract. This would help to reduce the likelihood of issues with the contract leading to retendering.
- **Recommended methods of cooperation:** This could give details of the level and manner of consultation an airport should undertake. It could detail how to involve airport users in consultation at all points of a tendering process, including from drafting of invitation to tender documents, to evaluating and scoring bids, and might include input on the eventual decision. It could also include how to involve PRM organisations in this process. Where implemented, this would improve the perception by airport users and other parties of airport consultation.

[15] London Luton airport provides a good example of this; see http://www.london-luton.co.uk/en/content/3/1427/how-to-book-special-asistance.html.

Share best practice on training

8.10 Our research found that approaches to training of staff to provide PRM services varied significantly. In particular, there was significant variation in length of training (between 3 and 14 days) and method of delivery (videos, classroom-based or practical), to provide what should in principle be the same services. In addition, some airports reported that they had sought assistance on developing training from local PRM organisations, but the PRM organisations were too resource-constrained to be able to provide the required assistance. We therefore recommend that the Commission work with ACI and EDF to develop and distribute best practice advice on training, which would include recommended minimum levels.

Airlines

8.11 A key problem identified in our research is the lack of consistency between airline policies on the carriage of PRMs. These policies are subject to approval by the carriers' licensing authorities (which are often the same organisation as the NEB), but in many cases they approve policies with little or no challenge.

Work with EASA to determine safe policies on carriage of PRMs

8.12 Article 4 of the Regulation permits air carriers to refuse to accept reservations from a PRM, or to require that a PRM be accompanied, in order to meet safety requirements set out in international, Community or national law, or established by the authority that issued the carrier's operating certificate. However, other than minimal requirements in EU-OPS, Community law does not impose specific requirements regarding the safe carriage of PRMs. There is little published research into safety issues regarding carriage of PRMs, so even where licensing authorities do seek to challenge proposed airline policies or impose their own, there is a limited evidence base on which to do this. This results in wide and unjustifiable variation in airline policies.

8.13 Therefore, we recommend that the Commission work with EASA to determine policies on carriage of PRMs which are consistent with safe operation. Such policies should include any limits on the number of PRMs permitted on board an aircraft, where PRMs may be seated, and whether and under what circumstances PRMs must be accompanied. The policies should take into account the type of aircraft and the different safety implications of carriage of different types of PRMs.

Airlines to publish clear policies on carriage of PRMs

8.14 We have identified a number of airlines which are failing to publish clear policies on carriage of PRMs. We recommend that the Commission encourage the relevant NEBs to ensure that the airlines identified in Table 4.1 as not publishing sufficient information do so. The Commission could also encourage NEBs to review the policies of airlines outside the study sample to ensure that these provide sufficient information.

Monitor pre-notification

8.15 Pre-notification of requirements for assistance should have two benefits:

- it should ensure that PRMs are able, on arrival at an airport, to promptly receive the assistance they require to take their chosen flight; and
- it should allow airports to plan their staffing requirements efficiently, minimising the cost of service provision .

8.16 However, at present, as discussed in section 4.74 above, pre-notification is not functioning well. Of the 16 airports which provided us with information on levels of pre-notification, 11 have rates of pre-notification under 60%. The result of this is that at most airports, the rate of pre-notification is too low for the airport to gain efficiency benefits, and the incentive for PRMs to pre-notify is reduced (since at many airports a similar quality of service is provided regardless of pre-notification). Therefore the system as it presently operates requires airlines and airports to incur the costs of enabling pre-notification, but not to realise the benefits of reduced costs or smoother provision of services. We recommend that the Commission monitor the operation of pre-notification (for example by encouraging NEBs to collect appropriate data), and in future assess the situation and consider either eliminating the requirement for pre-notification or alternatively retaining it and providing passengers and carriers with more incentive to pre-notify.

Encourage airlines to provide receipts for pre-notification

8.17 Several PRM organisations reported problems where PRMs had pre-notified their requirements for assistance, but then found that this information had not been passed on to airport or airline staff. To address this, and to provide PRMs with evidence that they can use when making a complaint, we recommend that the Commission encourage airlines to provide PRMs with a receipt for pre-notification. Once this voluntary scheme has been in place for an appropriate length of time, the Commission could consider amending the Regulation to make it compulsory.

Monitor implementation of ECAC Document 30 recommendations on carriage

8.18 Section 5 of ECAC Document 30 contains a number of recommendations regarding on-board provisions for PRMs which it recommends airlines commission in new or significantly refurbished aircraft. These include (depending on the type of aircraft) the provision of on-board wheelchairs, provision of at least one toilet catering for the special needs of PRMs, and ensuring that at least 50% of all aisle seats should have moveable armrests[16]. We recommend that the Commission monitor uptake of these recommendations.

NEBs

8.19 The greatest problem identified by the study regarding NEBs was the lack of pro-active measures taken to monitor or enforce the Regulation. In most cases this has not had significant detrimental effect, as most airports and airlines have implemented the provisions of the Regulation, but could become an issue if the situation changes in the future. In most States few complaints had been received by the NEB, and as a result

[16] See ECAC.CEAC DOC No. 30 (PART I), 11th Edition/December 2009, Section 5.10.5.

the handling of complaints has not been raised as a significant issue.

Encourage all States to implement the Regulation

8.20 We identified in section 5.13 above that some States have not as yet either introduced penalties into national law for all infringements of the Regulation, or designated an NEB. We recommend that the Commission encourage all States to comply with their obligations under the Regulation.

Encourage better promotion of rights under Regulation

8.21 Article 15(4) of the Regulation requires Member States to take measures to inform PRMs of their rights under the Regulation and of the possibility of complaint to the relevant NEB. Of the NEBs which provided information on this point, few had taken direct actions to promote the Regulation. Many had published sections with information on their websites, but unless PRMs are made aware that this website exists and is relevant to them, we do not believe that this is sufficient. Only two case study NEBs informed us that they had commissioned national promotional campaigns relating to the Regulation. We recommend that the Commission takes actions to encourage NEBs to inform PRMs of their rights under the Regulation.

Encourage NEBs to pro-actively monitor application of Regulation

8.22 Article 14 of the Regulation requires Member States to take the measures necessary to ensure that the rights of PRMs are respected. Our research found that most NEBs were taking only limited actions to monitor the application of the Regulation (see 5.42), and few NEBs were directly monitoring whether airports were meeting published quality standards. Many NEBs rely on complaints as a method of monitoring, but without promotion of awareness of rights and of the NEB as the body able to receive complaints (see above), a low number of complaints cannot be interpreted as evidence that there are no issues with the application of the Regulation.

8.23 We therefore recommend that the Commission encourage NEBs to pro-actively monitor the application of the Regulation. This could take a number of forms:

- increased interaction with PRM organisations;
- direct monitoring of quality of service provided, for example through ‘mystery shopping’ and other types of inspections of airports (which could be conducted in cooperation with PRM organisations);
- collection of airline pre-notification data; and
- reviews of airline websites for accessibility.

Guidance to be produced

8.24 We recommend that the Commission should, in collaboration with airlines, airports, PRM representatives and NEBs, develop a detailed good practice guide regarding implementation of the Regulation. This could take the code of practice issued by the

UK Department for Transport[17] as a model, and could form the basis for later detailed revisions of the Regulation. Publishing voluntary policies would allow potential future amendments to the Regulation to be tested in practice before adoption.

8.25 The good practice guide could address the following areas (some of which are discussed in previous sections on recommendations regarding airports and airlines):

- recommendations on safety limits;
- the format and content of policies on carriage (including safety rules);
- detailed training modules implementing the recommendations in Annex 5G of ECAC Document 30, in addition to recommended minimum duration;
- consultation; and
- airport accessibility information.

8.26 A key issue to be addressed in this guidance would be the quality standards to be published by airports. At present, most airports follow the format of the minimum standards recommended in ECAC Document 30[18] (see 3.57). However, these standards are a limited measure of the quality of service received by PRMs. We recommend that the Commission work with ECAC to develop recommended minimum standards which are wider in scope, and cover qualitative aspects of the service received. Airports such as London Luton, which publishes a wide range of quality standards which address all aspects of the service, could provide a model for this approach.

8.27 The guidance should also specify the information which should be included in carriers' published policies on carriage of PRMs, which should cover at least the areas identified in 4.8.

Recommendations for changes to the Regulation

8.28 The measures described above could significantly improve the operation of the Regulation. However, we believe that some issues could only be addressed through amendments to the text, and therefore we also set out:

- Recommendations for some minor amendments to address issues with the text (such as areas where the Regulation is unclear) which we believe should be implemented as soon as possible.
- Suggestions for more significant revisions to be considered in the longer term. These would require consultation with stakeholders and an impact assessment to be undertaken.

Changes to be implemented as soon as possible

Training

[17] *Access to Air Travel for Disabled Persons and Persons with Reduced Mobility – Code of Practice*, UK Department for Transport, July 2008.

[18] See ECAC.CEAC DOC No. 30 (PART I), 11th Edition/December 2009, Annex 5C section 1.6.

8.29 We recommend that Article 11 be extended to require airlines to ensure that the personnel of their ground handling companies are trained to handle mobility equipment. Several PRM organisations informed us that damage to mobility equipment was one of the most serious problems for PRMs travelling by air, and that such damage could cause considerable distress to PRMs.

8.30 We recommend that Article 11 be amended to include the provisions in Recital 10, namely to specify that the provisions regarding training in ECAC Document 30 be taken into account when commissioning and developing training. This could be phrased in the manner of Article 9(2) on quality standards.

8.31 We recommend that Article 11b be amended to clarify that disability-equality and –awareness training is required for passenger-facing subcontractors as well as personnel directly employed by an airport. This would be consistent with Article 11a regarding personnel providing direct assistance. We were informed by one airport that an airline had disputed the level of PRM charges on the basis that the charges recovered the costs of training subcontractors, which the airline believed was not required by the Regulation.

8.32 We recommend that the Commission consider removing the requirement in Article 11c for disability-awareness training for non-passenger facing personnel, as it is not clear why this should be any more necessary in this sector than in others.

Obligatory charges where costs recovered

8.33 Article 8 permits airports to levy specific charges on airport users to fund the assistance provided under the Regulation, which must be reasonable, cost-related, transparent and established in cooperation with airport users. However, it does not *require* airports to levy such charges; several of the airports we researched for the study recovered costs through their general passenger charges, and did not identify the PRM component separately. Where specific charges are not applied, airports are not required to follow the requirements on reasonability, cost-relatedness, transparency and cooperation. We therefore recommend that, for airports above a minimum size, Article 8 be amended to make specific charges obligatory if costs are to be recovered from users.

Airport charges

8.34 We recommend that Article 8 be amended where necessary to make clear that PRM charges are airport-specific and cannot be set at a network level. At present, the translation into some languages (for example Spanish) could be interpreted to permit network charges, which we believe is contrary to the intention of the Regulation.

Independence of NEBs

8.35 We recommend that Article 14 be amended to require that NEBs must be independent of any bodies responsible for providing services under the Regulation.

Scope of Regulation

8.36 We recommend that Article 14 be amended to clarify that NEBs are responsible for

flights departing from (rather than, as is currently stated, both departing from and arriving at) airports in their territory, in addition to flights by Community carriers arriving at airports within State's territory but departing from a third country.

8.37 We also recommend that Recital 17 (which states that complaints regarding assistance given by an airline should be addressed to the NEB of the State which issued the operating license to the carrier) be amended to be consistent with Article 14.

PRMs without a reservation

8.38 Article 7 requires airports to provide assistance to PRMs arriving at an airport so that they are able to take the flight for which they hold a reservation. However, there may be rare occasions where a PRM (like any other passenger) arrives at an airport *without* a reservation, expecting to purchase a ticket at the airport. We therefore recommend that Article 7 be amended to set out the airport's responsibilities to such PRMs.

Longer term changes to the Regulation

8.39 The key issue that we have identified with the Regulation is that the text is much less detailed or specific than other comparable legislation (in particular, the equivalent US regulations on carriage of PRMs) and therefore leaves much more scope for interpretation and variation in service provision. We suggest that, to ensure greater consistency and that PRMs rights are adequately respected, the Commission should consider making the text more detailed and specific about the requirements for airlines and airports. The rest of this section describes key areas in which we suggest that changes could be made.

8.40 It would be necessary to consult with stakeholders about these changes and to undertake an impact assessment, and therefore these changes could not be introduced immediately.

Provisions on safe carriage PRMs

8.41 Once the Commission has established with EASA policies on the safe carriage of PRMs, particularly regarding any permissible limits on carriage and requirements for passengers to be accompanied (see 8.13), we recommend that either the Regulation or EU-OPS be extended to include these policies.

Definitions

8.42 We recommend that the following definitions should be clarified:

- **PRM:** The definition of PRM used in the Regulation is very broad and this has led to disputes as to whether obese passengers or those impacted by temporary injuries (e.g. winter sports) are included; and even that those temporarily incapacitated e.g. due to alcohol consumption might be included. We suggest that, at a minimum, the definition should be amended to clarify this, and ideally (but subject to consultation) a much more precise definition of passengers entitled to assistance should be used, along the lines of that used in the equivalent US Regulations (see below).
- **Mobility equipment:** The Regulation should make clear whether this includes

equipment required by PRMs for the trip but not required for them to be able to take the flight (e.g. joists for assisted lifting of PRMs).

- **Cooperation:** The Regulation should to specify what measures airports must take when required by the Regulation to set out policies and charges in cooperation with airport users and PRM organisations - in particular in Article 8(4).

Definition of disability used in US CFR part 14 rule 382

Individual with a disability means any individual who has a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(a) *Physical or mental impairment* means:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardio-vascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism.

(b) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) Has a record of such impairment means has a history of, or has been classified, or misclassified, as having a mental or physical impairment that substantially limits one or more major life activities.

(d) *Is regarded as having an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by an air carrier as constituting such a limitation;

(2) Has a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others toward such an impairment; or

(3) Has none of the impairments set forth in this definition but is treated by an air carrier as having such an impairment.

Supplementary charges

8.43 Although we have not been made aware of any incidences of airlines or airports charging for assistance provided under the Regulation, several airlines charge for the supply of medical oxygen, and for multiple seats where one seat is insufficient for the passenger (for example, in the case of obese or injured passengers). Several PRM organisations informed us that they believed these charges were unjust. We recommend that in any amendment of the Regulation it should be clarified whether airlines may levy such additional charges.

Information on rights of PRMs

8.44 Regulation 261/2004 requires airlines to display at check-in a notice informing passengers that they may request information on their rights under the Regulation. To assist the promotion of awareness of rights under Regulation 1107/2006, we recommend that the Regulation be extended to include a provision requiring airports

to publish information on the rights of PRMs (including the right to complain) at accessible points within the airport, for example at check-in desks and help points.

Liability for mobility equipment

8.45 The Montreal Convention allows for compensation for damage to baggage up to 1,131 SDRs (€1,370), however this is insufficient for many technologically advanced electric wheelchairs, which can cost several thousand euros. Although most airlines we contacted for the study informed us that they waived the Montreal limits in this type of situation, several PRM organisations informed us of cases where they did not. Even in the case that an airline voluntarily waives the limit, the PRM is in a position of uncertainty. This is exacerbated by the difficulty of obtaining insurance for such wheelchairs; the high cost combined with the high probability of damage means that the PRM organisations we spoke to had been unable to find any insurers willing to provide coverage.

8.46 We therefore recommend that the Commission work with non-EU States to amend the Montreal Convention to exclude mobility equipment from the definition of baggage.

APPENDIX A

AIR CARRIERS POLICIES ON CARRIAGE OF PRMS

APPENDIX TABLE A.1 POLICY ON DENIAL OF BOARDING, ACCOMPANYING PASSENGERS AND MEDICAL CLEARANCE

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
Aegean Airlines	Not stated *Unpublished limit on unaccompanied PRMs*	Not stated	• PRM requires oxygen
Air Berlin	May limit number of PRMs on each flight for safety reasons	'Advised' if the following apply (although the use of 'must' in terms of the criteria for the companion suggest that this may not be optional): • PRM has severe walking disability • PRM has severe visual impairment *Also required if:* • *PRM is on stretcher* • *PRM is mentally ill / blind / deaf if unable to follow crew instructions* • *ID states that continuous accompaniment required*	• *PRM has infectious disease* • *PRM is on stretcher* • *PRM requires oxygen*
Air France	Not stated	• PRM cannot safely exit aircraft alone • PRM cannot follow safety instructions • PRM has visual or hearing impairment	• PRM is on stretcher or in incubator • PRM will need extraordinary medical equipment during flight • PRM requires oxygen
AirBaltic	To meet safety requirements If aircraft doors make boarding physically impossible If number of PRMs exceeds number of cabin crew per flight, where PRMs form a large proportion of passengers on flight	PRM requires assistance beyond that provided by cabin crew. Cabin crew will provide additional information to PRMs, but will not: • Assist with eating or personal hygiene; • Administer medication; or • Lift or carry passengers. *Also required if unable to follow safety instructions, e.g. if in stretcher, incubator, of if both blind and deaf*	• PRM has infectious disease • PRM has 'unusual condition' which could affect welfare of crew or other passengers, or could be considered a potential hazard to flight or its punctuality • PRM will require medical attention or special equipment during flight • PRM has medical condition which may worsen during, or because of, flight • PRM cannot use normal seat in upright position

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
			• Pregnant passengers, except when uncomplicated and with more than 4 weeks until due date.
Alitalia	Conditions of Carriage state that boarding may be denied if advance arrangements have not been made	• PRM uses wheelchair • PRM is blind or deaf • PRM is on stretcher • PRM is not self sufficient	• *PRM will require medical assistance on board*
Austrian	Not stated	• PRM cannot evacuate aircraft alone • PRM cannot follow safety instructions • PRM needs assistance in feeding or using toilet • PRM is deaf and blind • PRM requires assistance beyond that provided by cabin crew	• PRM has chronic illness or disability
British Airways	Not stated	• PRM cannot lift themselves • PRM cannot evacuate aircraft alone • PRM cannot communicate with crew on safety matters • PRM cannot unfasten seat belt • PRM cannot retrieve and fit life jacket • PRM cannot fit oxygen mask.	Not stated
Brussels Airlines	To meet safety requirements If size of doors makes boarding or alighting physically impossible Limit of PRMs of up to 31 per flight depending on aeroplane type Conditions of Carriage state that boarding may be denied if advance arrangements have not been made	• PRM is mentally disabled and does not have prior medical clearance of airline	• PRM is on stretcher or bed • PRM requires oxygen • PRM is under care of a doctor • PRM has unstable medical condition • PRM suffers from illness • PRM has recently been to hospital, or has operation

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
			• PRM has medical disability and cannot be accompanied • PRM is more than 34 weeks pregnant
Delta	On basis of safety, or if in violation of Federal Aviation Regulations If advance arrangements have not been made (this requirement is more stringent in the Conditions of Carriage)	• PRM requires constant monitoring at departure gate • PRM requires assistance beyond that provided by cabin crew	• PRM has infectious disease • PRM requires oxygen • PRM will require extraordinary medical assistance during flight
EasyJet	If the safety and welfare of the PRM or other passengers may be compromised *In only extreme circumstances, e.g. where special seats or torso restraints are required, or if a passenger's condition makes them potentially violent or disruptive.*	• PRM cannot evacuate aircraft alone • PRM cannot communicate with staff • PRM cannot unfasten seat belt • PRM cannot retrieve and fit life jacket • PRM cannot fit oxygen mask • PRM cannot take care of own personal needs and welfare	• PRM has infectious or chronic illness • PRM has broken limb in plaster • PRM is 28-35 weeks pregnant • PRM is a child with a chronic lung disease • PRM has severe asthma or has recently been prescribed oral steroids.
Emirates	Not stated	• PRM needs to travel in stretcher or incubator • PRM requires medical attention during flight • PRM cannot follow safety instructions • PRM cannot evacuate aircraft alone • PRM has severe hearing and visual impairments and cannot communicate with staff	• PRM is on stretcher • PRM requires oxygen • PRM requires medical escort or in-flight treatment • PRM is carrying medical equipment or instruments • PRM is 29 or more weeks pregnant
Iberia	If PRM poses a risk to themselves and other passengers for medical reasons Limit on number of PRMs per flight *May also refuse carriage for security reasons, e.g. aggression.*	• In order to meet safety requirements • *PRM is considered as a 'medical case'*	Not stated
KLM	Not stated	• PRM requires assistance beyond that provided by	• PRM has infectious disease

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
	Passenger cannot sit up straight *Wheelchair will not fit through aircraft door.*	cabin crew • PRM cannot move unassisted between wheelchair and seat / toilet • *PRM not compliant with normal safety rules*	• PRM requires medical care or specific equipment in-flight • PRM has medical condition that could result in a life-threatening situation or could require the provision of exceptional medical care for their safety during the flight. • PRM requires in-flight personal care • PRM cannot use normal seat in upright position • PRMs up to 36 weeks pregnant who are expecting complications
Lufthansa	Limit on number of unaccompanied limited mobility PRMs per flight	• Not stated for non-US flights	Stringent medical clearance requirements – see text
Ryanair	Limit on number of disabled or sensory or mobility impaired PRMs per flight. Conditions of Carriage state that failure to advise on special needs will result in denial of boarding. *PRM limit can be overridden at the discretion of the crew on a case-by-case basis*	• PRM cannot use toilet unaided • PRM cannot feed themselves unaided • PRM cannot administer own medication.	• PRM requires oxygen, portable dialysis machine or continuous portable airway pressure machine
SAS	Not stated *When PRMs cannot be safely carried or physically accommodated*	• Not stated • *PRM is blind, deaf; or both* • *PRM is Disabled Passenger with Intellectual or Developmental Disability Needing Assistance* • *PRM is on stretcher*	• PRM requires stretcher or other flat transportation
TAP Portugal	Not stated *Unpublished limit on unaccompanied PRMs*	• PRM is in an incubator • PRM is on trolley / stretcher • PRM requires oxygen • PRM uses wheelchair or has 'great difficulty in mobility'	• PRM uses emotional support dog • PRM is more than 36 weeks pregnant

Airline	Circumstances for refusal of carriage	Circumstances requiring accompanying passenger	Circumstances requiring medical clearance
		• PRM is reliant on others	
TAROM	Not stated	• PRM suffers from a disease • *PRM cannot self-evacuate*	• PRM has disease • PRM requires stretcher • PRM requires oxygen
Thomas Cook	Not stated	• PRM cannot lift themselves • PRM cannot use toilet unaided • PRM cannot feed themselves unaided • PRM cannot administer own medication • PRM cannot communicate or follow instructions • PRM reliant on oxygen.	Unspecified – see text
TUI (Thomsonfly)	Not stated	• PRM cannot lift themselves • PRM cannot use toilet unaided • PRM cannot feed themselves unaided • PRM cannot administer own medication • PRM cannot communicate or follow instructions • PRM reliant on oxygen • PRM requires wheelchair.	• *PRM is unaccompanied and does not meet self-sufficiency requirements* • *PRM has declared medical condition* • *PRM has requested a service for which there is a risk of abuse, e.g. extra legroom seats would normally be chargeable.*
Wizzair	If medical certification is not provided on request If airline is unable to provide for specific medical requirements Limit of 28 PRMs per flight Conditions of Carriage state that boarding may be denied if advance arrangements have not been made	• PRM unable to care for themselves • PRM cannot use toilet unaided.	Unspecified, but could be required in all cases – see text.

APPENDIX B

SERVICES PROVIDED BY AIR CARRIERS

APPENDIX TABLE A.2 SERVICE AND RESTRICTIONS

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
Aegean Airlines	Prenotification required Carried free in cabin Case / carrier required Subject to weight restriction Not carried on UK flights	Wheelchairs carried free Not subject to baggage allowance Passenger's oxygen allowed with medical certification Conditions of Carriage state that wet cell batteries are not allowed in cabin	Not stated	Not stated	Not stated
Air Berlin	Carried free in cabin Case / carrier not required Harness required	Wheelchairs carried in hold only Wet cell batteries subject to safety regulations Other medical aids carried free with medical certificate Limit of one wheelchair per passenger defined in Conditions of Carriage	Not stated	Not stated	Free seat reservation for passengers with severe disability pass (or equivalent) for 50% disability or more, and for companion PRMs cannot reserve XL / extra large seats (i.e. in exit rows) Conditions of carriage state that seating may be restricted for safety reasons
Air France	Carried free in cabin Leash required, attached to seat in front Muzzle not required	Up to two wheelchairs carried free of charge Onboard wheelchairs on most flights Stretchers accepted with medical clearance Oxygen allowed on board on payment of fee	Cannot lift passengers Cannot administer medication	Braille seat numbers in new aircraft Safety briefing in French or English Braille Some crew members able to communicate in French sign language	Additional seat may be reserved at discounted rate if needed Seats with retractable armrests Easy access toilets
AirBaltic	Carried free in cabin Excluded from weight	Carried free of charge Only collapsible wheelchairs	Will provide extra information Cannot assist with eating or	Not stated	Depending on aircraft, provide movable aisle armrest seats

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
	restrictions Prohibited from exit rows	allowed in cabin Spillable batteries accepted if removed and packed and labelled Stretchers not carried Oxygen provided free with prenotification, doctor's verification and accompanying passenger	personal hygiene Cannot lift or carry passengers Cannot administer medication		PRMs cannot obstruct crew or emergency exits Companion must travel in seat next to PRM
Alitalia	Carried free in hold, or in cabin if space available Leash required Muzzle required	Wheelchairs carried free Stretcher service offered for a fee and with authorisation and accompanying passenger, only one per aircraft. Oxygen must be booked in advance, and not available on all flights	Not stated	Not stated	Not stated
Austrian	Carried free in cabin Leash required Subject to size and weight restriction Proof of status required	Up to two wheelchairs carried free, subject to space and prenotification for electric wheelchairs Onboard wheelchairs available	Preparation for eating Use of on-board wheelchair Accessing lavatory Stowing / retrieving carry-on items	Will communicate effectively as required.	Choice of seat may be limited Some seats with moveable armrests Accessible lavatories on long haul flights
British Airways	Prenotification required Limit on no. of guide dogs per flight Carried free in cabin Carried on all UK and certain international routes	Up to two wheelchairs carried free Preparation required for certain types of electric wheelchair Onboard wheelchairs on some flights Portable Oxygen Concentrators accepted with medical clearance, included in cabin	Cannot assist with breathing apparatus Cannot assist with eating Cannot administer medication Cannot assist with going to toilet Can assist in access to and from toilet when on-board wheelchair is available	Individual safety briefings and subtitles on English safety video Braille cards on some flights	Lifting armrests on some seats Cannot be seated on emergency exit aisle due to safety regulations. Will be allocated bulkhead seat when requested, unless already allocated to PRM. Adapted toilets on 747-operated flights

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
		baggage allowance Conditions of carriage state that the airline reserves the right to refuse stretchers on any flight			
Brussels Airlines	Prenotification required Carried free in cabin Leash required Muzzle required Subject to national regulations	Electric wheelchairs carried in hold Spillable batteries accepted under certain conditions In-flight wheelchair on some flights Up to two stretchers on certain planes Can supply oxygen with prenotification and payment of fee in advance	Moving to toilet facilities Cannot lift passengers Cannot assist during visit to lavatory	Not stated	Not stated
Delta	Carried free in cabin Prohibited from exit rows Must occupy space where passenger sits No documentation required Subject to national entry requirements	One wheelchair can be carried in cabin per flight Wet cell batteries accepted with preparation One onboard wheelchair per flight Personal oxygen tanks can be transported but not used in flight Can provide oxygen on many flights, subject to medical certification Conditions of Carriage state that carriage of passengers requiring stretcher kit may be refused	Cannot assist with feeding or personal hygiene and lavatory functions. Cannot lift or carry passengers Cannot provide medical services such as giving injections.	Pre-booked passengers with hearing disabilities can be accompanied by agents who will provide updates on flight information	FAA regulations limit exit seats to certain customers Customers with service animals or immobilised leg are entitled to bulkhead seats On board aircraft with 100 seats or more, Delta provides a stowage location specifically for the first collapsible wheelchair

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
EasyJet	Carried free in cabin if space available Must occupy space where passenger sits Harness required Proof of training and status required Only allowed on routes within UK or mainland Europe	Up two to portable mobility items carried free, subject to weight restriction Wet cell batteries not accepted No onboard wheelchairs Allow up to two oxygen cylinders per passenger, with medical certification Conditions of Carriage state that stretchers are not carried	Stowing and retrieving of hand baggage Opening food packages and describing the contents Cannot lift passengers Cannot provide personal care Cannot administer medication Cannot assist with feeding or children	Can provide a verbal explanation of the safety card information and location of emergency exits	Body supports required for passengers who cannot sit upright
Emirates	All animals carried in hold, subject to IATA Live Animals and national regulations	Wheelchairs carried free of charge Do not count towards baggage allowance Battery-powered wheelchairs subject to safeguards Stretcher kit provided Oxygen provided Portable Oxygen Concentrators allowed	Cannot assist with transfer Cannot assist with feeding Cannot assist with toilet functions	Not stated	Not stated
Iberia	Carried free in cabin Must not use seat Muzzle required Does not count towards luggage allowance Deaf passengers will require medical certificate	All wheelchairs carried free in hold Wet cell batteries accepted with preparation Carriage of stretchers may be restricted on smaller aircraft Oxygen allowed in cabin subject to certain conditions	Cannot provide sanitary, hygienic or safety onboard assistance.	Not stated	'The entire fleet has been adapted to carry Passengers with Reduced Mobility, despite the space limitations that air transport normally poses.'
KLM	Carried free in cabin Must be with PRM, but not using seat or blocking aisle of	Up to two pieces of mobility equipment carried free Collapsible wheelchairs allowed	Transporting passengers using on-board wheelchair	Braille safety cards Toilets with Braille attendant call	Seats with moveable armrests Leg rests available

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
	exit Leash required Subject to national regulations	in cabin, electric wheelchairs carried in hold Wet cell batteries accepted with preparation Onboard wheelchairs on all flights Stretcher service offered, subject to medically trained companion Oxygen allowed on board on payment of fee Own oxygen not allowed Approved Portable Oxygen Concentrators allowed	Cannot assist with eating Cannot lift or carry passengers Cannot administer medication Cannot assist with personal hygiene	buttons	
Lufthansa	Carried free in cabin Limited number allowed per flight Subject to national regulations	Wheelchairs carried free in hold (small collapsible devices allowed in cabin to/from US) Non leak-proof wet cell batteries not accepted except to/from US Limit on number of wheelchairs per flight Limited oxygen available with advance payment of an unspecified fee	Assistance in boarding / disembarking Stowing hand luggage Opening of food items Getting to / from toilet Cannot provide assistance in toilet Cannot lift or carry passengers Cannot feed passengers Cannot administer medication	Will explain arrangement of meal tray to partially sighted Flights to/from US section of website also includes: Separate safety briefings Separate briefings about delays and other issues Captioning of in-flight video in English and German	Disabled toilets in long-haul aircraft Flights to/from US section of website also includes: Bulkhead seats provided if travelling with service animal Some seats with lifting armrests May not be able to sit near exit
Ryanair	Carried free in cabin Must travel on floor at passenger's feet Max of 4 per flight Not carried on some international routes	Wheelchairs carried free of charge in hold Not subject to weight limit Wet cell batteries not accepted One oxygen request per flight allowed at cost of £100.	Will provide water for taking medication Cannot administer medication Cannot lift passengers Cannot assist with personal hygiene	Not stated	Passengers with reduced mobility, or whose physical size prevents them from moving quickly cannot be seated near exit. Passengers with pre-booked special assistance will be

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
		Personal oxygen not allowed on board Conditions of carriage state that stretchers are not carried			boarded after general boarding is completed as seats will be held on board. Conditions of carriage state that seating may be restricted for safety reasons
SAS	Carried free in cabin Case / carrier not required Excluded from weight restriction	One collapsible and one power-driven wheelchair carried free of charge Wet cell batteries accepted as cargo In-flight wheelchair on some flights Personal oxygen allowed if required for transport to/from aircraft Will provide oxygen with payment of fee	Cannot lift passengers Cannot assist during visit to lavatory	Not stated	Not stated
TAP Portugal	Dogs and cats allowed in cabin Leash required Must not occupy a seat Must comply with sanitary regulations Proof of status required	Prenotification of type of wheelchair battery required On-board wheelchair on larger planes Stretchers accepted in economy class subject to medically trained companion Oxygen provided with medical certification Personal oxygen not allowed	Not obliged to provide any on-board assistance contradicting passenger statement of self-reliance, e.g. assistance in toilet, lifting, carrying or feeding.	Not stated	May request an additional seat for greater comfort in coach class only. This seat must be requested when booking and is charged as an occupied place
TAROM	Prenotification required Carried free in cabin Case / carrier not required	Wheelchairs carried free and allowed in cabin on some planes Preparation of some electric	Not stated	Not stated	Not stated

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
	Muzzle required	wheelchairs may be required Stretchers not allowed on certain planes. PRM using a stretcher is considered as 'medical case' and is consequently required to obtain a medical certificate, and to be accompanied by a medical professional. Oxygen provided free, subject to limits on no of passengers per flight Personal oxygen not allowed			
Thomas Cook	Carried on many routes	Wheelchairs carried free in hold Electric wheelchairs accepted subject to IATA Dangerous Goods Regulations Limit on no of wheelchairs Stretchers not carried One oxygen request per flight allowed at cost of £100. Personal oxygen not allowed on board	Can assist in opening food containers	Will describe catering arrangements to blind people In-flight safety video includes subtitles Also offer separate briefing about safety procedures for passengers with hearing impairments	PRMs cannot be seated near exits
TUI (Thomsonfly)	Carried on many routes Conditions of Carriage state that this will incur 'a nominal charge'	Wheelchairs carried free in addition to normal baggage allowance Electric wheelchairs accepted subject to IATA Dangerous Goods Regulations Passengers may bring their own oxygen supply onboard if authorised to do so by Special	Not stated	Not stated	Not stated

Airline	Assistance dogs	Wheelchairs and other equipment	Assistance offered	Accessible information	Seating and onboard assistance
		Assistance Team.			
Wizzair	Not stated	Wheelchairs carried subject to weight limit Spillable batteries not accepted Do not provide additional oxygen, and passengers cannot carry their own supply Conditions of carriage state that stretchers are not carried	Free 'Meet and Assistance Service' provided to deaf and blind passengers on request	Not stated	PRMs cannot be seated on exit rows

CONTROL SHEET

Project/Proposal Name:	EVALUATION OF REGULATION 1107/2006
Document Title:	Final report
Client Contract/Project Number:	TREN/A3/143-2007/SI2.545092
SDG Project/Proposal Number:	22179801

ISSUE HISTORY

Issue No.	Date	Details
1	**1 February 2010**	**Interim report issued**
2	**23 April 2010**	**Draft final report issued**
3	**18 June 2010**	**Final report**
4	**20 July 2010**	**Version for publication**

REVIEW

Originators: Will Macnair, Mark Havenhand, Simon Smith

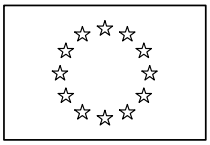
Review By: Print: Simon Smith

Sign: Reviewed electronically

DISTRIBUTION

Clients: European Commission

Steer Davies Gleave: Project team



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 1.12.2008
COM(2008) 804 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

"Towards an accessible information society"

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

"Towards an accessible information society"

[SEC(2008) 2915]

[SEC(2008) 2916]

1. EXECUTIVE SUMMARY

As our society is evolving to an 'information society', we are becoming intrinsically more dependent on technology-based products and services in our daily lives. Yet poor e-accessibility means many Europeans with a disability are still unable to access the benefits of the information society.

This issue of e-accessibility has received high policy visibility and attention in recent years. In 2006, European Ministers agreed targets in their 'Riga Declaration' to deliver significant progress by 2010. In 2007, benchmarking showed that the pace of progress was still insufficient and that further efforts were needed in order to achieve the Riga targets. Web accessibility, especially the accessibility of public administration websites, has emerged as a high priority due to the growing importance of the Internet in everyday life.

The Commission considers it is now urgent to achieve a more **coherent, common and effective approach to e-accessibility, in particular web accessibility,** to hasten the advent of an accessible information society, as announced in the Renewed Social Agenda[1]. Through this Communication, the Commission describes the current state of play, establishes the rationale for European action and sets out key steps to be taken.

To achieve a common and coherent **e-accessibility approach**:

- European Standardisation Organisations (ESOs) should **pursue wider e-accessibility standardisation** activities to reduce market fragmentation and facilitate increased adoption of ICT-enabled goods and services.

- Member States, stakeholders and the Commission should **stimulate greater levels of innovation and deployment** in e-accessibility, in particular through the use of the EU research and innovation programmes and the Structural Funds.

- All stakeholders should **make full use of** the opportunities to address e-accessibility within **existing EU legislation**. The Commission will include appropriate e-accessibility requirements in revisions or new legislative developments.

- The Commission will **boost stakeholder cooperation activities** to enhance the coherence, coordination and impact of the actions. In particular, a new high-level ad hoc group will be mandated to provide guidance on the overall coherent approach to e-accessibility (including web accessibility) and propose priority actions to overcome e-accessibility barriers.

[1] COM(2008)412.

To speed up progress in the special case of **web accessibility**:

- ESOs should **rapidly adopt European standards** for web accessibility, following the establishment of updated web guidelines (WCAG 2.0) by the World Wide Web Consortium.

- Member States should **step up work** on making public web sites **accessible** and **jointly prepare for swift adoption** of European web accessibility standards.

- The Commission will **monitor and publish progress** and may follow up at a later stage with legislative action.

2. E-ACCESSIBILITY

E-accessibility means overcoming the technical barriers and difficulties that people with disabilities, including many elderly people, experience when trying to participate on equal terms in the information society.

If everyone is to have equal opportunities for participation in today's society, the full range of ICT goods, products and services need to be accessible. This includes computers, telephones, TVs, online government, online shopping, call centres, self-service terminals such as automatic teller machines (ATMs) and ticket machines.

2.1. State of play

The scale of the accessibility challenge is huge and growing: around 15% of Europe's population has a disability and up to one in five working-age Europeans have impairments requiring accessible solutions. Overall, three out of every five people stand to benefit from e-accessibility, as it improves general usability[2].

E-accessibility has socio-economic implications for both individuals and Europe as a whole. For example, accessible ICT-enabled solutions can help older workers to stay in employment and enhance the take-up of online public services such as e-Government and e-Health. Lack of e-accessibility excludes significant sectors of the population and prevents them from fully carrying out their professional, education, leisure, democratic participation and social activities. Strengthening e-accessibility will contribute to both economic and social inclusion goals.

Many countries have adopted at least some legislative or support measures to promote e-accessibility and parts of the ICT industry are making significant efforts to improve the accessibility of their products and services[3].

E-accessibility is also a key element in the European e-Inclusion policy[4]. In a broader context, ICT falls within the scope of the proposed Directive on equal treatment that refers to access to and supply of goods and services available to the public[5]. The European Community and the

---

2 The Demographic Change — Impacts of New Technologies and Information Society.

3 See details in accompanying Staff Working Paper.

4 i2010 Communication COM(2005) 229, Communication on e-accessibility COM(2005) 425, and Communication on e-Inclusion COM(2007) 694.

5 COM(2008) 426.

Member States also have to fulfil obligations under the United Nations Convention on the Rights of Persons with Disabilities in relation to accessibility of ICT goods and services. Some pieces of EU legislation already directly or indirectly address e-accessibility issues.

2.2. Rationale for further action

Despite the benefits and political attention, progress in e-accessibility is still unsatisfactory. There are many striking examples of accessibility deficits. E.g. text relay services, essential for deaf and speech-impaired people, are only available in half of the Member States; emergency services are directly accessible by text telephone in only seven Member States; broadcasting with audio description, subtitled TV programming and TV sign-language programming remains very poor; only 8% of ATMs installed by the two main European retail banks provide 'talking' output[6].

The existing EU *acquis* relating to e-accessibility is limited. At Member State level, there is considerable fragmentation in the treatment of e-accessibility, both in the issues addressed (usually fixed telephony services, TV broadcast services and public website accessibility) and the completeness of policy instruments used. Faced with divergent requirements and uncertainties, the ICT industry suffers from this market fragmentation, making it difficult to achieve the economies of scale necessary to sustain widespread innovation and market growth. Parts of the industry are actively engaged and cooperating with users (e.g. on accessible digital television) but too many are watching from the sidelines.

The key issue in e-accessibility is that current efforts have insufficient impact due to a lack of coherence, unclear priority setting, and poor legislative and financial support.

A common and coherent European approach to e-accessibility is therefore key to achieving significant improvements.

2.3. Proposed actions

(1) Delivering the change — strengthening policy priorities, coordination and stakeholder cooperation

At European level several activities have been put in place in recent years. Now is the time to increase synergies between these and reinforce individual areas of action for greater and more consistent impact.

Member States, users and industry need to step up their efforts and seek more impact through greater cooperation at European level and better exploitation of existing EU policy instruments. To support and strengthen coherence and effectiveness of a common approach and to help define priorities, the Commission will establish an **ad hoc high-level group on e-accessibility**, reporting to the i2010 high level group, involving consumer organisations and representatives of disabled and elderly users, ICT and assistive technology and service industries, academia and relevant authorities.

Early in 2009, the Commission will establish an **ad hoc high-level group** to provide guidance on priorities and a more coherent approach to e-accessibility. Stakeholders are called upon to commit to this cooperation.

[6] For details, see the MeAC study (Measuring progress of e-accessibility in Europe).

The Commission will **boost its existing support for cooperation** with and between stakeholders. In particular the groups following the implementation of i2010, standardisation matters, telecommunication issues and the disability action plan should use the guidance of the high-level group to inform their priorities. It is also important that users, relevant authorities, and industry reinforce their commitment and cooperation on e-accessibility matters.

Priorities for e-accessibility need to be selected. The first is web accessibility, where the proposed coherent and common approach can be applied. Next are the accessibility of digital television and electronic communications, including accessibility of the single European emergency number. For these, cooperation of users and industry should be increased and, with the help of the high-level group, better linked to the EU-level legislative and innovation support.

Self-service terminals and electronic banking is another high priority[7]. The closer cooperation of stakeholders will help to obtain guidance on further priorities and define a common programme of future work.

The Commission has already addressed e-accessibility in its proposal for a new version of the e-government European Interoperability Framework[8], and will do so in its follow-up to the i2010 initiative and the disability action plan.

The Commission will ensure e-accessibility remains a **policy priority** in the follow-up to i2010 and disability action plan.

This closer coordination and cooperation will be further strengthened through enhanced exploitation of the activities mentioned below.

(2) Monitoring progress and reinforcing good practice

The Commission will launch a study in 2009 to continue monitoring general e-accessibility and web accessibility progress and implementation, following up two studies conducted in 2006-2008[9].

Under the 2009 Competitiveness and Innovation Programme (CIP), the Commission will propose a new thematic network on e-accessibility and web accessibility to further enhance stakeholder cooperation and the building up of experience and collection of good practices. It will also seek to reinforce the *ePractice* good practice exchange network on e-government, e-health and e-Inclusion, which has already amassed a vast amount of expertise on e-accessibility.

The Commission will monitor web-accessibility and e-accessibility progress and implementation, support cooperation and exchange of good practices via **studies** and a **CIP thematic network**, to be launched in 2009.

(3) Supporting innovation and deployment

---

7 See report on the public consultation.

8 http://ec.europa.eu/idabc/en/document/7728

9 MeAC and study on accessibility of ICT products and services for disabled and elderly people.

There is already extensive support for e-accessibility research and innovation. In 2008, 13 new projects were funded with some €43m from the EU research programme. The Commission will continue to actively support e-accessibility and ICT for independent living of elderly people through the EU research programmes with a further call for proposals in 2009.

The Commission will **ensure e-accessibility is a strong research and innovation priority** in 2009 and beyond.

Member States and the Commission will use the Ambient Assisted Living joint research programme, launched in 2008, to stimulate innovative ICT-based solutions for independent living and the prevention and management of chronic conditions of elderly people.

Under the 2008 CIP, the Commission funded a pilot project on accessible TV and pilots on ICT for elderly people to accelerate technology deployment. In 2009, the Commission will fund a pilot on 'total conversation' (the combination of audio, text and video communications to support people with disabilities), which will help hearing- and speech-impaired persons to access the European '112' emergency number.

Member States and stakeholders are urged to **stimulate e-accessibility innovation and deployment** via the Structural Funds, FP7, the AAL programme and national programmes.

The Structural Funds Regulation[10] requires that the Member States consider accessibility for disabled persons as one of the criteria to receive funding. In this context, the Commission will provide a 'disability toolkit' in 2009, applicable to ICTs, and encourage Member States and Regions to ensure that ICT accessibility is incorporated in their procurement and funding criteria.

The Commission will provide a **disability toolkit** applicable to ICTs in 2009 for use in Structural Funds and other programmes.

(4) Facilitating standardisation activities

The Commission continues its strong support for e-accessibility in its standardisation work programme. In particular, Mandate 376 issued to the European Standardisation Organisations is an important standardisation activity to foster e-accessibility.[11] The Commission will promote the use of the results from this standardisation work and will seek a rapid continuation of Mandate 376 to deliver the actual standards and related conformity assessment schemes. This process will be complemented and supported by stakeholders' dialogue, exchange of good practices and deployment pilots, as referred to in the proposed actions of this Communication.

Under Mandate 376, ESOs should **rapidly develop EU standards** for e-accessibility, in cooperation with relevant stakeholders during 2009 and beyond.

---

10 Council Regulation (EC) 1083/2006

11 The aim of Mandate 376 is to enable the use of public procurement and practice for ICT´s to remove barriers to participation in the Information Society by disabled and older people. The Mandate was given by the European Commission to the ESOs to come up with a solution for common requirements (for example for text sizes, screen contrast, keypad sizes etc) and conformance assessment.

(5) Exploiting current and considering new legislation

There is a clear correlation at national level between the existence of legislation and the actual level of progress on e-accessibility[12]. Research points to the risks of legal fragmentation in the EU due to divergent legislative measures. Based on this, and building on the 2005 and 2007 Communications, the Commission has started exploring a more general legislative approach to e-accessibility.

However, given the vast, complex and evolving nature of the e-accessibility field, there is not yet a clear consensus on possible EU legislation dedicated to e-accessibility[13], e.g. on elements such as scope, standards, compliance mechanisms and links to existing legislation. Furthermore, although there is a clear consensus on the need to act jointly to improve e-accessibility, there are different views on the next priorities to address. The Commission has therefore concluded that the time is not yet right for a specific e-accessibility legislative proposal, but will continue to assess its feasibility and relevance, taking into account actual progress in the field.

Nevertheless, there are provisions under current EU legislation that remain under-exploited, in particular for radio telecommunications equipment, electronic communications, public procurement, copyright in the information society, equality in employment, value added tax and state aid exemptions[14]. Making full use of these provisions would already significantly improve e-accessibility in Member States. The Commission therefore encourages Member States to make the most of these before new legislation is considered.

Several of the above pieces of EU legislation are under review or will be reviewed soon[15]. The Commission will work to ensure that, where appropriate, e-accessibility requirements are considered and reinforced in these revisions. Moreover, legislative proposals for electronic communications significantly strengthen provisions on disabled users under the current framework. The Commission will also carefully monitor the transposition and implementation of the audiovisual media services Directive[16] in particular its Article 3c that provides that Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.

The Commission will **ensure that appropriate e-accessibility provisions are integrated in revisions** of EU legislation. Member States, stakeholders and the Commission should **make full use of opportunities in current legislation** to strengthen e-accessibility.

---

12 See MeAC and study on accessibility of ICT products and services for disabled and elderly people.

13 In the public consultation 90% of user organisations considered binding legislation a high priority, versus 33% of industry and public authorities.

14 Directives 2000/78/EC, 2002/21/EC, 1999/5/EC, 2004/18/EC, 2001/29/CE, 2007/65/EC.

15 For example, Directive 1999/5/EC on terminal equipment is under review: in this context, the Commission will make sure to maintain the possibility to activate the relevant Article 3(3)(f).

16 Directive 2007/65/EC.

3. WEB ACCESSIBILITY

Web accessibility is an important aspect of e-accessibility which offers disabled people the possibility to perceive, understand, navigate, interact with and contribute to the Web. It also benefits other people confronted with visual, dexterity or cognitive limitations, such as elderly people. Web accessibility has become particularly important because of the explosive growth in online information and interactive services: online banking, shopping, government and public services, and communicating with distant relatives or friends.

3.1. State of play

Despite its importance, the overall level of web accessibility remains poor across the EU. Several national and European surveys conducted over the last few years have found that the majority of websites, public and private, do not comply even with the most basic internationally accepted guidelines for accessibility. A recent survey found that only 5.3% of government websites and hardly any of the commercial websites surveyed were fully compliant with the basic accessibility guidelines[17]. This confirms why many people find important websites difficult to use and are therefore at risk of being partially or totally excluded from the information society.

The accessibility of public websites has received increasing policy attention in recent years in Member States[18]. At European level, a 2001 Communication on web accessibility encouraged Member States to endorse the Web Content Accessibility Guidelines (WCAG)[19]. In two Resolutions[20], the Council stressed the need to speed up accessibility to the web and its content. The European Parliament suggested in 2002 that all public websites be fully accessible to disabled persons by 2003[21]. In 2006, the Riga Ministerial Declaration on an inclusive Information Society included a commitment that 100% of public websites be accessible by 2010.

Internationally, WCAG version 1 was adopted in 1999 by the World Wide Web Consortium (W3C). However, ambiguities led to fragmented implementations by Member States, and in view of new internet developments, WCAG 1.0 is becoming outdated. W3C has been working on a new version of the specifications (WCAG 2.0) for several years; these are now in the final stages of adoption. The challenge this time is to avoid a fragmented implementation.

3.2. Rationale for further action

Making websites more accessible may be challenging in some cases, involving certain costs and expertise. However, there is increasing evidence and documented examples that making a website accessible delivers real benefits not only for disabled users, but also for website owners and users in general. Services are easier to use, simpler to maintain and accessed by more users[22]. As a result, improving website accessibility improves the situation for people

---

17 MeAC study.
18 See related Staff Working Paper.
19 COM(2001) 529.
20 2002/C 86/02 and 2003/C 39/03.
21 C5-0074/2002-2002/2032(COS).
22 Staff Working Paper.

with disabilities and also for others and can thus strengthen the competitiveness of European companies.

Case study: benefits of an accessible website

After making their website accessible, a financial services business in the UK identified as benefits:

- Customers found information more quickly and stayed on the site longer.

- New customers used the service, increasing online sales.

- Website maintenance was simpler, quicker and cheaper.

- The website achieved significantly higher search engine rankings.

- Compatibility problems were eliminated and mobile device access improved.

- 100% return on investment in less than 12 months.

Even so, persistent legislative fragmentation across Member States combined with the lack of clear legislative action at European level continues to hamper the internal market, constitutes barriers to consumers and citizens in this cross-border environment, and hinders industry development. The United Nations Convention on the Rights of Persons With Disabilities foresees obligations related to the internet which State Parties have to comply with. Further action at European level is therefore appropriate.

3.3. Proposed actions

The primary responsibility for improving web accessibility rests with Member States and individual service providers. Nevertheless, there are actions that the Commission can undertake or facilitate that will help accelerate the improvement in web accessibility in Europe, even without specific EU legislative provisions on web accessibility. Overall success will be achieved through a common and consistent approach. The key action areas are:

(1) Facilitate the rapid adoption and implementation of international guidelines in Europe

There is broad consensus that WCAG 2.0 guidelines are the technical specifications to be closely adhered to for web accessibility. Once W3C reaches agreement on the guidelines, expected in the near future, Mandate 376 will be able to complete its harmonisation work at European level. In the meantime, Member States should undertake actions to ensure the Riga target for accessible public websites is achieved and prepare for the rapid incorporation of new web-accessibility specifications into national rules in a common and coherent way by:

– Publishing during 2009-2010 updated technical guidance and, where appropriate, translating relevant W3C specifications;

– Identifying during 2009 the public websites and intranets[23] concerned and achieving their accessibility by 2010.

[23] In accordance with the Employment Equality Directive 2000/78/EC.

The Commission will continue its work to improve the accessibility of its own websites, updating its internal guidance to reflect the new specifications.

Non-public service providers, in particular owners of websites providing services of general interest[24], and providers of commercial websites that are essential for participation in the economy and society are also encouraged to improve web accessibility (2008 onwards).

Member States should **achieve 100%** accessibility of public websites by 2010 and prepare for rapid transition to updated web accessibility specifications **in a common and coherent way.**

Websites owners providing services of general interest and other relevant website owners should improve the accessibility of their websites.

The European Standardisation Organisations, in cooperation with stakeholders, should rapidly develop **EU standards for web accessibility** building on WCAG 2.0.

The Commission is improving the accessibility of Commission websites, updating internal guidance to reflect the new specifications.

The Commission will monitor and support these developments, encouraging Member States to take rapid action on the key aspects of implementation and facilitating the collection and exchange of practical experience, primarily through the ePractice platform[25]. Depending on progress and when the standards are in place, the Commission will consider the need for common EU guidance, including legislative action[26].

The Commission will monitor and publish progress and consider the need for common EU guidance, including legislative action (2009 onwards).

(2) Improve the understanding of and promote web accessibility

There is a strong need for increased visibility, understanding and awareness of the needs and solutions for web accessibility. Member States should take a leading role in achieving this by:

– Widely promoting accessibility of websites by providing clear information and guidance on website accessibility, including assistive technologies[27], and encouraging the use of accessibility statements[28];

– Supporting training schemes, knowledge sharing and good practice exchange;

– Purchasing accessible tools and websites in their public procurement;

– Assigning a national contact point for web accessibility, e.g. via a website, in 2009;

---

24 As referred to in COM(2007) 725.

25 www.epractice.eu.

26 See Impact Assessment of COM 2007 (694)

27 Pieces of ICT equipment that support functional capabilities of people with disabilities.

28 Providing supporting information such as accessibility policy of the website, compliance with relevant specifications, support for persons with disabilities, complaint mechanisms.

– monitoring and reporting progress on compliance, user satisfaction and implementation costs for web accessibility on both public and other websites to the proposed high-level group and general public.

Member States should **lead in improving the awareness and understanding** of web accessibility in a coherent, efficient and effective manner and **report progress** to the high-level group.

4. CONCLUSION

Common and coherent action is required on many fronts to achieve e-accessibility. In particular, immediate and rapid progress on web accessibility is essential. All stakeholders have decisive roles to play to achieve the common goal of a truly inclusive information society.

The Commission invites the Council, the European Parliament, the Committee of the Regions, and the Economic and Social Committee to express their views on the actions to be taken to make the information society accessible to all.

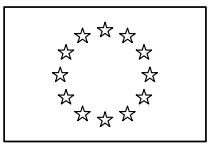
Annex – Summary of actions

E-accessibility

Actions	*Date*	*Responsible*
Establish an ad hoc **high-level group** to provide guidance on priorities and a more coherent approach to e-accessibility. Stakeholders are called upon to commit to this cooperation.	Early 2009	EC, stakeholders
Ensure e-accessibility remains a **policy priority** in the follow-up to i2010 and disability action plan.	2009-	EC
Monitor web-accessibility and e-accessibility progress and implementation, support cooperation and exchange of good practices via **studies** and a **CIP thematic network**.	2009-	EC, industry and stakeholders
Ensure e-accessibility is a strong **research and innovation priority.**	2009 -	EC
Stimulate **e-accessibility innovation and deployment** via the Structural Funds, FP7, the AAL programme and national programmes.	2009 -	MS, other stakeholders
Provide a **disability toolkit** applicable to ICTs for use in Structural Funds and other programmes.	2009	EC
Under Mandate 376, **rapidly develop EU standards** for e-accessibility, in cooperation with relevant stakeholders.	2009-	ESOs
Ensure appropriate **e-accessibility provisions are integrated in revisions** of EU legislation.	2008-	EC
Make full use of opportunities in current legislation to strengthen e-accessibility.	2008-	MS, EC industry and stakeholders

Web-accessibility

Achieve 100% **accessibility of public websites** and prepare for rapid transition to updated web accessibility specifications in a **common and coherent way**.	2009-2010	MS
Rapidly develop **EU standards for web accessibility** building on WCAG 2.0.	2009-	ESOs (and stakeholders)
Improve the accessibility of **Commission websites**, updating internal guidance to reflect the new specifications.	2009-	EC
Websites owners providing services of general interest and other relevant website owners to improve the accessibility of their websites.	2009-	Other stakeholders
Monitor and publish progress and consider the need for common EU guidance, including legislative action.	2009-	EC
Lead in improving the **awareness and understanding** of web accessibility in a coherent, efficient and effective manner and report progress to the high-level group**.**	2008-	MS



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.9.2005
COM(2005)425 final

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMITTEE OF THE REGIONS

eAccessibility

[SEC(2005)1095]

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMITTEE OF THE REGIONS

eAccessibility

Accessible Information and Communication Technologies (ICT) will improve the quality of life of people with disabilities significantly. At the same time, the lack of equal opportunities to access ICT can lead to exclusion. In this Communication, the Commission proposes a set of policy actions that foster eAccessibility. It calls on Member States and stakeholders to support voluntary positive actions to make accessible ICT products and services far more widely available in Europe.

This Communication on eAccessibility contributes to the implementation of the recently launched "**i2010 – A European Information Society for growth and employment**"[1] initiative, that presents a new strategic framework and broad policy orientations to promote an open and competitive digital economy, emphasising ICT as a driver of inclusion and quality of life. The Commission has the ambitious objective of achieving an "Information Society for All", promoting an inclusive digital society that provides opportunities for all and minimises the risk of exclusion.

1. INTRODUCTION

People with disabilities constitute about 15% of the European population and many of them encounter barriers when using ICT products and services. In certain cases, older people can be faced with similar problems. Accessible ICT products and services have now become a priority in Europe, due to the demographic shift: 18% of the European population was aged over 60 in 1990, while this is expected to rise to 30% by 2030.[2]

A recent study in the USA[3] found that 60% of working-age adults can benefit from the use of accessible technologies because they experience mild impairments or difficulties when using current technologies.

A 2002[4] study found that over 48% of 50 years+ persons in Europe considered that they are not being adequately addressed by manufacturers in the design of their products. Between 10 and 12 million were nevertheless potential customers of new mobile phones, computer and internet services.

The implications are clear: **making the benefits of ICT available to the widest possible number of people is a social, ethical and political imperative**. Furthermore, this creates markets of increasing economic significance.

---

1 COM(2005) 229 final of 1 June 2005.
2 UN World Population Prospects (2002 Revision) and Eurostat Demographic projections
3 The Wide Range of Abilities and Its Impact on Computer Technology – Forrester Research Inc., 2003.
4 Seniorwatch IST-1999-29086 www.seniorwatch.de

Overcoming the technical barriers and difficulties that people with disabilities and others experience when trying to participate on equal terms in the Information Society (IS) is known as "***eAccessibility***". This is part of the broader eInclusion concept, which also addresses other types of barriers, such as financial, geographical or educational.

This Communication builds on previous work on eAccessibility under the two eEurope Action Plans and on the conclusions and results of RTD projects. It also integrates the main findings of an **online consultation**[5] that was held early 2005, which showed a very strong support (over 88% of responses) for the European Institutions to take initiatives to address a situation that is perceived by a significant majority (over 74%) as a lack of coherence among accessible ICT products and services in Europe. A wider availability of accessible products and services is also felt to be needed (84% of respondents).

The main objective of this Communication is to promote a consistent approach to eAccessibility initiatives in the Member States on a voluntary basis, as well as to foster industry self-regulation.

2. THE PRACTICAL CHALLENGES

New technologies have already provided clear support to persons with disabilities and have enabled the realisation of functions in an independent manner that was only possible before with human assistance. However, despite efforts by industry, persons with disabilities still report a large number of problems when trying to use information technology products and services for example:

- lack of harmonised solutions, e.g. lack of access to the 112 emergency number from text phones in many Member States;
- lack of interoperable solutions for accessible ICT ;
- software not compatible with assistive devices, screen readers for blind users are often impossible to use after releases of new operating systems;
- interference between mainstream products and assistive devices, e.g. GSM telephones and hearing aids;
- lack of European-wide standards, e.g. the seven different, incompatible text phone systems for deaf and hard-of-hearing persons;
- lack of adequate services, e.g. many websites too complicated for cognitively impaired or inexperienced users or impossible to read and navigate through for visually impaired persons;
- lack of products and services for certain groups, e.g. telephone communication for sign language users;
- physical design difficult to use, e.g. keypads and displays on many devices;
- lack of accessible content;
- restricted choice of electronic communication services, quality and price.

[5] Results available at: http://europa.eu.int/information_society/policy/accessibility/com_ea_2005/a_documents/com_consult_res.html#_Toc97028181

Most of these problems could, conceptually, be easily solved from a technical point of view, but require cooperation, coordination and determination at European level as market forces alone seem not to have been sufficient to date.

In the near future, examples of new technologies where accessibility aspects must be considered early include:

- digital television, e.g. regarding standards and compatibility as well as design of services and hardware;
- third generation mobile telephones, e.g. regarding design of hardware and software as well as services;
- broadband communication, e.g. using the possibilities of multimodal presentations in a way that enhances accessibility rather than the opposite.

Addressing these issues, previously thought to be of interest to a specific target segment of the population, will actually have positive consequences for the majority of technology users.

3. MARKET AND ECONOMY ISSUES

ICT research and the market have come up with innovative solutions for some of these challenges. The main obstacles to their widespread availability are:

- until now they have been targeting a small market (seen essentially as people with disabilities and in some cases older people), mostly through SMEs at a national or regional level;
- the scarcity of applicable technical standards and technical specifications;
- relevant European legislation only recently explicitly contemplated the possibility of using accessibility requirements in the technical specifications in public procurement procedures;
- there are significant differences in the way some Member States have developed their own solutions.

As a consequence, the accessible ICT products and services market in Europe is still in an initial development phase, largely fragmented at national borders and lacking harmonised legislation and applicable technical standards. This does not facilitate the functioning of a single market and poses an increased burden on industry to comply with differing requirements in different Member States.

Increasingly, the target consumers are not seen anymore as only persons with disabilities and in some cases, older people, but as the whole population. This realization entails a market change we are just beginning to witness, as the bigger European industrial players are now turning their attention to this market sector, although they are still some time away before putting their full weight behind it.

This is also the case of the Telecommunications area – the pervasiveness of telecommunications products and services is now such that even this (relatively small for now) market niche is significant as a differentiator and growth generator, attracting interest from the bigger market players.

In conclusion, eAccessibility and related assistive technology products and services are now on the "midterm radar" of even the bigger mainstream technology providers, not only from Europe but also from other regions of the world.

4. LEGAL AND POLICY ISSUES

On several occasions, Council has encouraged action at EU level for instance when it called on Member States and invited the Commission to "*Tap the Information Society's potential for people with disabilities and, in particular, tackle the removal of technical and other barriers to their effective participation in the Knowledge Based Economy and Society*" [6]. The European Parliament has also supported this perspective[7].

In particular, European policies and legislation have recognised employment and occupation as key elements in guaranteeing equal opportunities for all, contributing strongly to the full participation of citizens in economic, cultural and social life and to realising their potential. The potential impact on this from a wider availability of quality accessible ICT products and services is clear. It will foster greater employability, better social inclusion and give people the ability to live independently for longer.

The need to include all Europeans in the Information Society has been expressed by the European Institutions in many contexts. The Commission has taken initiatives in the two eEurope Action Plans to build a more accessible IS. The 2002 Action Plan included a separate action line addressing these issues. It recommended the adoption of the Web Accessibility Inititiative (WAI)[8] guidelines, the development of a European Design for All (DFA) curriculum and strengthening assistive technology and DFA standardisation. In the eEurope 2005 Action Plan, the aim was to mainstream eInclusion in all action lines. It also proposed the introduction of accessibility requirements for ICT in public procurement.

Supporting this work, the Telecommunications Council has expressed the need to improve eAccessibility in Europe[9]. Furthermore the Ministerial Declaration[10]on eInclusion proposes taking all necessary actions towards an open, inclusive knowledge-based society accessible to all citizens.

Furthermore, in its 2003 Resolution on eAccessibility[11], the Social Affairs Council called on Member States to tackle the removal of technical, legal and other barriers to the effective participation of people with disabilities in the knowledge-based economy and society.

In line with this, the European Parliament, in its 2002 Resolution on web accessibility[12], "*reiterates the need to avoid any form of exclusion from the IS, and calls for the integration of*

---

6 Council Resolution on "eAccessibility for People with Disabilities", 2-3 December 2002, http://www.socialdialogue.net/docs/cha_key/consilium_2002_14892en2.pdf

7 EP Resolution on eEurope 2002: Accessibility of Public Web Sites and their Content (2002 (0325))

8 «eEurope 2002 : Accessibility of public websites and their content », COM(2001) 529 final, http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0529en01.pdf

9 Council Resolution on the eEurope Action Plan 2002 : Accessibility of public websites and their content, OJ C 86, 10.4.2002.

10 Ministerial Declaration on eInclusion, 11 April 2003 http://www.eu2003.gr/en/articles/2003/4/11/2502/

11 Council resolution 14892/02.

12 EP Resolution on eEurope 2002: Accessibility of Public Web Sites and their Content (2002 (0325))

disabled and elderly people in particular". Furthermore in another Resolution, the use of sign language in Telecommunications in Europe[13] is mentioned.

In a general sense, Article 13 of the Treaty establishing the EC provides for action to combat discrimination, *inter alia* because of disability.

Based on this article, Council Directive 2000/78/EC of 27 November 2000[14], has the explicit purpose (Article 1) "*...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*". In particular the Directive states that *"Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises* ***and equipment****..."*

Furthermore, a number of European Directives related to the Information Society have clauses referring to the inclusion of persons with disabilities and older people. These include the Electronic Communications Directives, in particular the Framework[15] and the Universal Service Directives[16], the Directive on Radio and Telecommunication Terminals (RTTE)[17] the Public Procurement Directive[18] and the Employment Equality Directive[19].

The Commission Action Plan[20] published in December 2003 on the follow-up of the European Year of People with Disabilities included as one of its four areas the access to, and use of, new technologies and describes actions undertaken to improved accessibility to the information society using instrument available at EU level.

Activities at EU level have an added value as several Member States are developing legislation, regulations, standards or guidelines to tackle these issues at national level. These actions are leading to similar but yet different eAccessibility requirements for products and services, thus creating a high risk for the European industry, i.e. being forced to operate in a fragmented market with the consequent loss of competitiveness and effectiveness.

The risk for consumers is even greater, particularly for people with disabilities and older persons: a fragmented market means costlier, more unfamiliar and incompatible products, more difficulty in accessing/moving information across borders, etc.

EU actions also take into account international experiences, like those in the USA and Canada, with which a dialogue has been initiated by the European Commission, particularly regarding the use of legislative provisions in the context of public procurement as a powerful leverage factor.

Consequently, basic conditions are set for initiatives to be taken at EU level – this was the view expressed by an overwhelming majority of the stakeholders during the public consultation process (84%).

---

13 EP Resolution on Sign Language - Resolution B4/ 0985/98.

14 Available at http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/2000_78_en.pdf

15 Directive 2002/21/EC.

16 Directive 2002/22/EC.

17 Directive 1999/5/EC.

18 Directives 2004/17/EC and 2004/18/EC.

19 Directive 2000/78/EC.

20 Equal opportunities for people with disabilities; A European Action Plan, COM(2003) 650 final.

5. ONGOING ACTIVITIES AT EU LEVEL

Several measures are already under way at EU level and will be strengthened and continued.

Accessibility requirements and standards

Standards are a strategic tool for industry and for the public sector as well as a key enabler for new market opportunities. Although the production and implementation of standards are voluntary, they are an important tool to support the implementation of policy actions. European Standards on eAccessibility would contribute to the proper functioning of the single European market and consequently promote the development of new markets, competitiveness and employment Thus, the Commission will continue to provide financial support to specific activities proposed by the European Standardisation Organisations (ESO) in the framework of the European Standardisation Action Plan or issuing mandates to the ESO[21].

Accessibility requirements specified by standards must meet the needs of industry, designers and providers of products and services to avoid the hampering of creativity or innovation. At the same time they must meet user needs, and the involvement of users in the development of standards is therefore essential: a balance should be found between industrial and public interest. Standards should allow easy enforcement and reference in legislation, regulation and other instruments that promote accessibility. Free availability of standards or availability at a reduced cost would make their uptake easier, especially by SMEs with limited resources to purchase them and for users to access them.

Whilst promoting interoperability, care should be taken that patented technologies without reasonable and non-discriminatory (RAND) licensing are not promoted as standard solutions.

Design for All (DFA)

The DFA methodology denotes the design of products and services to be accessible to as broad a range of users as possible[22]. DFA is now well established, although not yet widely practiced. It is therefore essential to continue raising awareness and promotion of DFA in Europe. To this end, the Commission has set up a network of centres of excellence known as EDEAN[23], which has over one hundred members.

DFA not only allows a **more thorough consideration of accessibility requirements when designing a product or service**, but also fosters important **economies by avoiding costly redesign or technical fixes** after their deployment.

The basic structure for a European DFA curriculum for engineers and designers has been developed and several pilot courses have been provided in Member States. Strengthening its use in post secondary and professional education is a way of ensuring a future accessible IS.[24]

---

21 This process is governed by Directive 98/34: http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_204/l_20419980721en00370048.pdf

22 There are three main strategies for DFA: 1) design for most users without modifications, 2) design for easy adaptation to different users (e.g. using adjustable interfaces), 3) design with a view to connect seamlessly to assistive devices.

23 Website EDEAN (European Design for All e-Accessibility Network), http://www.e-accessibility.org/

24 DFA curriculum report of IDCnet project.

The presence of an accessibility officer competent in DFA in relevant organisations, could be a way to professionalize eAccessibility.

Web accessibility

A 2001 Commission Communication [25] on accessibility to public websites was followed by Council and Parliament resolutions in 2002. As a result, Member States have committed themselves to make their public websites accessible according to international guidelines[26].

Through the eAccessibility Expert Group, the Commission with the Member States is monitoring developments, including new evaluation methods[27] and procedures, benchmarking, data collection and identification of best practices. **Web accessibility is an enabler** of accessible online services of public interest. To facilitate this process, it is important to encourage the development of authoring tools that encompass accessibility[28].

A need for certification schemes of accessibility has arisen from the fact that several Member States have binding legislation that mandates accessibility and the need to assess compliance. A European Committee for Normalization (CEN) Workshop[29] is currently exploring adequate solutions.

Benchmarking and monitoring

Several Member States are introducing benchmarking for accessibility and monitoring in their national legislation. At EU level, monitoring of web accessibility has been requested by Council and the European Parliament. The Parliament also requested monitoring subtitles and audio description for Digital TV.

To be able to further develop adequate European eAccessibility policies **it is essential to have European data comparable across Member States**. The Commission will build upon the ongoing European monitoring activities, taking account of the revised Lisbon approach.

The Commission maintains a dialogue with statistical bodies in order to develop and improve relevant indicators, in particular to mainstream accessibility questions in existing indicators.

Research

Research and technological development (RTD) is a fundamental element in the push towards an accessible IS. Almost 200 European RTD projects since 1991, representing approximately € 200 Million in EC co-financing[30] have already contributed to improving accessibility with increased knowledge of accessibility problems and required solutions.

Specific results demonstrated possible solutions such as accessible remote home services for older people (including alarms and emergency services). Solutions have been developed to

---

25 COM(2001) 529 final.

26 W3C/WAI/WCAG1.0 Web Content Accessibility Guidelines 1.0. Version 2 is under preparation and will address the evolution that has taken place in web technologies and facilitate testing compliance.

27 Web Accessibility Benchmarking (WAB) cluster.

28 W3C/WAI/ATAG Authorising Tools Accessibility Guidelines (ATAG).

29 http://www.cenorm.be/cenorm/businessdomains/businessdomains/isss/activity/ws-wac.asp

30 For examples of projects, see http://www.cordis.lu/ist/so/einclusion/home.html and http://www.cordis.lu/ist/directorate_f/einclusion/previous-research.htm

improve access to digital information by blind and partially sighted persons (text, graphics, 3D images, coded music, television programmes). Systems for motor impaired persons to facilitate mobility, manipulation and control have been demonstrated, as have services to improve communication possibilities of hearing impaired persons including sign language and lip movement generation. Other examples included computer environments to facilitate the integrated education of children with disabilities or employment of adults with disabilities and contributions to policy-making (eEurope i.e. Web Accessibility, Design for all).

Many of the results of Community projects have been further successfully elaborated in products in the market, or the knowledge developed has contributed to the improvement of the accessibility of ICT products and services.

As technologies continue to rapidly evolve, offering new technical solutions, it is essential to invest in research to reap the significant potential that they have for people with disabilities and older persons. The current proposal for the 7th Framework Programme integrates the **need to continue and, indeed, to expand RTD in eAccessibility** so as to further develop European assistive technology industry[31] and to make accessibility an everyday issue for mainstream industry.

6. INCREASING THE E-ACCESSIBILITY OF ICT PRODUCTS AND SERVICES IN EUROPE – THREE NEW APPROACHES

In addition to promoting the ongoing measures just listed, the Commission will foster the use of three approaches not yet widely used in Europe: (i) accessibility requirements in public procurement, (ii) accessibility certification, and (iii) better use of existing legislation.

Two years after the publication of this Communication, the Commission will evaluate the outcome of these actions. Following the principle of Better Regulation[32] the Commission will hold an exchange of views with the Member States and, subject to full impact assessment, may consider the possibility of taking additional measures, including legislation if deemed necessary.

1. Public procurement

The total public procurement in Europe is about 16% of the gross domestic product. Public authorities at all levels can require accessibility features in the goods and services they purchase. In fact, the European Public Procurement Directives specifically mention the possibility to include DFA and accessibility requirements in conditions for tender (technical specifications).

This implies a clear commitment to **an inclusion policy that makes the products and services available to more users, citizens and employees**. It encourages industrial companies to include accessibility as a built-in feature of their products and creates a larger market for accessible ICT. Such effects have been seen in the USA[33] where legislation mandates accessibility requirements to be included in federal procurement.

---

31 Access to Assistive Technology in the EU, a DG EMPL report, CE-V/5-03-003-EN-C

32 European Commission 'White Paper on Governance' COM(2001) 428 final.

33 Section 508 of the Rehabilitation Act as amended by the Workforce Investment Act of 1998.

In the online consultation over 90% of respondents favoured the principle of public agencies requiring all ICT products and services they buy to be accessible. Some Member States already include accessibility requirements in their public procurement. Shared accessibility requirements at EU level have the potential to reduce market fragmentation and to foster interoperability.

There is a strong need for consistency of accessibility requirements in public procurement in Europe. To this effect, the Commission is preparing a mandate to the European standardisation organisations to develop European accessibility requirements for public procurement of products and services in the ICT domain. The mandate is currently submitted to the Member States for consultation. It is foreseen to be issued to the European standardisation organisations by the end of 2005.

The Commission will encourage the debate on this subject with the Member States in the framework of the eAccessibility Expert Group[34]. It will continue to collect experiences from Europe and to encourage an international dialogue in particular with the US through the Transatlantic Economic Partnership (TEP) on harmonisation of eAccessibility requirements for public procurement.

2. Certification

It is not always obvious when buying ICT products what requirements they fulfil. This is particularly important when buying accessible ICT. Some standards exist or are under development defining how products and services can be made accessible. However, at present there is no reliable means to assess the conformity of products with those accessibility standards. Adequate certification schemes for accessibility of products, organisational processes and professionals (based on the European Key Mark[35] and on European standards) would provide guidance to customers and clients who want accessible products and services and might give manufacturers and service providers due recognition for their efforts. They would also facilitate the monitoring of compliance with regulations demanding accessibility.

In its January 2003 Resolution on eAccessibility , the Council called for an "eAccessibility mark" for goods and services. The 2002 Ministerial Declaration on eInclusion reflected that *"a European web accessibility label that certifies compliance with W3C WAI[36] guidelines could be considered in order to avoid market fragmentation".*

The Commission will study together with the key stakeholders **possibilities for the development, introduction and implementation of certification schemes for accessible products and services**, including the definition of criteria testing, and evaluation methods. The possibility of self-declaration or third-party certification will also be investigated and the different options will be compared for their effectiveness[37]. The Commission will launch a study on this matter in the last quarter of 2005.[38]

---

34 The eAccessibility Experts Group coordinates experts from the Member States who support the implementation of the eEurope Action Plan.

35 http://www.cenorm.be/conf_assess/keymark/keymarktext.htm

36 World Wide Web Consortium (W3C) Web Accessibility Initiative (WAI).

37 The online consultation showed a strong support (over 72%) for the certification and labelling of eAccessible ICT products and services, with significant differences among target groups only 61.4% agreement among *Manufacturers, providers or sellers of eAccessibility products & services).* Additionally, among those supporting product certification and labelling, the groups "*Private*

3. Better use of existing Legislation

Several Directives have provisions that can be used to enforce eAccessibility (such as the Equal Treatment in Employment Directive[39], the Directive on Radio and Telecommunication Terminals and the Public Procurement Directives). It is important to cooperate with the Member States, to develop a practical way of using these Directives to address eAccessibility.

In particular, implementing the Inclusive Communications Group (INCOM)[40] suggestions would resolve some existing European challenges, e.g. to ensure access by users with disabilities to emergency services using the single European number 112, to have harmonised frequencies in Europe for assistive wireless solutions, to ensure real time text and sign communication across Member States, and to facilitate the purchasing of accessible goods by public authorities. Possible difficulties in putting existing legislation into practice should be addressed.

The Commission, in its audiovisual policy dialogue, will encourage common or interoperable solutions in the field, for example, of improved access to digital TV programmes. Such common solutions will allow the exploitation of economies of scale.

The "eAccessibility potential" of existing European legislation needs to be fully exploited. The Commission will launch a study[41] in 2005 to identify best practices and establish a dialogue with Member States and key stakeholders through the relevant groups in charge of the implementation of the Directives.

7. CONCLUSIONS AND FOLLOW-UP

This Communication and the results of the online consultation process show and endorse the European Commission's determination to address eAccessibility issues and find solutions that (i) convey to Member States the urgent need to work together towards a consistent approach to e-accessibility; (ii) encourage industry to develop accessible solutions for ICT products and services; (iii) demonstrate to users with disabilities the active commitment to improve accessibility in the Information Society.

During the next two years (2005-2007), the Commission will continue to raise awareness, promote the use of the proposed instruments, gather evidence and continue stakeholder consultation in order to take informed decisions in the eAccessibility domain.

To this effect, the Commission plans a study to begin in the last quarter of 2005 on *"Measuring progress of eAccessibility in Europe"* in order to identify and evaluate policy options aiming at improving eAccessibility in Europe. The initial results of the study will be available in early 2007.

---

individuals with a disability" and "*Public Agencies*" clearly favouring mandatory schemes, while "*Manufacturers, providers or sellers of eAccessibility products & services*" favour voluntary procedures, with the remaining groups standing somewhere in between.

38 See chapter Follow-up and conclusions.

39 Council Directive 2000/78/EC of 27 November 2000 prohibits discrimination of persons with disabilities *inter alia* at work and encompasses reasonable accommodation including ICT.

40 Formed in 2003 and made up of representatives of Member States, Telecoms operators, user organisations and standardisation bodies.

41 See Follow–up and conclusions.

A follow-up that focuses on the eAccessibility situation will be made two years after the publication of this Communication. It will include an evaluation of the outcome of the approaches proposed here, following the principle of Better Regulation[42] and, subject to full impact assessment, the Commission may consider additional measures, including new legislation if deemed necessary. This eAccessibility work will in turn contribute to the already announced 2008 European Initiative on eInclusion[43].

[42] European Commission 'White Paper on Governance' COM(2001) 428 final.

[43] COM(2005) 229 "i2010 – A European Information Society for growth and employment".

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 Vorschlaege. Die Instrumente zur Politikumsetzung sind mit einem "+" gekennzeichnet.

List of secondary legislation relevant to "disability"

1) **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**

2) **Directive 2001/85/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 1999/5/EC (on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity)**

4) **Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data**

5) **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 312, 7.9.1995, p.1)**

6) **Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment**

7) **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.1-9**

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 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)**

10) **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° 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 5 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° 1553/2005 of the EP and Council of 7 September 2005 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 5 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) 577/98 of 9 March on the organisation of the Labour Force Sample Survey in the Community (LFS):**

+ **Commission Regulation (EC) N° 1571/98 of 20 July 1998 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community (OJ L 205, 22.7.98, p.40)**

+ Commission Regulation (EC) N° 1924/1999 of 8 September 1999 implementing Council Regulation (EC) 577/98 as regards the 2000 to 2002 programme of ad hoc modules to the LFS

+ **Commission Regulation (EC) N° 1566/2001 of 12 July 2001 implementing Council Regulation (EC) N° 577/98 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° 1575/2000 of 19 July 2000 implementing Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community concerning the codification to be used for data transmission from 2001 onwards (OJ L 181, 20.7.2000, p.16)**

+ Commission Regulation (EC) N° 1626/2000 of 24 July 2000 implementing Council Regulation (EC) N° 577/98 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° 577/98 on the organisation of a labour force sample survey in the Community.

+ Regulation (EC) N° 2257/2003 of the EP and of the Council of 25 November 2003 amending Council Regulation (EC) N° 577/98 on the organisation of a labour force sample survey in the Community to adapt the list of survey characteristics.

+ **Commission Regulation (EC) N° 430/2005 of 15 March 2005 implementing Council Regulation (EC) N° 577/98 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 (OJ L 71, 17.3.2006, p.36).**

12) **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)**

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 – COM(2007) 46 final**

14) **Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax**

15) **Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty**

16) **Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes" (as amended by "Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes")**

17) **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 (recast)**

18) **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**

19) **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**

20) **Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medical product s for human use, as amended by Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 (OJ L 136, 30.4.2004, p.34)**

21) **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 ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22)**

22) **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. 18-21)**

23) **Directive 96/48/EC on the interoperability of the trans-European high-speed rail system (O J L 235, 17.09.1996, p. 6-24) as amended by Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 (O J 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 J L 110, 20.04.2001, p. 1-27) -as amended by Directive 2004/50/EC of the European Parliament and of the Council of 29 April 2004 (O J L 164, 30.4.2004, p. 114-163)**

25) **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) (Text with EEA relevance)(O J L 263, 9.10.2007, p 1)**

26) **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 (Text with EEA relevance) (OJ L 332, 18.12.2007, p. 27)**

27) **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**

28) **Decision 1720/2006/EC of the European Parliament and of the Council of 15 November 2007 establishing an action programme in the field of lifelong learning**

29) **Council Regulation (EC) No 1698/2005 of 20 September 2005 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 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive").**

31) **Council Decision 2005/600/EC of 12 July 2006 on guidelines for the employment policies of the Member States**

+ Council Decision 2006/544/EC of 18 July 2006 on guidelines for the employment policies of the Member States

32) **Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December2006on 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(2005)625 final.**

36) **Directive 97/67/EC of the European Parliament and of the Council of 15 December on common rules for the development of the internal market of Community postal services and the improvement of quality of services**(OJ L15 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 05.07.2002, page 21).

37) **Decision No 1982/2006/EC of the European Parliament and of the Council of 18 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 2119/98 of the European Parliament and of the Council of 24 September 1998 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**

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

COURT OF JUSTICE OF THE EUROPEAN UNION

The following replaces the information note published in OJ 2009 C 297, p. 1, as a consequence of the addition of a new paragraph 25 and the amendment of paragraph 40.

INFORMATION NOTE

on references from national courts for a preliminary ruling

(2011/C 160/01)

I – **General**

1. The preliminary ruling system is a fundamental mechanism of European Union law aimed at enabling national courts to ensure uniform interpretation and application of that law in all the Member States.

2. The Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of European Union law and on the validity of acts of the institutions, bodies, offices or agencies of the Union. That general jurisdiction is conferred on it by Article 19(3)(b) of the Treaty on European Union (OJEU 2008 C 115, p. 13) ('the TEU') and Article 267 of the Treaty on the Functioning of the European Union (OJEU 2008 C 115, p. 47) ('the TFEU').

3. Article 256(3) TFEU provides that the General Court is to have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute. Since no provisions have been introduced into the Statute in that regard, the Court of Justice alone has jurisdiction to give preliminary rulings.

4. While Article 267 TFEU confers on the Court of Justice a general jurisdiction, a number of provisions exist which lay down exceptions to or restrictions on that jurisdiction. This is true in particular of Articles 275 and 276 TFEU and Article 10 of Protocol (No 36) on Transitional Provisions of the Treaty of Lisbon (OJEU 2008 C 115, p. 322).

5. The preliminary ruling procedure being based on cooperation between the Court of Justice and national courts, it may be helpful, in order to ensure that that cooperation is effective, to provide the national courts with the following information.

6. This practical information, which is in no way binding, is intended to provide guidance to national courts as to whether it is appropriate to make a reference for a preliminary ruling and, should they proceed, to help them formulate and submit questions to the Court.

The role of the Court of Justice in the preliminary ruling procedure

7. Under the preliminary ruling procedure, the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law.

8. In ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute, but it is for the referring court to draw the appropriate conclusions from that reply, if necessary by disapplying the rule of national law in question.

The decision to submit a question to the Court

The originator of the question

9. Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule refer a question to the Court of Justice for a preliminary ruling. [1] Status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law.

10. It is for the national court alone to decide whether to refer a question to the Court of Justice for a preliminary ruling, whether or not the parties to the main proceedings have requested it to do so.

References on interpretation

11. Any court or tribunal **may** refer a question to the Court of Justice on the interpretation of a rule of European Union law if it considers it necessary to do so in order to resolve a dispute brought before it.

12. However, courts or tribunals against whose decisions there is no judicial remedy under national law **must, as a rule**, refer such a question to the Court, unless the Court has already ruled on the point (and there is no new context that raises any serious doubt as to whether that case-law may be applied), or unless the correct interpretation of the rule of law in question is obvious.

13. Thus, a court or tribunal against whose decisions there is a judicial remedy may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful, at an appropriate stage of the proceedings, when there is a new question of interpretation of general interest for the uniform application of European Union law in all the Member States, or where the existing case-law does not appear to be applicable to a new set of facts.

14. It is for the national court to explain why the interpretation sought is necessary to enable it to give judgment.

References on determination of validity

15. Although national courts may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid.

16. All national courts **must** therefore refer a question to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that that act may be invalid.

---

[1] Article 10(1) to (3) of Protocol No 36 provides that the powers of the Court of Justice in relation to acts adopted before the entry into force of the Treaty of Lisbon (OJ 2007 C 306, p. 1) under Title VI of the TEU, in the field of police cooperation and judicial cooperation in criminal matters, and which have not since been amended, are, however, to remain the same for a maximum period of five years from the date of entry into force of the Treaty of Lisbon (1 December 2009). During that period, such acts may, therefore, form the subject-matter of a reference for a preliminary ruling only where the order for reference is made by a court of a Member State which has accepted the jurisdiction of the Court of Justice, it being a matter for each State to determine whether the right to refer a question to the Court is to be available to all of its national courts or is to be reserved to the courts of last instance.

17. However, if a national court has serious doubts about the validity of an act of an institution, body, office or agency of the Union on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers the act to be invalid.

The stage at which to submit a question for a preliminary ruling

18. A national court or tribunal may refer a question to the Court for a preliminary ruling as soon as it finds that a ruling on the point or points of interpretation or validity is necessary to enable it to give judgment; it is the national court which is in the best position to decide at what stage of the proceedings such a question should be referred.

19. It is, however, desirable that a decision to seek a preliminary ruling should be taken when the national proceedings have reached a stage at which the national court is able to define the factual and legal context of the question, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that European Union law applies to the main proceedings. It may also be in the interests of justice to refer a question for a preliminary ruling only after both sides have been heard.

The form of the reference for a preliminary ruling

20. The decision by which a national court or tribunal refers a question to the Court of Justice for a preliminary ruling may be in any form allowed by national law as regards procedural steps. It must however be borne in mind that it is that document which serves as the basis of the proceedings before the Court and that it must therefore contain such information as will enable the latter to give a reply which is of assistance to the national court. Moreover, it is only the actual reference for a preliminary ruling which is notified to the interested persons entitled to submit observations to the Court, in particular the Member States and the institutions, and which is translated.

21. Owing to the need to translate the reference, it should be drafted simply, clearly and precisely, avoiding superfluous detail.

22. A maximum of about 10 pages is often sufficient to set out in a proper manner the context of a reference for a preliminary ruling. The order for reference must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings. In particular, the order for reference must:

— include a brief account of the subject-matter of the dispute and the relevant findings of fact, or, at least, set out the factual situation on which the question referred is based;

— set out the tenor of any applicable national provisions and identify, where necessary, the relevant national case-law, giving in each case precise references (for example, a page of an official journal or specific law report, with any internet reference);

— identify the European Union law provisions relevant to the case as accurately as possible;

— explain the reasons which prompted the national court to raise the question of the interpretation or validity of the European Union law provisions, and the relationship between those provisions and the national provisions applicable to the main proceedings;

— include, if need be, a summary of the main relevant arguments of the parties to the main proceedings.

In order to make it easier to read and refer to the document, it is helpful if the different points or paragraphs of the order for reference are numbered.

23. Finally, the referring court may, if it considers itself able, briefly state its view on the answer to be given to the questions referred for a preliminary ruling.

24. The question or questions themselves should appear in a separate and clearly identified section of the order for reference, generally at the beginning or the end. It must be possible to understand them without referring to the statement of the grounds for the reference, which will however provide the necessary background for a proper assessment.

25. Under the preliminary ruling procedure, the Court will, as a rule, use the information contained in the order for reference, including nominative or personal data. It is therefore for the referring court itself, if it considers it necessary, to render anonymous, in the order for reference, one or more persons concerned by the dispute in the main proceedings.

The effects of the reference for a preliminary ruling on the national proceedings

26. A reference for a preliminary ruling calls for the national proceedings to be stayed until the Court of Justice has given its ruling.

27. However, the national court may still order protective measures, particularly in connection with a reference on determination of validity (see point 17 above).

Costs and legal aid

28. Preliminary ruling proceedings before the Court of Justice are free of charge and the Court does not rule on the costs of the parties to the main proceedings; it is for the national court to rule on those costs.

29. If a party has insufficient means and where it is possible under national rules, the national court may grant that party legal aid to cover the costs, including those of lawyers' fees, which it incurs before the Court. The Court itself may also grant legal aid where the party in question is not already in receipt of legal aid under national rules or to the extent to which that aid does not cover, or covers only partly, costs incurred before the Court.

Communication between the national court and the Court of Justice

30. The order for reference and the relevant documents (including, where applicable, the case file or a copy of the case file) are to be sent by the national court directly to the Court of Justice, by registered post (addressed to the Registry of the Court of Justice, L-2925 Luxembourg, telephone + 352-4303-1).

31. The Court Registry will stay in contact with the national court until a ruling is given, and will send it copies of the procedural documents.

32. The Court of Justice will send its ruling to the national court. It would welcome information from the national court on the action taken upon its ruling in the national proceedings and, where appropriate, a copy of the national court's final decision.

II – **The Urgent preliminary ruling procedure (PPU)**

33. This part of the note provides practical information on the urgent preliminary ruling procedure applicable to references relating to the area of freedom, security and justice. The procedure is governed by Article 23a of Protocol (No 3) on the Statute of the Court of Justice of the European Union (OJEU 2008 C 115, p. 210) and Article 104b of the Rules of Procedure of the Court of Justice. National courts may request that this procedure be applied or request the application of the accelerated procedure under the conditions laid down in Article 23a of the Protocol and Article 104a of the Rules of Procedure.

Conditions for the application of the urgent preliminary ruling procedure

34. The urgent preliminary ruling procedure is applicable only in the areas covered by Title V of Part Three of the TFEU, which relates to the area of freedom, security and justice.

35. The Court of Justice decides whether this procedure is to be applied. Such a decision is generally taken only on a reasoned request from the referring court. Exceptionally, the Court may decide of its own motion to deal with a reference under the urgent preliminary ruling procedure, where that appears to be required.

36. The urgent preliminary ruling procedure simplifies the various stages of the proceedings before the Court, but its application entails significant constraints for the Court and for the parties and other interested persons participating in the procedure, particularly the Member States.

37. It should therefore be requested only where it is absolutely necessary for the Court to give its ruling on the reference as quickly as possible. Although it is not possible to provide an exhaustive list of such situations, particularly because of the varied and evolving nature of the rules of European Union law governing the area of freedom, security and justice, a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the following situations: in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation or, in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling.

The request for application of the urgent preliminary ruling procedure

38. To enable the Court to decide quickly whether the urgent preliminary ruling procedure should be applied, the request must set out the matters of fact and law which establish the urgency and, in particular, the risks involved in following the normal preliminary ruling procedure.

39. In so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the question(s) referred. Such a statement makes it easier for the parties and other interested persons participating in the procedure to define their positions and facilitates the Court's decision, thereby contributing to the rapidity of the procedure.

40. The request for the urgent preliminary ruling procedure must be submitted in an unambiguous form that enables the Court Registry to establish immediately that the file must be dealt with in a particular way. Accordingly, the referring court is asked to couple its request with a mention of Article 104b of the Rules of Procedure and to include that mention in a clearly identifiable place in its reference (for example at the head of the page or in a separate judicial document). Where appropriate, a covering letter from the referring court can usefully refer to that request.

41. As regards the order for reference itself, it is particularly important that it should be succinct where the matter is urgent, as this will help to ensure the rapidity of the procedure.

Communication between the Court of Justice, the national court and the parties

42. As regards communication with the national court or tribunal and the parties before it, national courts or tribunals which submit a request for an urgent preliminary ruling procedure are requested to state the e-mail address or any fax number which may be used by the Court of Justice, together with the e-mail addresses or any fax numbers of the representatives of the parties to the proceedings.

43. A copy of the signed order for reference together with a request for the urgent preliminary ruling procedure can initially be sent to the Court by e-mail (ECJ-Registry@curia.europa.eu) or by fax (+352 43 37 66). Processing of the reference and of the request can then begin upon receipt of the e-mailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.

Neutral Citation 2012 [IEHC] 491

THE HIGH COURT
[2011 No. 9548P]

BETWEEN

M.X. [APUM]
PLAINTIFF
AND
HEALTH SERVICE EXECUTIVE

DEFENDANT
AND
BY ORDER

THE ATTORNEY GENERAL

NOTICE PARTY
AND
IRISH HUMAN RIGHTS COMMISSION

AMICUS CURIAE

JUDGMENT of Mr. Justice John MacMenamin delivered on Friday, the 23rd day of November, 2012

1. The unfortunate factual background to the proceedings to date has already been set out in a previous judgment in this matter, namely, HSE v X. [APUM] [2011] IEHC 326. Since that time, new proceedings have been initiated on behalf of the plaintiff, M.X. (hereinafter referred to as "X"). On her behalf, her counsel seeks to challenge a number of aspects of the procedure which have been adopted in her care regime. It is now claimed that the medical decisions, made in the context of her incapacity by reason of treatment-resistant paranoid schizophrenia, fail to have regard to her equal rights before the law as a citizen; and that she should be entitled to have the decision that she lacks capacity to decide whether or not to receive treatment subject to an independent review, ideally by an independent tribunal or court. While not fully alluded to in the pleadings, it is claimed that she is entitled to have the medical options concerning her treatment made on an "assisted decision-making" basis, which would give proper weight to her own wishes as to that treatment. It is contended that the plaintiff is being treated under s. 57 of the Mental Health Act 2001 ("the Act"), and that this provision is repugnant to the Constitution, incompatible with the European Convention on Human Rights ("ECHR"), and also fails to have due regard for the provisions of the United Nations

Convention on the Rights of Persons with Disabilities ("UNCRPD"). The Attorney General and the Irish Human Rights Commission have been joined as notice parties to the proceedings. As this judgment outlines, the law in this area is evolving, and this case must be decided on its very unusual, if not unique, facts. It is essential to bear in mind the nature of the treatment being administered against the plaintiff's will. It involves the regular administration of the drug Clozapine, together with the necessary involuntary abstraction by a syringe of blood samples from the plaintiff's veins. This is itself an invasion of the plaintiff's bodily integrity – a constitutionally protected right.

Issues to be considered

2. This judgment, first, considers how the plaintiff's assessment was carried out in the context of the Act of 2001, and in particular the precise provisions of that Statute which are applicable.

3. Second, in cases like the present, where challenges are brought to the constitutionality of legislation, and declarations as to the incompatibility of legislation with the European Convention on Human Rights are also sought, the sequencing approach which a court should follow has been set out in a number of decisions of the Supreme Court. The guiding principle regarding determinations of constitutionality was set out by Henchy J. in The State (Woods) v. Attorney General [1969] I.R. 385 at p. 400 where he stated "… that a court should not enter upon a question of constitutionality unless it is necessary for the determination of the case before it". Similarly, in Murphy v. Roche [1987] I.R. 106, Finlay C.J. stated at p. 110:-

"… where the issues between the parties can be determined and finally disposed of by the resolution of an issue of law other than constitutional law, the Court should proceed to determine that issue first and, if it determines the case, should refrain from expressing any view on the constitutional issue that may have been raised."

Therefore, a court must initially seek to resolve an issue by a means other than through constitutional reference. Here, counsel for the plaintiff contends, in a novel argument, that the UNCRPD is directly applicable within this jurisdiction, by virtue of the fact that the European Union is a signatory to that Convention. As will be explained later, the Court is not of the view that this Convention has direct effect in this jurisdiction at this time. That is not to say however that the provisions of that Convention are entirely immaterial, however.

4. Therefore, it will then be necessary to consider the other aspects of the plaintiff's claim, namely that the impugned provisions are unconstitutional, and/or incompatible with the ECHR. In accordance with the judgment in Carmody v. Minister for Justice [2010] 1 I.R. 635, this judgment will first assess questions of constitutionality before turning to consider the compatibility of the legislation with the ECHR. At p. 650 of Carmody, Murray C.J. pointed out:-

"… when a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility of such Act or some of its provisions with the State's obligations under the Convention, the issue of constitutionality must first be decided.

If a court concludes that the statutory provisions in issue are incompatible with the Constitution and such a finding will resolve the issues between the parties as regards all the statutory provisions impugned, then that is the remedy which the Constitution envisages the party should have. Any such declaration means that the provisions in question are invalid and do not have the force of law. The question of a declaration pursuant to s. 5 concerning such provisions cannot then arise. If, in such a case, a court decides that the statutory provisions impugned are not inconsistent with the Constitution then it is open to the court to consider the application for a declaration pursuant to s. 5 if the provisions of the section including the absence of any other legal remedy, are otherwise met."

5. As will be explained, the Court does not conclude that any of the statutory provisions impugned are inconsistent with the Constitution. The conclusion is, rather, that procedures which have been adopted in purported compliance with s. 60 of the Act of 2001 are to be applied in a constitutional manner, which process, in this specific category of cases, involves a right to independent review and assisted (rather than substituted) decision making. The incursion into the plaintiff's constitutional rights is very significant. It involves medical treatment against her will. The conclusion is that it is only in this manner can the rights of the plaintiff under the Constitution be vindicated "as far as practicable" (Article 40.3 of the Constitution). I do not think such vindication can take place unless the steps outlined here are an integral part of the process and, allow for remedies commensurate with the protection of rights. To decide whether the plaintiff is entitled on a mandatory basis to an independent tribunal or court to determine the issues as to her treatment, and in light of the connections between rights identified in the Charter of Fundamental Rights in European Union jurisprudence and the ECHR, it will then be necessary to outline some current jurisprudence of the Strasbourg Court. The judgment follows the following sequence therefore. Having outlined the statute law and the evidence, it asks first can the issues be decided and finally disposed of by an issue of law other than constitutional law (section 1) (see The State (Woods) v. Attorney General and Murphy v. Roche). This question is answered in the negative. Section 2 addresses the constitutional issues (see Carmody). Section 3 addresses whether the plaintiff is entitled to a declaration regarding an independent tribunal or court under s. 5 of the European Convention of Human Rights Act 2003, in the absence of any other legal remedy.

6. Finally, the judgment addresses the issue of the plaintiff's locus standi (section 4). While parts of this judgment may overlap with the earlier judgment relating to the same plaintiff, for completeness it is necessary to outline certain of the statutory provisions in detail.

The provisions of the Mental Health Act 2001

7. Section 2 of the Act provides:-

"2(1) In this Act, save where the context otherwise requires— …
'treatment', in relation to a patient, includes the administration of physical, psychological and other remedies relating to the care and rehabilitation of a

patient under medical supervision, intended for the purposes of ameliorating a mental disorder;"

…

Section 4 provides:-

"4(1) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person), the best interests of the person shall be the principal consideration with due regard being given to the interests of other persons who may be at risk of serious harm if the decision is not made.

(2) Where it is proposed to make a recommendation or an admission order in respect of a person, or to administer treatment to a person, under this Act, the person shall, so far as is reasonably practicable, be notified of the proposal and be entitled to make representations in relation to it and before deciding the matter due consideration shall be given to any representations duly made under this subsection.

(3) In making a decision under this Act concerning the care or treatment of a person (including a decision to make an admission order in relation to a person) due regard shall be given to the need to respect the right of the person to dignity, bodily integrity, privacy and autonomy."

Part 4 of the Act deals with the question of consent to treatment. For present purposes ss. 56-60 must be read together. They provide as follows:-

"56. In this Part 'consent', in relation to a patient, means consent obtained freely without threats or inducements, where—
(a) the consultant psychiatrist responsible for the care and treatment of the patient is satisfied that the patient is capable of understanding the nature, purpose and likely effects of the proposed treatment; and

(b) the consultant psychiatrist has given the patient adequate information, in a form and language that the patient can understand, on the nature, purpose and likely effects of the proposed treatment."

Section 57 of the Act provides:

"57(1) The consent of a patient shall be required for treatment except where, in the opinion of the consultant psychiatrist responsible for the care and treatment of the patient, the treatment is necessary to safeguard the life of the patient, to restore his or her health, to alleviate his or her condition, or to relieve his or her suffering, and by reason of his or her mental disorder the patient concerned is incapable of giving such consent.

(2) This section shall not apply to the treatment specified in sections 58, 59 or 60."

8. It is important to point out, therefore, that s. 57 does not apply in relation to forms of treatment specified in s. 60. The latter section deals with a position where it is necessary to administer medicine for a continuous period of three months. The evidence now clearly establishes that the treatment regime adopted in the case of the plaintiff is that identified in s. 60, and, contrary to what is asserted on behalf of the plaintiff, not under s. 57 of the Act. Sections 58 and 59 of the Act are not relevant. However, s. 60 provides:-
"60. Where medicine has been administered to a patient for the purposes of ameliorating his or her mental disorder for a continuous period of 3 months, the administration of that medicine shall not be continued unless either—
(a) the patient gives his or her consent in writing to the continued administration of that medicine, or

(b) where the patient is unable or unwilling to give such consent—

(i) the continued administration of that medicine is approved by the consultant psychiatrist responsible for the care and treatment of the patient, and
(ii) the continued administration of that medicine is authorised (in a form specified by the Commission) by another consultant psychiatrist following referral of the matter to him or her by the first-mentioned psychiatrist,

and the consent, or as the case may be, approval and authorisation shall be valid for a period of 3 months and thereafter for periods of 3 months, if, in respect of each period, the like consent or, as the case may be, approval and authorisation is obtained."
9. During the four day hearing, a number of witnesses testified regarding the treatment regime. I would emphasise that all the evidence indicates that the greatest care has been taken by each of the practitioners involved in the plaintiff's care in a unique and very difficult situation.
The evidence on capacity

Dr. Paul O'Connell
10. Dr. Paul O'Connell is employed as Consultant Forensic Psychiatrist in the Central Mental Hospital. Earlier in the case, he set out the nature of his first involvement in the provision of care to the plaintiff. He is the primary treating psychiatrist responsible for her care. He gave a detailed account of the course of her treatment, along with her medical and forensic history dating from 2007.

11. The plaintiff's diagnosis is one of treatment resistant paranoid schizophrenia, the salient symptoms of which include auditory hallucinations, which take the form of mocking voices, which are at different times attributed to members of the staff or laughter of small children. Associated with these hallucinations, the plaintiff has reported the delusional belief that she has been

controlled by the voices or, more often, by members of staff. When acutely psychotic, the plaintiff admits to urges to assault or kill members of staff. At times, she exhibits various behaviours including agitated pacing, facial expression of excitement and fixed staring at those she believes are mocking her. At such times she has made efforts to, and has assaulted, members of staff. As was pointed out earlier, prior to being placed in the Central Mental Hospital, she harboured urges to harm, or even to kill small children.

12. In the course of the hearing of these proceedings, Dr. O'Connell gave further testimony on the question of capacity. He was satisfied, as the treating consultant that the plaintiff was not capable of fully understanding the nature, purpose and likely risks of the proposed treatment. He concluded the plaintiff's understanding was made up of different components. His clinical view has remained consistently, that the plaintiff could not form a balanced judgment in relation to the treatment being afforded to her. She saw both the staff and himself as a threat to her. She was delusional, and while she would not admit to hallucinating, he was of the strong clinical conclusion that she was hallucinating. He was also of the firm clinical opinion that the plaintiff lacked capacity because of her mental disorder and therefore was, to quote him, "unable to consent to, or refuse, either the administration of anti-psychotic medication, or the ancillary and necessary blood tests associated with that treatment course".

13. The witness went on to conclude that the plaintiff's illness has the effect of impairing her reasoning, emotional regulation, and judgment. Although she is able to register and retain information with respect to her care and treatment, she remains unable to exercise her judgment in coming to a balanced decision about that treatment, insofar as she lacks insight and fails to appreciate the nature of her mental illness and the need to receive treatment. She fails to appreciate that her illness, if untreated, would represent a serious and immediate risk to herself and others, and would inevitably deteriorate, exacerbating that risk.

Professor Harry Kennedy

14. Professor Harry Kennedy, Consultant Forensic Psychiatrist and Executive Clinical Director of the National Mental Health Service at the Central Mental Hospital testified that his function was as leader of the team of psychiatrists working in the hospital. He described his responsibility for clinical governance and for the planning of modernised services. He testified that when ill, the plaintiff has homicidal preoccupations which focus particularly on children, or on the children of those who come into contact with her. He said that the plaintiff loses insight, and her capacity to give or withhold consent to treatment, is at its lowest. He, too, testified that when the plaintiff became agitated, she attacked doctors and nurses causing significant injuries. On such occasions, it was necessary that she be secluded for her own safety, and that of others. At times, this seclusion has had to be for prolonged periods which have been monitored by the Mental Health Commission Inspectorate of Mental Health Services.

15. Professor Kennedy pointed out, importantly, that capacity can fluctuate, and that many patients in the hospital experience differing levels of capacity at different times. He considered that it would be profoundly wrong to assume that all patients in the hospital lack capacity. Where a patient has capacity, they are encouraged to take their full role in the therapeutic decision making regarding their care and treatment. Professor Kennedy has a particular professional interest in this issue. He has led a research team that has published learned articles on the assessment of mental capacity to consent to treatment, and that subject forms part of his teaching responsibilities. He too, was of the strong professional opinion that the plaintiff lacked capacity to give or withhold consent to treatment. She does not understand the information about her mental health and the treatment options, lacks the ability to reason about these options, and is unable to compare such choices. She is unable to reason about the possible or potential side effects or consequences of the treatment. He testified that she is unable to appreciate the importance of information about mental health and mental illness for herself. She does not believe information because of her paranoia, her delusions, and her impaired capacity to reflect on her situation.

16. Professor Kennedy highlighted a number of the procedural safeguards in place in the Central Mental Hospital. All patients in the hospital are subjected to regular multi-disciplinary review. A treating doctor in a situation such as this does not act alone. He pointed out that there is in being, a process of obtaining second opinions from a consultant psychiatrist who is not attached to the hospital. This is not unique to this case but is rather a consistent feature of treatment in the hospital since the commencement of the Act of 2001.

17. The witness took issue with a typification of the treatment regime as being one "imposed against the plaintiff's will". He stated that, rather, treatment is provided in the absence of her capacity to make decisions, and subject always to independent review and safeguards. Second, he testified that it was the plaintiff's illness, and not the views of her treating doctors, that deprived her of the ability to consent to, or refuse treatment. Every effort is made to engage a patient in the decision-making process. If, and when, a patient such as the plaintiff regained sufficient mental capacity, she will then be again empowered to make decisions regarding her treatment including the then regained ability to give or withhold consent. Professor Kennedy also expressed the view that the UNCRPD, to which reference was made earlier, did not contain any explicit condemnation of "paternalism", which he summarised as being an ethical principle of protecting the best interests of vulnerable persons and which, he claimed, was not in conflict with a rights based respect for disabled people as persons. This part of the testimony is particularly relevant, and I will return to it later.

18. The witness took issue with a contention that disability was seen through medical criteria as a deviation from the norm which he characterised as a polemic "straw man". He distinguished between "disability" (not an inherently

medical categorisation being a qualitative term defining status in society before the law), and, on the other hand, medical measurements of impairment due to disorder which are quantitative. The former "qualitative" approach is inherently more reductive, and hence lends itself to ease of definition and legal convenience; as opposed to the latter quantitative medical approach which recognises degrees of impaired and restored mental capacity. He entirely rejected any suggestion that the plaintiff had been subjected to inhuman or degrading treatment. In fairness, it must be pointed out that any such suggestion was withdrawn by the plaintiff's legal advisers. Professor Kennedy's view was that it was the plaintiff's own lack of capacity which constituted an infringement on her rights and rendered her unable to exercise those rights. He described it as unhelpful and damaging to therapeutic relationships to imply that a "finding" by psychiatrists, rather than the absence of capacity of itself, was what was important.

Dr. Ian Bownes

19. It is important here to re-emphasise that the defendant, (the HSE), assisted in the retention of an independent psychiatrist to testify on behalf of the plaintiff. Dr. Ian Bownes is a Consultant Forensic Psychiatrist with the South Eastern Health and Social Trust in Northern Ireland. He is a Forensic Psychiatrist with the Northern Ireland Prison Service. His report was furnished to the Court and admitted in evidence. He examined the plaintiff on behalf of her solicitors, and presented a report to the court with his assessment of her condition. That assessment is largely, if not entirely corroborative of the views of Dr. O'Connell and Professor Kennedy.

Dr. Brendan Kelly's evidence – the "Form 17" procedure

20. Dr. Brendan Kelly is a Consultant Psychiatrist at the Mater Misericordiae University Hospital and Senior Lecturer in Psychiatry at University College, Dublin. He was retained by the HSE on a national panel of consultants who are in a position to carry out assessments for the purposes of s. 60 of the Act of 2001. He explained that the function of the independent psychiatrist, carrying out a s. 60 assessment, is to exercise a fully independent clinical judgment in appraising the situation. He noted that, in the past, he had had occasion to disagree with responsible consultant psychiatrists, and had no difficulty in so doing. On a number of occasions in this case, Dr. Kelly completed the Mental Health Commission forms recording his decisions pursuant to s. 60 authorising the continued administration of medicine without consent to the plaintiff. These forms are referred to as "Form 17".

21. In evidence, Dr. Kelly described the number of occasions when he carried out examinations in pursuance of the Form 17 procedure. He described the structure of such an examination as follows. First, the clinician considers whether a patient suffers from a mental disorder as understood in the 2001 Act. Second, that clinician considers the question of capacity and insight. This includes a consideration of whether the patient has any understanding of his or her illness, (including whether they accept that they are in fact ill), the proposed treatment, and the purposes of that treatment. Third, if the patient has capacity or is found to so have, the question of whether the patient is willing to undergo the treatment is next considered. Fourth, the proposed medication regime is

considered, and particularly, whether it will likely benefit the patient. Finally, the clinician records his notes in writing in accordance with the structured mental state examination structure. In doing so he summarises the key issues, before forming a view on the entire examination which is then reflected on the completed Form 17, which is checked and then signed.

22. Dr. Kelly was satisfied that each time he was requested to authorise the continuance of medication to the plaintiff without her consent, he carried out an independent examination and assessment, and concluded that, first, the plaintiff was unable to consent to treatment, and second, that she would benefit from the continuation of the treatment with the medication in question. He had examined the plaintiff on at least six occasions between November 2010 and December 2011. Finally, he agreed with an analysis of the plaintiff's doctors regarding the taking of blood samples in conjunction with the administration of the anti-psychotic medication in question, and noted that, to date, and to the best of his knowledge, nobody in the State had died from Agranulocytosis resulting from the administration of Clozapine following the introduction of a mandatory blood testing requirement.

Findings on the section 60 procedure

23. I am satisfied that each of the doctors faithfully complied with the procedure laid down under Form 17, which, itself, forms part of treatment under section 60. The evidence established conclusively that the situation which existed is not one where the treatment regime was being administered under s. 57 which, among other areas, deals with treatment which is required urgently to safeguard a patient's life or to restore him or her to health. Section 57 treatment arises when the patient is "incapable" of giving consent. The evidence clearly establishes that here the medicine has been, to use the terms deployed in s. 60 of the Act, "administered to a patient for the purposes of ameliorating … her mental disorder for a continuous period of 3 months" and where "the patient is unable or unwilling to give consent".

24. Some idea of the extent of the difficulty in this case can be derived from Dr. Bownes reports, where he described visiting X on a number of occasions. On those occasions her mood fluctuated. On the first occasion, she was pacing backwards and forwards, muttering to herself relentlessly for the duration of the interview. She became increasingly agitated on questioning, and her narrative became tangential, poorly structured, contradictory and internally inconsistent.

25. On a later visit, on 26th February, 2012 the plaintiff welcomed him warmly with a handshake using his correct name and recalled the previous examination. She was able to sit at peace during the session. Nevertheless, during the course of the interview, her mood became increasingly low, irritable, and perplexed, and she evinced extraordinarily hostile and homicidal attitudes towards her doctors. She felt that her doctors were poisoning her, and were administering her medication which was in some sense being kept a secret from her. She also showed suicidal ideation, and stated that she would kill herself "at the first opportunity". She stated that her family never visited her, but that her

children were well looked after and there was now no need for her to stay alive. It is difficult, therefore, to exaggerate the extremely tragic nature of the plaintiff's illness.

26. Section 60 of the Act addresses the limited circumstances in which a finding of incapacity takes place. It requires that two decisions be made, the first on the appropriateness of the medicine proposed, and the second on the issue of consent by the responsible consultant. These decisions must then be approved by the independent consultant psychiatrist before the treatment can be authorised. All this was done in the plaintiff's case. The case, insofar as it relates to a challenge to the constitutionality of s. 57 of the Act is unsustainable. I am unable to conclude that the provisions of s. 57(1) are engaged at all. Moreover, I think it would be inconsistent with the earlier judgment in these proceedings to adopt anything but a broad and purposive approach to the concept of "treatment". As such, any treatment which is ancillary to principal "treatment" administered pursuant to s. 60 of the Act must benefit from the same protections and prescriptions as that principal treatment. This does not absolve the Court from a consideration of the issues arising from the treatment regime however.

The procedural safeguards under s. 60 of the Act

27. The focus of analysis in this judgment must be confined to the terms of s. 60 on the administration of medicine and the safeguards identified in that section. This is not a case where there is a dispute in relation to the correctness of the treatment. It is clear that the responsible treating consultant psychiatrist, and the independent consultant, Dr. Kelly, at an early stage clinically assessed the plaintiff's capacity to consent to the proposed treatment as part of their respective functions. Dr Bownes agreed with this diagnosis and proposed treatment.

Matters not addressed in Form 17

28. It is important also to emphasise, however, that the contents of Form 17 are set out in what might be termed "box" form. After a description of the patient, her location, the treating psychiatrist, the medication intended, and how it will benefit the patient, the form simply sets out options for the independent consultant to identify whether the patient is unable or unwilling to give consent to the treatment. Dr. Kelly indicated that the plaintiff was unable to give such consent. The form, thereafter, identifies the name of the independent consultant psychiatrist and how the details of the treatment will benefit the patient. However, it goes no further. The form does not address the patient's views at all. This has consequences which are addressed later in the judgment. I now turn to consider whether the UNCRPD is directly effective in the State.

Section 1 – Can the issues be decided and finally disposed of by an issue of law other than constitutional law?

The United Nations Convention on the Rights of Persons with Disabilities

29. The European Union acceded to the UNCRPD through Council Decision 2010/48/EC, formally adopted on 26 November, 2009. The instrument of ratification on behalf of the EU was then deposited in December 2010. This was

the first occasion that the EU became a party to an international human rights treaty, and that an intergovernmental organization had joined with a United Nations human rights treaty. Although a signatory to the UNCRPD, Ireland has not, as yet, itself ratified the Convention.

30. The Convention specifies rights and obligations with regard to persons with disabilities. Of particular relevance to the present case are Articles 12(1) and (2) which provide:

"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."

It is right to say that the values enunciated in the Convention constitute a "paradigm-shift" in the manner in which persons with disabilities are to be treated by, and before, the law. However, the Convention, in its preamble, also acknowledges the diversity of persons with disabilities. Therefore, in considering the applicability and the interpretation of the Convention, due regard must be had to the individual circumstances of each individual. What is the legal status of the Convention within the State?

31. Article 300(7) of the Treaty for the Establishment of the European Community ("TEC") provides that international treaties, once concluded by the EU, are binding on European institutions and Member States, provided that they relate to areas of EU competence. The European Court of Justice ("ECJ") has adopted a "monist" approach to international agreements, whereby such agreements have legal effect without the requirement for further active implementation (see the decision in Haegemen v. Belgium [1974] E.C.R. 449). Under certain conditions, international agreements can, in principle, be invoked before a national court by an individual, if there is direct effect (see Demirel v. Stadt Schwabish Gmund [1987] ECR I-3719). In order for there to be such effect, the provisions sought to be relied on must be clear, precise and unconditional. It is argued that the terms of Article 12 come within these criteria.
32. Counsel for the plaintiff contends that the main objective of the UNCRPD is the equal treatment of, and the prohibition of discrimination against, disabled persons. It is important to the argument now made, to state that it is the plaintiff's contention that this area is also covered in 'large measure' by Community law – for example, Directive 2000/43/EC, which governs non-discrimination on the grounds of ethnic origin; Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation; Directive 2002/73/EC, which governs the equal treatment of men and women in the employment sphere; and Directive 97/80/EC, which governs matters of proof in sexual discrimination cases. The plaintiff argues that as a Member State of the European Union, Irish law must give force to Article 12 as part of their obligations under the EU's legal order.

33. Two questions arise from these contentions. First, this Court must consider whether the principles set out in the UNCRPD, despite Ireland's non-ratification, have the force of law in this jurisdiction. In order to establish her case, the plaintiff would be required to establish (a) that the relevant provision of the UNCRPD falls within a community competence which had been exercised to a "large degree" or was an "integral part of Community law"; and, also, (b) that the provision sought to be enforced is sufficiently clear, concise and unconditional as to be capable of itself directly regulating the legal position of individuals. Alternatively, the Court is asked to consider whether the UNCRPD is a "guiding instrument" in respect of the interpretation of the plaintiff's constitutional rights, or her rights under the European Convention of Human Rights.

(a) Community competence

34. The UNCRPD is a mixed international agreement where the EU, its member states, and other third party states are contracting parties. As a mixed agreement, the UNCRPD does, in fact, cover fields that, in part, fall within the competence of the EU; in part within the competence of member states; and in part within the shared competence of the EU and its member states. This issue will be explained in greater detail later. However, it is not the case that, once the EU ratifies an international convention, its subject matter automatically falls within its competence, and is thus directly enforceable in its member states. Nor is such convention enforceable simply by virtue of the fact that the EU has legislated in some of the areas which the Convention addresses.

35. Member states, when participating in mixed agreements, are subject to a duty of loyal cooperation between one another and the EU, deriving from Article 4(3) of the TFEU. This duty of loyal co-operation embraces two sets of obligations. First, member states must take appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the TFEU, or resulting from action taken by EU institutions. Second, member states must facilitate the achievement of the EU's tasks, and abstain from any measures which could jeopardise the attainment of the objectives of the TFEU.

36. The plaintiff relies on principles enunciated in Commission v. France [2004] E.C.R. I-09352, in which the issue was whether France, in failing to take all appropriate measures to prevent, abate and combat heavy pollution of the lagoon area known as the Étang de Berre, had breached its obligations under Articles 4(1) and 8 of the Convention for the Protection of the Mediterranean Sea Against Pollution and its Protocol, which had been signed and approved on behalf of the European Economic Community by two Council Decisions. The European Court of Justice held that the fact that there had been no EEC legislation covering the nature of the breach committed by France did not release that state from its obligations under the Convention. The breach fell within Community law, because the Convention and Protocol was a mixed agreement in a field in "a large measure covered by Community law". Thus, in such cases, there was "a Community interest in compliance by both the Community and its Member States with commitments entered into". Therefore, a member state must implement such a mixed agreement, provided the

measure to be implemented falls within the competence of the EU, either by way of being covered by Community legislation, or, where the particular issue was "covered in large measure" by Community legislation.

37. At Article 44(1), the UNCRPD requires regional integration organisations such as the EU, who accede to the Convention to declare the extent of their competence in their instruments of formal confirmation or accession. The Council Decision sets out the legal basis under the Treaties by which the EU has ratified the UNCRPD, and also lists EU instruments that demonstrate its competence. The Council Decision also provided that the extent of the EU's competence must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which the provisions establish common rules. The Decision goes on to say that the scope and the exercise of EU competence are subject to continuous development, and that the EU will complete or amend its declaration, if necessary in accordance with Article 44(1) of the UNCRPD. It is thus possible to identify which areas of the UNCPRD fall under EU competence, and which do not.

38. Despite a Commission proposal to use a number of legal bases (Articles 13, 26, 47(2), 55, 71(1), 80(2), 89, 93, 95 and 285 EC in conjunction with Article 300(2), and the first subparagraph of Article 300(3) EC), in fact the Council selected only two substantive legal bases, namely Article 13 and Article 95 EC, in conjunction with the (procedural) provisions of Article 300(2) EC and Article 300(3) EC, as authorising the EU to conclude the UNCRPD. This has some legal significance, in that the ECJ has ruled that the legal basis cited gives an indication to the other contracting parties of the extent of EU competence, and the division of competence between the EU and its member states (see Commission v. Council [2006] E.C.R I-00001). However, although the choice of legal basis for the decision is of some significance, it is not decisive for implementation, as the ECJ has also held that it is not necessary for the same provisions to be used as the legal basis for the adoption of the measures intended to implement the agreement at Community level (see Commission v. Parliament [2006] E.C.R. I-00107).

39. The Court has been referred to a report compiled by the European Foundation Centre in response to a request by the European Commission in 2010 to carry out a study in relation to the implementation of the UNCRPD. The aim of the study was to analyse in detail the obligations set out there, and to gather information about the various practices relating to the implementation of the Convention by the EU and its member states. This study was designed to support the objectives of the current EU Disability Acton Plan; which, too, emphasised full participation and equal opportunities for all people with disabilities, and which was intended to contribute to the preparation of the new EU Disability Strategy, based more explicitly on the UNCRPD. The project team carrying out the study included a wide range of experts in the field of disability law and policy, including many persons who took part in the negotiations of the UNCRPD, and who made submissions to the ad hoc committee of the UNCRPD as to the drafting of the Convention. This report has

been admitted into the case without any dispute. I am prepared, therefore, to admit it as being a useful reference work and as an aid to interpretation. The plaintiff's submissions face an immediate difficulty here.

40. In a table provided therein at p. 40, the Article in question here, Article 12 is stated to fall solely within the competence of Member States. It is not within EU competence, or the shared competence of the EU and Member States.

41. The report also notes that before the Council Decision issued, the High Level Group on Disability (HLGD), in its first report on UNCRPD, identified nine areas of interest for the EU, considering both the EU, and its member states, with regard to implementation. These areas included legal capacity under Article 12. The Report points out that some of the matters addressed by the HLGD were beyond the EU competence to act. Notwithstanding this, in 2008, member states confirmed that collaboration at European level would be of added value in implementing the UNCRPD, and that the EU would become the "platform" to facilitate this collaboration. However, the only clear inference from this is that, as matters stand, Article 12 lies outside the EU competence. The Report also points out that some member states expressed reservations in relation to Article 12.

42. By way of distinction, the ECJ recent addressed the direct applicability of international agreements in Lesoochranarske Zoskupenie, C-240/09, 8th March 2011, where the issue at stake was Article 9(3) of the Aarhus Convention dealing with access to administrative or judicial procedures. There, the ECJ specifically held that the objective of the Aarhus Convention was consistent with the objectives of the Community's environmental policy listed in Article 174 of the EC Treaty. This was found to be an area in which the Community did share competence with its member states, and where a comprehensive body of legislation was evolving and contributing to the achievement of the objective of the Convention, not only by its institutions, but also by public bodies within its member states.

43. As matters stand, however, the same cannot be said of the law relating to mental capacity, an area in which to date, the EU has not assumed any large or appreciable jurisdiction. Furthermore, the measures to which the plaintiff referred, do not support the assertion that, at present, the EU has legislated or exercised a large degree of competence in the matters governed by Article 12. I am not convinced that Directive 2000/43/EC, Directive 2002/73/EC, nor Directive 97/80/EC are, in the relevant particulars, comparable to the questions of legal capacity, or to the detention and treatment of persons in the category of the plaintiff. I must accept the submission made on behalf of the Attorney General that the Commission v. France case is distinguishable as that case concerned a shared competence between the EU and member states.

44. There being no such competence here, I must conclude, therefore, that as the law stands, the plaintiff's argument on this point cannot succeed.

(b) Direct applicability

45. The question also arises as to whether Article 12 is capable of being directly applicable. It is contended on behalf of the Attorney General that the Article constitutes a "principle not a rule" and is dependent on subsequent measures to identify a particular manner in which the principle may be respected. It is not necessary for this Court to express a view on this point. For the reasons outlined earlier, the court does not consider that the UNCRPD can, as yet, be seen as a rule in the interpretation of an application of EHCR jurisprudence or, through that avenue, to E.U. rights law. This does not, however, prevent the UNCRPD being a guiding principle in the identification of standards of care and review of persons in this category.

46. As matters stand, the realm of EU law has not yet extended to the area of mental health law, nor to the issue of legal capacity. However, the rights of equal treatment and non-discrimination are core values in the EU legal order. As far as the present case goes, it has not been shown the right to equal treatment, as enshrined in the UNCRPD, is presently part of the EU's legal order such that Article 12 UNCRPD creates directly enforceable rights or obligations.

47. The law in this area is evolving, both in the legislative and judicial realm. It is of interest that a recent judgment, R. (on the application of NM) v. the London Borough of Islington and Northamptonshire County Council and Others [2012] EWHC 414, Sales J. observed at para. 102 that:-

"In principle, a point might be reached when the [UN]CPRD has been ratified by sufficient European states, or when sufficient European states have brought their domestic law and practice into line with the standards set out in the CPRD, that the CPRD or the practice flowing from it could be taken to amount to a relevant European consensus to inform the interpretation and application of the Convention rights. Also, though the position is less clear, a point might be reached where the CPRD is taken to be a leading international instrument establishing an appropriate standard against which to judge the conduct of member states of the Council of Europe, as in relation to other international instruments…"

48. However, that judge expressed reservations as to whether the Convention has yet acquired this significance for the purposes of interpretation in light of the significant number of member states which have yet to ratify it. Sales J. observed that none of the Strasbourg authorities cited to him in that case went as far as to say that an individual could, in substance, rely on the provisions of UNCRPD under the guise of relying on ECHR rights. If the rights asserted here are not to be found in EU law which is directly effective in the State, can they be found elsewhere and if so, precisely which rights?

Section 2 – Decision as to the constitutionality of the impugned provisions

Constitutional requirements

49. What are the applicable constitutional and legal principles? The facts of the present case from two legal authorities where the question of consent has been very comprehensively considered. These were Fitzpatrick & Anor. v. K. [2009] 2 I.R. 7 and Re Ward of Court (Withholding Medical Treatment) (No. 2)

[1996] 2 I.R. 79. By way of distinction from Fitzpatrick, we are not dealing, here, with a person, who was, at least prima facie, of full capacity although as was held, there, that the patient's capacity had been affected by the influence of others. Nor are we considering a situation such as that which arose in Re Ward of Court (No. 2), where the ward was in a condition known as P.V.S. or persistent vegetative state. But what is involved here is involuntary medication, together with the invasive taking of blood samples by a syringe on a regular basis. The plaintiff strongly objects to the procedure. The invasive nature of the treatment results in a loss of bodily integrity and dignity. (see the judgment of Denham J. in Re Ward of Court, cited above, at p.158 of the report)

50. In the latter case, the High Court, at first instance, had the opportunity of considering evidence from family members of the ward as to what her wishes would have been had she been in a position to speak about her tragic situation. By virtue of the ward's legal status, the court was vested with jurisdiction over all matters relating to her person and estate, and in the exercise of its jurisdiction, was subject only to the provisions of the Constitution. The High Court, and on appeal the Supreme Court, held that, in the exercise of that jurisdiction, the prime and paramount consideration must be the best interests of the ward. Both Courts found that, although the views of the committee and family of the ward were factors to be taken into consideration, they could not prevail over the court's view as to what was in the ward's best interests. The Supreme Court upheld the finding of the trial judge that the court should approach from the standpoint of a prudent, good and loving parent in deciding what course should be adopted, and held that the treatment being afforded by means of a gastrostomy tube, surgically inserted into the stomach was an intrusive interference with the ward's bodily integrity, and could not be regarded as a "means of nourishment". The care and treatment being afforded constituted medical treatment and not merely medical care. The Supreme Court held that the nature of the right to life, and its importance, imposed a strong presumption in favour of taking all steps capable of preserving it, save in exceptional circumstances. However, it concluded that, if the ward had been mentally competent, she would have had the right to forego or discontinue her treatment, and the exercise of that right would be lawful in the pursuance of her constitutional right to self determination implicit in her right to bodily integrity and privacy. However, this right did not include the right to have life terminated, or death accelerated, and was confined to the natural process of dying. The court decided that the loss by the ward of her mental capacity did not result in any diminution of her personal rights recognised by the Constitution, including the right to life, bodily integrity, privacy (including self determination), or the right to refuse medical treatment.

51. At the statutory level, s. 60 provides for a mechanism whereby the plaintiff's rights, and those of the community, can be balanced and protected. That is not to say, of course, that her rights could not also be vindicated under the inherent jurisdiction of this court, that jurisdiction having been invoked in this case. But there are constitutional dimensions to this case which cannot be ignored. In the next paragraphs, the main emphasis is on the concept of

decision making. It logically follows that the observations which are made here, also apply to a right of independent review, a statutory right provided by s. 60 itself.

52. The plaintiff's complaint is that the review procedure, as outlined earlier, insufficiently vindicates her constitutional rights, and fails to give recognition to rights identified in the jurisprudence of the European Court of Human Rights. Her counsel contends that the effect of the current procedure results in what is termed "substituted decision-making" (bearing the hallmarks of a paternalistic approach to the treatment of mental health patients), rather than "assisted decision-making" which better vindicates the range of rights engaged. For brevity, the range of values and rights involved will be collectively referred to as "personal capacity rights". These comprise the Article 40.3 values of self-determination, bodily integrity, privacy, autonomy and dignity, all unenumerated, but identified in case-law, as well as the explicit right to equality before the law, as identified in, and qualified by, Article 40.1 of the Constitution. For the purposes of consideration here, these are all, whether characterised as values or rights, capable of vindication in the courts. The case is now made that both the treatment regime, and the protections therein, fail properly to reflect the changes and provisions under the United Nations Convention on the Rights of Persons with Disabilities which, by contrast, aims at encouraging assisted decision-making and seeks to vindicate the interests of disabled persons.

53. Prior to a consideration of those rights, it is worthwhile recollecting the observations of Costello J. in R.T. v. Director of the Central Mental Hospital [1995] 2 I.R. 65, where he drew attention to the concept that, in considering the safeguards necessary to protect the rights of vulnerable people, regard should be had to the standards set by the recommendations and conventions of international organisations of which this country is a member. The superior courts have resorted to international human rights instruments in order to interpret appropriate constitutional standards in a number of cases. In The State (Healy) v. Donoghue [1976] I.R. 325, the Supreme Court had regard to Article 6 of the European Convention of Human Rights and also to the United States Constitution. In O'Leary v. The Attorney General [1993] 1 I.R. 102, Costello J. referred to Article 6(2) ECHR; Article 11 of the United Nations Universal Declaration on Human Rights; Article 8 (2) of the American Convention on Human Rights; and Article 7 of the African Charter of Human Rights in holding that the presumption of innocence in a criminal trial was one which enjoyed "universal recognition". Are these principles of interpretation applicable here?

54. Article 40.1 of the Constitution provides:-

"1.All citizens shall, as human persons, be held equal before the law.
This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function…."

At Article 40.3 it is provided:-

"1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

55. Hitherto, arising from the facts in each case, decisions of the Superior Courts in this area have tended to lay emphasis on a paternalistic intent of legislation concerning persons with incapacity. This approach, very much in line with long-established decided authority, was most recently reiterated by the Supreme Court in E.H. v. Clinical Director of St. Vincent's Hospital [2009] 3 I.R. 774.
56. By way of illustration of the approach, in Gooden v. St. Otteran's Hospital [2005] 3 I.R. 617, McGuinness J. pointed out, at p.633, that:-

"In Re Philip Clarke [1950] I.R. 235 the former Supreme Court considered the constitutionality of s. 165 of the Act of 1945. O'Byrne J. who delivered the judgment of the court described the general aim of the Act of 1945 at pp. 247-248 thus:-

'The impugned legislation is of a paternal character clearly intended for the care and custody of persons suspected to be suffering from mental infirmity and for the safety and wellbeing of the public generally. The existence of mental infirmity is too widespread to be overlooked and was, no doubt, present to the minds of the draftsmen/draughtsmen when it was proclaimed in Article 40.1 of the Constitution that though all citizens as human persons are to be held equal before the law, the State, may, nevertheless in its enactments, have due regard to differences of capacity, physical and moral, and of social function. We do not see how the common good would be promoted or the dignity and freedom of the individual assured by allowing persons, alleged to be suffering from such infirmity to remain at large to the possible danger of themselves and others.'"
(emphasis added)
57. In E.H., Kearns J., speaking on behalf of the Supreme Court, observed that the same principle should be adopted in interpreting the provisions of the Mental Health Act 2001, again, in issues concerning personal liberty. He stated:-
"I do not see why any different approach should be adopted in relation to the Mental Health Act 2001, nor, having regard to the Convention, do I believe that any different approach is mandated or required by Article 5 of the European Convention on Human Rights 1950."
58. However, it is noteworthy that these observations, very understandably on the facts, deal with the interpretation and application of the statutes predominantly in the context of the right to liberty and the right to fair trial. The position here is distinct. The case before this Court does not concern the right to liberty or fair trial, but rather, the plaintiff's entitlements while being treated in involuntary care.

59. I do not think there is anything inconsistent with the avowedly paternalistic nature of the legislation or that jurisprudence, insofar as they concern liberty, in also ensuring that the wishes and choices of a person suffering from a disability, while under such care, should be guaranteed in a manner which, "as far as practicable" (to use the phrase adopted in Article 40.3.1 of the Constitution), vindicates his or her personal capacity rights. The interpretation of the Constitution in this area of the law should be informed by, and have regard to international conventions. This principle of interpretation, of course, applies a fortiori in relation to the regard which, as a matter of law, must be had to decisions of the European Court of Human Rights (see ss. 2-5 of the European Convention on Human Rights Act 2003).

60. That the Constitution is a living instrument which adapts to protect rights that develop over time cannot be controverted. In The State (Healy) v. Donoghue [1976] I.R. 325, O'Higgins C.J. observed of the values espoused in the preamble to the Constitution that:-

"The judges must therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts…"

61. Should this Court then have reference to the UNCRPD if not as a rule, then at least as a guiding principle? The values in question here are in no sense contrary to any provision of the Constitution. The UN Convention affirms the contemporary existence of fundamental rights for persons with a mental disorder. Although the UN Convention itself is not part of our law, it can form a helpful reference point for the identification of "prevailing ideas and concepts", which are to be assessed in harmony with the constitutional requirements of what is "practicable" in mind. A court will, of course, (subject to the qualification pronounced in McD. v L. [2010] 2 I.R. 199) also "have regard" to the jurisprudence of the European Court of Human Rights to which Ireland also adheres on the basis of an international convention. As well as the UNCRPD itself, are there also relevant principles, ideas and concepts identified in Strasbourg case law? By virtue of ss. 2-5 of the European Convention on Human Rights Act 2003, this court is required to interpret laws of this State in compliance with the State's obligation under the ECHR provisions. Judicial notice is to be taken of decisions of the ECHR and the principles contained therein. This allows a court in an appropriate case to consider whether those principles may inform present day interpretation of "prevailing ideas and concepts" provided such principles accord with the Constitution.

62. Shtukaturov v. Russia, (Application no. 44009/05, ECHR, 27th June 2008) concerned the issue of capacity in mental health. There, the ECtHR had regard to "Principles concerning the legal protection of incapable adults", Recommendation No. R (99) 4, adopted by the Council of Europe on the 23rd February 1999. The Court referred in its judgment to Principle 3 of the Recommendation which stipulates that legislative frameworks relating to

persons suffering from incapacity should as far as possible recognise that different degrees of capacity may exist and that incapacity may vary from time to time. Accordingly, measures of protection should not result automatically in a complete removal of legal capacity. Principle 3.2 specifically provides that measures of protection should not automatically deprive a person of "… the right to consent or refuse consent in the health field…"

63. While it was suggested in argument in this case that the European Court of Human Rights had not specifically approved the United Nations Convention on the Rights of Persons with Disabilities, I do not think this is so. The judgment of the ECtHR in Glor v. Switzerland (Application No. 13444/04, ECHR, 30th April 2009), is noteworthy for pointing out that the UNCRPD signalled the existence of a European and universal consensus on the need to protect persons with disabilities from discriminatory treatment.

64. In Kiss v. Hungary (Application No. 38832/06, ECHR, 20th May, 2010) the ECtHR pointed out:-

"The court further considers that the treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny. This approach is reflected in other instruments of international law …"

65. More immediately relevant is the decision of the ECtHR in X v. Finland (Application no. 34806/04, ECHR, 3rd July 2012). That judgment of the Court will now be analysed. The applicant complained that her involuntary confinement in a mental hospital following psychiatric examination was in breach of her right to liberty conferred by Article 5, particularly in the absence of an independent second opinion. The Court agreed with this contention. It stated at paras. 169-171:-

"169. The Court first draws attention to the fact that, in the present case, the decisions to continue the applicant's involuntary confinement after the initial care order were made by the head physician of the Vanha Vaasa hospital after having obtained a medical observation statement by another physician of that establishment. In the Finnish system the medical evaluation is thus made by two physicians of the same mental hospital in which the patient is detained. The patients do not therefore have a possibility to benefit from a second, independent psychiatric opinion. The Court finds such a possibility to be an important safeguard against possible arbitrariness in the decision-making when the continuation of confinement to involuntary care is concerned. In this respect the Court also refers to the CPT's recommendation that the periodic review of an order to treat a patient against his or her will in a psychiatric hospital should involve a psychiatric opinion which is independent of the hospital in which the patient is detained (see paragraph 133 above). This covers all of the criteria in section 8 of the Mental Health Act.

170. Secondly, the Court notes that the periodic review of the need to continue a person's involuntary treatment in Finnish mental hospitals takes place every six months. Leaving aside the question whether a period of six months can be

considered as a reasonable interval or not, the Court draws attention to the fact that, according to section 17(2) of the Mental Health Act, this renewal is initiated by the domestic authorities. A patient who is detained in a mental hospital does not appear to have any possibilities of initiating any proceedings in which the issue of whether the conditions for his or her confinement to an involuntary treatment are still met could be examined. The Court has found in its earlier case-law that a system of periodic review in which the initiative lay solely with the authorities was not sufficient on its own (see mutatis mutandis Rakevich v. Russia, no. 58973/00, §§ 43-44, 28 October 2003; and Gorshkov v. Ukraine, no. 67531/01, § 44, 8 November 2005). In the present case this situation is aggravated by the fact that in Finland a care order issued for an involuntary hospitalisation of a psychiatric patient is understood to contain also an automatic authorisation to treat the patient, even against his or her will. A patient cannot invoke any immediate remedy in that respect either.

171. The Court considers, in the light of the above considerations, that the procedure prescribed by national law did not provide in the present case adequate safeguards against arbitrariness. The domestic law was thus not in conformity with the requirements imposed by Article 5 § 1 (e) of the Convention and, accordingly, there has been a violation of the applicant's rights under that Article in respect of her initial confinement to involuntary care in a mental hospital."

66. The ECtHR further examined claims that the forced administration of medication was in breach of the applicant's rights under Article 8 of the ECHR. The Court noted that under Finnish law, an involuntary care order also included an automatic authorisation to treat such a patient, even against his or her will. It also found that the decisions of a treating doctor are not subject to appeal. In those circumstances, it concluded, at paras. 220-222:-
"220. The Court considers that forced administration of medication represents a serious interference with a person's physical integrity and must accordingly be based on a "law" that guarantees proper safeguards against arbitrariness. In the present case such safeguards were missing. The decision to confine the applicant to involuntary treatment included an automatic authorisation to proceed to forced administration of medication when the applicant refused the treatment. The decision-making was solely in the hands of the treating doctors who could take even quite radical measures regardless of the applicant's will. Moreover, their decision-making was free from any kind of immediate judicial scrutiny: the applicant did not have any remedy available whereby she could require a court to rule on the lawfulness, including proportionality, of the forced administration of medication and to have it discontinued.
221. On these grounds the Court finds that the forced administration of medication in the present case was implemented without proper legal safeguards. The Court concludes that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, the absence of sufficient safeguards against forced medication by the treating doctors deprived the applicant of the minimum degree of protection to which she was entitled under the rule of law in a democratic society (see Herczegfalvy v. Austria, cited

above, § 91; and, mutatis mutandis, Narinen v. Finland, no. 45027/98, § 36, 1 June 2004).

222. The Court finds that in these circumstances it cannot be said that the interference in question was "in accordance with the law" as required by Article 8 § 2 of the Convention. There has therefore been a violation of Article 8 of the Convention." (emphasis added)

67. The emphasised part of the passages quoted leave it unclear whether access to a court is thought to be mandatory, or, as I believe, whether there must be a right of access capable of vindication other than just by State initiative. This is considered in section 3 of this judgment.
68. The Article 13 contention, that the applicant was denied an effective remedy to challenge the forced administration of medication, was not examined on the basis of the findings in relation to Article 8.

"229. The Court reiterates that the applicant complained in essence about the lack of an effective remedy to challenge the forced administration of medication.
230. In view of the submissions of the applicant in the present case and of the grounds on which it has found a violation of Article 8 of the Convention, the Court considers that there is no need to examine separately the complaint under Article 13 of the Convention."

69. The issues raised are relevant to the instant case. The decision clearly establishes that adequate safeguards must be placed in legislation apparently permitting a patient's involuntary detention and involuntary treatment. It was held that these safeguards were not present in the Finnish legislation. In the instant case, the detention procedures are not being questioned. Therefore, this aspect of the case has limited application.
70. How then should these concepts and principles be applied here? Under the provisions of s. 60 itself, the right to independent review and independent determination of capacity are already, in effect, recognised statutory procedural rights; the provisions give effect to the duty of the State to vindicate the plaintiff's personal capacity rights. Professor Kennedy's evidence establishes that the proper vindication of these rights is "practicable".

71. But what is at issue here are truly fundamental constitutional rights in more than just name. What is at stake is truly, in the words of Kenny J. in Ryan v. Attorney General [1965] I.R. 294 at p. 313, the right to the "integrity of the person". Each of the rights affected under s. 60 fall within that category, should be policed and monitored by the courts, and are susceptible to judicial supervision, where necessary. Do they necessitate ancillary rights, analogous to the right to legal aid in defence of a serious criminal charge, which itself derives from the constitutional right under Article 38.1 to a criminal trial "in due course of law"?

72. As in the Irish and ECtHR authorities identified, I believe the broader range of constitutional "personal capacity rights" identified earlier, now fall to be informed by the United Nations Convention on the Rights of Persons with Disabilities, as well as the principles enunciated in the judgments of the European Court of Human Rights. The vindication of these rights to a sufficiently high level is necessary because of the serious incursion into bodily integrity and the other personal capacity rights which arises in the case of persons who are subject to orders made under s. 60 of the Act of 2001. Decisions of this type, involving the continued administration of an involuntary drug regime and the taking of blood samples require, in the words of the European Court of Human Rights, "heightened scrutiny".

73. I believe a constitutional reading of s. 60 of the Act of 2001 now requires that this range of rights must be recognised at the constitutional as well as the legal level, especially if the present application of that legal provision does not vindicate those rights "as far as practicable". The constitutional protections must act as an appropriate counterweight to the nature of the incursion into fundamental constitutional rights. Professor Kennedy's evidence establishes that every effort is made to engage a patient in the decision-making process, and that when a patient regains sufficient mental capacity, they will again be empowered to make decisions regarding their treatment, including the then regained ability to give or withhold consent. Why then should the voice of a patient not be heard, and if not by the patient, then through a representative? This was not a situation, unfortunately, where the plaintiff had family members to speak for her. Such a situation may arise in other cases. What is necessary is to achieve the maximum protection which is "practicable". If a patient lacks capacity, does it not follow that, in order to vindicate these rights, the patient should, where necessary, be assisted in expressing their view as part of the decision-making process? It cannot be said that such a process is impractical. I think the constitutional duty involved here is a positive one. I do not think even a retrospective declaration of incompatibility under the European Convention on Human Rights Act 2003 could be a sufficient protection. A sub-constitutional, and possibly retrospective, remedy is not commensurate with the nature of the rights engaged, and the extent of the possible incursion into such rights.

74. There is, of course, the irony that in this case, on its unique facts, the entire process involved in this extensive court hearing may already be seen as a vindication of each one of the rights claimed, including that of assisted decision-making. The function of counsel for the plaintiff in this case has been nothing less than to put forward, in as comprehensive a manner as is practicable, the views and choices of the plaintiff regarding her treatment regime under s. 60.

75. But the unique nature of the case gives rise to an obstacle from the plaintiff's point of view. Decision-making, even assisted decision-making, does not predetermine the outcome of the deciding process. The nature of this case necessitated that it went to court because of the unusual legal issues which arose. The plaintiff has a right of access to court under the Constitution. As discussed at other points in this judgment, I do not envisage that a court

procedure will be necessary or mandatory in the vast range of other such cases involving patients subject to s. 60 of the Act. In my view, it would require a truly exceptional case to necessitate a court application. What I think is constitutionally necessary is a right of access to the courts, independent of any State agency, should the need arise. I do not think that an assisted decision-making process of this type need necessarily involve lawyers. The views of the patient might be expressed by carers, social workers or, perhaps most appropriately, by family members. Very frequently, such decisions are ones in which the courts will have little expertise. I would also observe that the evidence of Professor Kennedy indicates that, at least in part, these entitlements are already observed as a matter of course in the hospital where, as he testified, patients are asked to participate in decisions regarding their own treatment. This begs the question as to why this participation process cannot be performed on behalf of the incapacitated patient by another, suitably qualified, person. The case has not been made that assisted decision-making is not practicable; the contrary is so. To judge from experience in neighbouring jurisdictions, and in light of legislative proposals on mental capacity here, such a form of decision making must be seen as "practicable".

76. But, here, the plaintiff indisputably does not have capacity to make decisions. There is no controversy on the point. Therefore, having heard the parties, it fell to this court to make decisions as to her treatment, applying the best interest test identified in Re Ward of Court (No. 2). This test has been applied, having examined whether the choices made are the least restrictive, and involve the minimum practical incursion into the plaintiff's rights.

77. Having made that determination, however, it should not be thought that what is involved here is the application of what is termed a "status" approach. This involves making an "across the board" assessment of a person's capacity or views capacity in "all or nothing terms". A "once and for all" status approach in cases in this narrow category does not, I think, vindicate rights as far as practicable. It would not take into account patients whose capacity fluctuates, or those who have episodic mental illness. It may also not take into account the actual capacity of otherwise incapacitated individuals to make decisions in a particular sphere. However, here, there is the real problem that the patient wished to make a decision, which would be not only detrimental to her own health, but would place her life, and the life of others, at risk.

78. In adopting the best interest test, it might be suggested that what was applied then was an "outcome approach" involving the court assessing the patient's wishes, based on an assessment of the outcome of the process. Failure to make what might be a "prudent" decision will not always, of itself, be an indicator of want of decision making capacity. Here, one must look at not only the decision itself, but the quality of the plaintiff's decision making capacity. Unavoidably in this instance, the nature of the decision and the dangerous nature of the plaintiff's wishes must be a factor. The court cannot disregard that it has constitutional duties toward the plaintiff and the public.

79. As the ECtHR judgments point out, however, such decision-making in this area should seek to apply a "functional" approach" to capacity, involving both an issue-specific and time-specific assessment of the plaintiff's decision-making ability. One determination should not be permanent; the process must refer to "differences in capacity" (Article 40.3 of the Constitution). This involves analysing, not only differences in capacity between patients, but also variations in each patient's capacity at particular times. Only in that manner can their rights be properly vindicated in accordance with the constitutional requirement.

80. In all this, there must be both trust and commonsense. Every decision cannot be made by a court. This case is one where, sadly, on the indications so far, the plaintiff has an ongoing condition. While her capacity fluctuates, the evidence does not show that, at any point since the initiation of these proceedings, she has reached a point where she is capable of making a decision independently. It has not been suggested that any decisions have been made which were not in the plaintiff's best interests, or at a time, when she actually had capacity to make decisions as to her treatment.

Conclusion

81. In summary, I conclude that the plaintiff is entitled to both an independent review and to an assisted decision-making process in vindication of her rights. But the entire process here involved a vindication of other rights. It has been necessary for this Court to make the ultimate decision because of her incapacity. In the strict sense, therefore, the plaintiff cannot be entitled to the reliefs she claims. It has not been shown that s. 60 of the Act of 2001, constitutionally interpreted, is repugnant to the Constitution. Applying the principle of double construction what then is necessary for a constitutional interpretation and application of the section? What is required is that it should be applied in a constitutional manner, giving effect to rights to be found within the Constitution itself (see East Donegal Co-operative Ltd v Attorney General [1970] I.R. 319). The constitutional application of that section should have regard to international norms and conventions identified in this part of the judgment.

82. For the future, I think it will be necessary to review the Form 17 procedure, adopted under s. 60. This can be done in a manner so as to ensure that the range of "personal capacity rights" of a patient objecting to treatment under s. 60 of the Act are vindicated, not only in form but in substance. There should be independent review and the patient's decision or choice, albeit whether assisted or not, should be recorded and due regard given to it. The patient's choice, however conveyed, will not always be determinative, but must always be part of the balance. But the role of the consultant psychiatrists remains pivotal. I turn now to another aspect of the relief claimed.

83. The plaintiff, at paragraph 1 of the statement of claim has sought also a declaration that the finding in respect of capacity must be subject to independent tribunal or court review. In this case, I think that right has already been vindicated to date, and will continue to be. But then the claim goes rather

deeper. Does a s. 60 treatment-decision necessitate ongoing court review on a mandatory basis?
Section 3 – Is the plaintiff entitled to a declaration of incompatibility under the ECHR Act and is there an ECHR right to an independent court or tribunal to consider future treatment?
84. It is now contended that, if the HSE should continue to administer treatment on the basis that the plaintiff lacks capacity, that defendant must convincingly show that such treatment is necessary before an independent tribunal or court. I would observe here that because of the highly unusual nature of this case it was proper that the matter should be dealt with by the Court. Can a genuine right to a court or tribunal hearing in all cases of this type be found? Do the constitutional rights, to be vindicated in each case, necessitate a mandatory ongoing court involvement in every such case? I am not persuaded that a mandatory engagement, even in a narrow category of cases involving difficult clinical decisions, can be seen as "practicable". In my view, it would involve a degree of legal involvement in the field of psychiatry, which would be unprecedented, and, I believe, often impractical. Even on this basis alone, it would be very difficult to give recognition to such a right. Does such a right nonetheless exist under the ECHR? Is the plaintiff, therefore, entitled to a declaration that s. 60 is incompatible with the provisions of the ECHR under s. 5 of the Act of 2003?

85. Even having regard to the decision in X v. Finland, I am not persuaded that such a right exists in ECHR jurisprudence. That case must be seen as still pending as at present an application for admission to a Grand Chamber hearing remains to be considered. I think the passages cited earlier lack clarity as to whether what is in question is a right to a court hearing as alleged, or, rather a right of access to a court. The rights identified in the cases which follow lay particular emphasis on review of detention procedures. Clearly, at a minimum, there must be a right of court access. Decisions as to involuntary medical treatment must be subject to the rule of law, and must be independently reviewed. They must be capable of being assessed by a court, and cannot be arbitrary. The case of Storck v Germany (Application 61603/00, ECHR, 16th September 2005), addresses involuntary treatment and detention but is based on very different facts. There was a real question there as to the plaintiff's incapacity, and as to the lawfulness of her detention. The ECtHR held that under Article 5 and Article 8 ECHR, there were positive obligations to ensure that an involuntary deprivation of liberty was carried out in accordance with a procedure prescribed by a rule of law. Significantly, it held that special procedural safeguards may be necessary to protect the interests of persons not fully capable of acting for themselves; that even a minor interference with the physical integrity of an individual was to be regarded as an interference with the respect for private life, if carried out against that person's will; and that the State had a positive obligation to protect the applicant against interference with her private life guaranteed by Article 8 of the Convention. By way of distinction with that case, there is no question here that the plaintiff has been wrongly diagnosed, or as to her decision-making capacity. The detention process, here, is in accordance with law. The treatment has been independently

assessed by Dr. Kelly, Dr. Bownes and by this Court. It cannot be said that any part of the process is arbitrary therefore.

86. Earlier, in Winterwerp v. The Netherlands [1979 – 80] 2 E.H.R.R. 387, the applicant had been compulsorily detained pursuant to successive court orders, was not allowed to appear or be represented at proceedings and was not notified when such proceedings were in progress. As a consequence of his detention, the applicant also automatically lost the capacity to administer his property. There, the ECtHR unanimously held that the applicant's ability to have his detention reviewed by a court and the failure to hear him constituted a violation of Article 5(4) of the Convention. I do not think this case is on point here.

87. Three further decisions of the ECtHR were cited to this Court. All must now be seen in light of the decision in X v. Finland. The first, Shtukaturov, has already been briefly referred to. The applicant there suffered from a mental disorder but despite this was a relatively autonomous person. His mother lodged an application with the District Court of St. Petersburg seeking to deprive him of his legal capacity. An expert team assessed the applicant and concluded that he was suffering from "simple schizophrenia". A hearing then occurred, of which the applicant was neither notified nor present, where the judge declared the applicant to be legally incapable and his mother was appointed to be a legal guardian. The hearing lasted only ten minutes. At his mother's request he was then placed in a psychiatric institution where he was prohibited from having contact with the outside world. Unsurprisingly, the European Court of Human Rights in that case held that although domestic courts had a certain margin of appreciation, there had been a breach of the applicant's right to fair trial, as guaranteed under Article 6 of the Convention. This arose because, in assessing whether or not a particular measure such as the exclusion of the applicant from a hearing was necessary, relevant factors had to be taken into account including the nature and complexity of the issue which had been before the domestic courts, what had been at stake for the applicant and whether the applicant's appearance in person represented any threat to others or to himself. It was held that the domestic court proceedings had been unfair. The court observed that the applicant had played a double role in the proceedings, that of interested party and also the main object of the court's examination. His participation was therefore necessary not only so that he could present his own case but so as to afford the judge the opportunity to form an opinion about the applicant's mental capacity. The court also held that the declaration of the domestic court with the effect that the applicant was regarded as having full incapacity for an indefinite period which could not be challenged otherwise than through the guardian constituted a breach of Article 8 of the Convention.

88. It is significant in the context of this case that the ECtHR laid emphasis on the right of a person, the subject matter of an order, to representation and participation in the proceedings concerning a very significant incursion in their right to liberty and to private life.

89. Similar observations were made by the court in Stanev. v. Bulgaria (Application no. 36760/06, ECHR, 17th January 2012), where, in national court proceedings on capacity, the applicant was denied the right to have a lawyer of his choice. This had not been authorised by his guardian. He could not perform legal transactions or take part in court proceedings without his guardian's consent; although the guardian's decisions were subject to review by an authority, there was no clarity as to whether the applicant as a partially incapacitated person could challenge the decisions of that authority by way of judicial review. As a consequence, the court held that there were breaches of Article 5(4) involving an entitlement to institute proceedings reviewing a decision and a denial of direct access to courts in violation of Article 6(1) of the Convention. Again, the facts are very different from those in the instant case.
The Wilkinson case
90. In the earlier judgment, I made reference to the decision in R. (On the Application of Wilkinson) v. Broadmoor Special Hospital Authority and Others [2002] 1 W.L.R 419. As well as pursuing remedies in domestic legislation, the plaintiff in that case, also sought to pursue his rights in the European Court of Human Rights in Wilkinson v. United Kingdom, (Application No. 14659/02, 28th February, 2006).

91. The applicant had been detained in a psychiatric institution under the Mental Health Act 1983 in England following conviction for rape of a minor in 1969. Though a clinical consensus existed at the relevant time that he suffered from psychopathic personality disorder, opposing views had been expressed as to whether he suffered from a recognised mental illness. In 1999, his treating doctor sought to administer antipsychotic medication without consent, on the basis that it was necessary to relieve the applicant of 'paranoid ideation'. The treatment was administered moments after an independent doctor approved it under s. 58(3) of the 1983 Act, without notice to the applicant (due to the prospect that he would respond violently). The applicant resisted the injections and had to be physically restrained. On the first occasion, he suffered an angina attack and had to be secluded. The medication was administered on one further occasion, and thereafter he engaged solicitors to contest the treatment.

92. Wilkinson is significant because the provisions at issue were broadly akin to those which arise in these proceedings. Section 63 of the 1983 United Kingdom Act removed the general requirement for obtaining a patient's consent for any treatment given to him for his mental disorder so long as the treatment was approved by the clinician in charge of his treatment subject to special requirements stipulated in the case of long term medication, ECT and psychosurgery, equivalent to ss. 58, 59 and 60 of the Act of 2001. However, I think that the observations of the ECtHR must now be seen in the light of the Glor, Kiss and X v. Finland judgments referred to earlier.

93. At the time of the hearing, I was not referred to any of the ECHR jurisprudence involving a right to ongoing court or tribunal engagement as to ongoing treatment decisions. However, counsel subsequently brought to my

attention the case of X v. Finland (Application no.34806/04, 3 July, 2012), where a request to the Grand Chamber is pending. The findings of the ECtHR have been set out earlier.

94. I fully agree that the interference with a patient's rights, in cases like the present, is so serious to require adequate safeguards against arbitrariness. What is necessary is a clearly defined procedure, in accordance with law, which vindicates ECHR rights to privacy and autonomy involving proper clinical decision-making procedures. I believe such safeguards are to be found in s. 60 through the requirement for a second opinion from an independent consultant, in relation to the proposed treatment, at regular three month intervals, together with such charges as may be necessitated by this judgment. I would add that a further consequence of assisted decision-making is that it enhances the right of access to the court on behalf of a s. 60 patient. But I do not think any of the ECtHR case law goes further than the rights identified here under the Constitution. In short, I do not understand the law, whether national or under the ECHR, presently to require a mandatory court hearing in every case. I note the X. v Finland case remains pending before the Grand Chamber. I should re-iterate that, in the instant case, the plaintiff here was, thanks both to the HSE and to her lawyers, able to have the legality of her treatment procedure reviewed by this Court. But the plaintiff is not, in my view, entitled to a declaration of incompatibility under s. 5. The provisions of s. 60 are of course to be interpreted and applied in a manner compatible with the State's obligations under the ECHR. On my understanding of the ECHR jurisprudence, this objective is achieved by virtue of the adherence to the constitutionally compliant procedures under s. 60 of the Act, outlined earlier in this judgment.

Section 4 - Locus Standi

95. It is necessary finally to address the question of the plaintiff's locus standi. This case directly arose from questions which were raised in the earlier case wherein the plaintiff in these proceedings was the defendant. The questions directly related to the proper interpretation of the Act of 2001. The plaintiff was directly concerned with how Part 4 of the Act applied to her. It must be recollected also that the HSE, the plaintiff in the original proceedings, as an alternative to the statutory argument, advanced the contention that the Court would be entitled to grant the reliefs sought, pursuant to its inherent jurisdiction. The issues in this case, in my view could only properly have been resolved by court proceedings.

96. Even though it cannot be said that the plaintiff has succeeded on the issues, this case comes within one of the exceptions identified by Henchy J. in Cahill v. Sutton [1980] I.R. 269, as being one where the legal provisions involved were directed to, or operable against a group which includes the plaintiff and where the plaintiff may be said to have a common interest, albeit in circumstances where it may be difficult to segregate the plaintiff's own position from the rights of other persons similarly affected. The law in this area is in a state of evolution and the issues here required judicial determination. In an area where the law required clarification, I therefore conclude that the plaintiff did have locus standi.

97. Having regard to all the circumstances, I must find that the plaintiff is not entitled to relief under the headings identified in the claim.

98. I would like to express appreciation to counsel for the parties and the notice parties whose submissions helped to chart the way through the shoals of this difficult area of jurisprudence. It is to be hoped their efforts have resulted in the arrival at a destination which best protects the interests and rights of the plaintiff and those in similar situations.

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 (recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 141(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([2]),

Whereas:

(1) 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 ([3]) and Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes ([4]) have been significantly amended ([5]). Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women ([6]) and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex ([7]) also contain provisions which have as their purpose the implementation of the principle of equal treatment between men and women. Now that new amendments are being made to the said Directives, it is desirable, for reasons of clarity, that the provisions in question should be recast by bringing together in a single text the main provisions existing in this field as well as certain developments arising out of the case-law of the Court of Justice of the European Communities (hereinafter referred to as the Court of Justice).

([1]) OJ C 157, 28.6.2005, p. 83.

([2]) Opinion of the European Parliament of 6 July 2005 (not yet published in the Official Journal), Council Common Position of 10 March 2006(OJ C 126 E, 30.5.2006, p. 33) and Position of the European Parliament of 1 June 2006 (not yet published in the Official Journal).

([3]) OJ L 39, 14.2.1976, p. 40. Directive as amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

([4]) OJ L 225, 12.8.1986, p. 40. Directive as amended by Directive 96/97/EC (OJ L 46, 17.2.1997, p. 20).

([5]) See Annex I Part A.

([6]) OJ L 45, 19.2.1975, p. 19.

([7]) OJ L 14, 20.1.1998, p. 6. Directive as amended by Directive 98/52/EC (OJ L 205, 22.7.1998, p. 66).

(2) Equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to promote it in all its activities.

(3) The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

(4) Article 141(3) of the Treaty now provides a specific legal basis for the adoption of Community measures to ensure the application of the principle of equal opportunities and equal treatment in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

(5) Articles 21 and 23 of the Charter of Fundamental Rights of the European Union also prohibit any discrimination on grounds of sex and enshrine the right to equal treatment between men and women in all areas, including employment, work and pay.

(6) Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.

(7) In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and in access to employment, vocational training and promotion, in accordance with national law and practice.

(8) The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty and consistently upheld in the case-law of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women and an essential and

indispensable part of the *acquis communautaire*, including the case-law of the Court concerning sex discrimination. It is therefore appropriate to make further provision for its implementation.

(9) In accordance with settled case-law of the Court of Justice, in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation.

(10) The Court of Justice has established that, in certain circumstances, the principle of equal pay is not limited to situations in which men and women work for the same employer.

(11) The Member States, in collaboration with the social partners, should continue to address the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market by means such as flexible working time arrangements which enable both men and women to combine family and work commitments more successfully. This could also include appropriate parental leave arrangements which could be taken up by either parent as well as the provision of accessible and affordable child-care facilities and care for dependent persons.

(12) Specific measures should be adopted to ensure the implementation of the principle of equal treatment in occupational social security schemes and to define its scope more clearly.

(13) In its judgment of 17 May 1990 in Case C-262/88 ([1]), the Court of Justice determined that all forms of occupational pension constitute an element of pay within the meaning of Article 141 of the Treaty.

(14) Although the concept of pay within the meaning of Article 141 of the Treaty does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, notwithstanding the fact that such scheme forms part of a general statutory scheme. According to the judgments of the Court of Justice in Cases C-7/93 ([2]) and C-351/00 ([3]), that condition will be satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary. For reasons of clarity, it is therefore appropriate to make specific provision to that effect.

([1]) C-262/88: Barber v Guardian Royal Exchange Assurance Group (1990 ECR I-1889).

([2]) C-7/93: Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune (1994 ECR I-4471).

([3]) C-351/00: Pirkko Niemi (2002 ECR I-7007).

(15) The Court of Justice has confirmed that whilst the contributions of male and female workers to a defined-benefit pension scheme are covered by Article 141 of the Treaty, any inequality in employers' contributions paid under funded defined-benefit schemes which is due to the use of actuarial factors differing according to sex is not to be assessed in the light of that same provision.

(16) By way of example, in the case of funded defined-benefit schemes, certain elements, such as conversion into a capital sum of part of a periodic pension, transfer of pension rights, a reversionary pension payable to a dependant in return for the surrender of part of a pension or a reduced pension where the worker opts to take earlier retirement, may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented.

(17) It is well established that benefits payable under occupational social security schemes are not to be considered as remuneration insofar as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who initiated legal proceedings or brought an equivalent claim under the applicable national law before that date. It is therefore necessary to limit the implementation of the principle of equal treatment accordingly.

(18) The Court of Justice has consistently held that the Barber Protocol ([4]) does not affect the right to join an occupational pension scheme and that the limitation of the effects in time of the judgment in Case C-262/88 does not apply to the right to join an occupational pension scheme. The Court of Justice also ruled that the national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice. The Court of Justice has also pointed out that the fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned.

(19) Ensuring equal access to employment and the vocational training leading thereto is fundamental to the application of the principle of equal treatment of men and women in matters of employment and occupation. Any exception to this principle should therefore be limited to those occupational activities which necessitate the employment of a person of a particular sex by reason of their nature or the context in which they are carried out, provided that the objective sought is legitimate and complies with the principle of proportionality.

([4]) Protocol 17 concerning Article 141 of the Treaty establishing the European Community (1992).

(20) 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. Measures within the meaning of Article 141(4) of the Treaty may include membership or the continuation of the activity of organisations or unions whose main objective is the promotion, in practice, of the principle of equal treatment between men and women.

(21) 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 one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between men and women.

(22) In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.

(23) It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.

(24) The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. This Directive should therefore be without prejudice to Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding ([1]). This Directive should further be without prejudice to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC ([2]).

(25) For reasons of clarity, it is also appropriate to make express provision for the protection of the employment rights of women on maternity leave and in particular their right to return to the same or an equivalent post, to suffer no detriment in their terms and conditions as a result of taking such leave and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

(26) In the Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council, of 29 June 2000 on the balanced participation of women and men in family and working life ([3]), Member States were encouraged to consider examining the scope for their respective legal systems to grant working men an individual and non-transferable right to paternity leave, while maintaining their rights relating to employment.

(27) Similar considerations apply to the granting by Member States to men and women of an individual and non-transferable right to leave subsequent to the adoption of a child. It is for the Member States to determine whether or not to grant such a right to paternity and/or adoption leave and also to determine any conditions, other than dismissal and return to work, which are outside the scope of this Directive.

(28) The effective implementation of the principle of equal treatment requires appropriate procedures to be put in place by the Member States.

(29) The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment.

(30) The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a *prima facie* case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.

(31) With a view to further improving the level of protection offered by this Directive, associations, organisations and other legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of a complainant, without prejudice to national rules of procedure concerning representation and defence.

(32) Having regard to the fundamental nature of the right to effective legal protection, it is appropriate to ensure that workers continue to enjoy such protection even after the relationship giving rise to an alleged breach of the principle

([1]) OJ L 348, 28.11.1992, p. 1.

([2]) OJ L 145, 19.6.1996, p. 4. Directive as amended by Directive 97/75/EC (OJ L 10, 16.1.1998, p. 24).

([3]) OJ C 218, 31.7.2000, p. 5.

of equal treatment has ended. An employee defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection.

(33) It has been clearly established by the Court of Justice that in order to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate in relation to the damage sustained. It is therefore appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to take his/her job application into consideration.

(34) In order to enhance the effective implementation of the principle of equal treatment, Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations.

(35) Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive.

(36) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. 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 those objectives.

(37) For the sake of a better understanding of the different treatment of men and women in matters of employment and occupation, comparable statistics disaggregated by sex should continue to be developed, analysed and made available at the appropriate levels.

(38) Equal treatment of men and women in matters of employment and occupation cannot be restricted to legislative measures. Instead, the European Union and the Member States should continue to promote the raising of public awareness of wage discrimination and the changing of public attitudes, involving all parties concerned at public and private level to the greatest possible extent. The dialogue between the social partners could play an important role in this process.

(39) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.

(40) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in Annex I, Part B.

(41) In accordance with paragraph 34 of the Interinstitutional agreement on better law-making [1], 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 this Directive and the transposition measures and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

Article 2

Definitions

1. For the purposes of this Directive, the following definitions shall apply:

(a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

(c) 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

[1] OJ C 321, 31.12.2003, p. 1.

(d) 'sexual harassment': where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

(e) 'pay': the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer;

(f) 'occupational social security schemes': schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security ([1]) whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

2. For the purposes of this Directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;

(b) instruction to discriminate against persons on grounds of sex;

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

Article 3

Positive action

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

([1]) OJ L 6, 10.1.1979, p. 24.

TITLE II

SPECIFIC PROVISIONS

CHAPTER 1

Equal pay

Article 4

Prohibition of discrimination

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

CHAPTER 2

Equal treatment in occupational social security schemes

Article 5

Prohibition of discrimination

Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

(a) the scope of such schemes and the conditions of access to them;

(b) the obligation to contribute and the calculation of contributions;

(c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

Article 6

Personal scope

This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

Article 7

Material scope

1. This Chapter applies to:

(a) occupational social security schemes which provide protection against the following risks:

(i) sickness,

(ii) invalidity,

(iii) old age, including early retirement,

(iv) industrial accidents and occupational diseases,

(v) unemployment;

(b) occupational social security schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment.

2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect.

Article 8

Exclusions from the material scope

1. This Chapter does not apply to:

(a) individual contracts for self-employed persons;

(b) single-member schemes for self-employed persons;

(c) insurance contracts to which the employer is not a party, in the case of workers;

(d) optional provisions of occupational social security schemes offered to participants individually to guarantee them:

(i) either additional benefits,

(ii) or a choice of date on which the normal benefits for self-employed persons will start, or a choice between several benefits;

(e) occupational social security schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.

2. This Chapter does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational social security scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.

Article 9

Examples of discrimination

1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:

(a) determining the persons who may participate in an occupational social security scheme;

(b) fixing the compulsory or optional nature of participation in an occupational social security scheme;

(c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;

(d) laying down different rules, except as provided for in points (h) and (j), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;

(e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;

(f) fixing different retirement ages;

(g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;

(h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;

(i) setting different levels for workers' contributions;

(j) setting different levels for employers' contributions, except:

(i) in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more nearly equal for both sexes,

(ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;

(k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

2. Where the granting of benefits within the scope of this Chapter is left to the discretion of the scheme's management bodies, the latter shall comply with the principle of equal treatment.

Article 10

Implementation as regards self-employed persons

1. Member States shall take the necessary steps to ensure that the provisions of occupational social security schemes for self-employed persons contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest or for Member States whose accession took place after that date, at the date that Directive 86/378/EEC became applicable in their territory.

2. This Chapter shall not preclude rights and obligations relating to a period of membership of an occupational social security scheme for self-employed persons prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.

Article 11

Possibility of deferral as regards self-employed persons

As regards occupational social security schemes for self-employed persons, Member States may defer compulsory application of the principle of equal treatment with regard to:

(a) determination of pensionable age for the granting of old-age or retirement pensions, and the possible implications for other benefits:

(i) either until the date on which such equality is achieved in statutory schemes,

(ii) or, at the latest, until such equality is prescribed by a directive;

(b) survivors' pensions until Community law establishes the principle of equal treatment in statutory social security schemes in that regard;

(c) the application of Article 9(1)(i) in relation to the use of actuarial calculation factors, until 1 January 1999 or for Member States whose accession took place after that date until the date that Directive 86/378/EEC became applicable in their territory.

Article 12

Retroactive effect

1. Any measure implementing this Chapter, as regards workers, shall cover all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures shall apply retroactively to 8 April 1976 and shall cover all the benefits derived from periods of employment after that date. For Member States which acceded to the Community after 8 April 1976, and before 17 May 1990, that date shall be replaced by the date on which Article 141 of the Treaty became applicable in their territory.

2. The second sentence of paragraph 1 shall not prevent national rules relating to time limits for bringing actions under national law from being relied on against workers or those claiming under them who initiated legal proceedings or raised an equivalent claim under national law before 17 May 1990, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice.

3. For Member States whose accession took place after 17 May 1990 and which were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 in the first sentence of paragraph 1 shall be replaced by 1 January 1994.

4. For other Member States whose accession took place after 17 May 1990, the date of 17 May 1990 in paragraphs 1 and 2 shall be replaced by the date on which Article 141 of the Treaty became applicable in their territory.

Article 13

Flexible pensionable age

Where men and women may claim a flexible pensionable age under the same conditions, this shall not be deemed to be incompatible with this Chapter.

CHAPTER 3

Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 14

Prohibition of discrimination

1. There shall be no direct or indirect discrimination on grounds of sex in the public or 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, as well as pay as provided for in Article 141 of the Treaty;

(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. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex 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 its objective is legitimate and the requirement is proportionate.

Article 15

Return from maternity leave

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

Article 16

Paternity and adoption leave

This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

TITLE III

HORIZONTAL PROVISIONS

CHAPTER 1

Remedies and enforcement

Section 1

Remedies

Article 17

Defence of rights

1. Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial 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/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 equal treatment.

Article 18

Compensation or reparation

Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

Section 2

Burden of proof

Article 19

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. 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.

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) the situations covered by Article 141 of the Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC;

(b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

5. This Article shall not apply to criminal procedures, unless otherwise provided by the Member States.

CHAPTER 2

Promotion of equal treatment — dialogue

Article 20

Equality bodies

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination;

(d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality.

Article 21

Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.

2. Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the provisions of this Directive and the relevant national implementing measures.

3. Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in a planned and systematic way in the workplace, in access to employment, vocational training and promotion.

4. To this end, employers shall be encouraged to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking.

Such information may include an overview of the proportions of men and women at different levels of the organisation; their pay and pay differentials; and possible measures to improve the situation in cooperation with employees' representatives.

Article 22

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 grounds of sex with a view to promoting the principle of equal treatment.

CHAPTER 3

General horizontal provisions

Article 23

Compliance

Member States shall take all necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations or any other arrangements shall be, or may be, declared null and void or are amended;

(c) occupational social security schemes containing such provisions may not be approved or extended by administrative measures.

Article 24

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, 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 25

Penalties

Member States shall lay down the rules on penalties 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 penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 26

Prevention of discrimination

Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.

Article 27

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. Implementation of this Directive shall under no circumstances be sufficient grounds for a reduction in the level of protection of workers in the areas to which it applies, without prejudice to the Member States' right to respond to changes in the situation by introducing laws, regulations and administrative provisions which differ from those in force on the notification of this Directive, provided that the provisions of this Directive are complied with.

Article 28

Relationship to Community and national provisions

1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

2. This Directive shall be without prejudice to the provisions of Directive 96/34/EC and Directive 92/85/EEC.

Article 29

Gender mainstreaming

Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

Article 30

Dissemination of information

Member States shall ensure that measures taken pursuant to this Directive, together with the provisions already in force, are brought to the attention of all the persons concerned by all suitable means and, where appropriate, at the workplace.

TITLE IV

FINAL PROVISIONS

Article 31

Reports

1. By 15 February 2011, the Member States shall communicate to the Commission 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. Without prejudice to paragraph 1, Member States shall communicate to the Commission, every four years, the texts of any measures adopted pursuant to Article 141(4) of the Treaty, as well as reports on these measures and their implementation. On the basis of that information, the Commission will adopt and publish every four years a report establishing a comparative assessment of any measures in the light of Declaration No 28 annexed to the Final Act of the Treaty of Amsterdam.

3. Member States shall assess the occupational activities referred to in Article 14(2), in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment periodically, but at least every 8 years.

Article 32

Review

By 15 February 2011 at the latest, the Commission shall review the operation of this Directive and if appropriate, propose any amendments it deems necessary.

Article 33

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 August 2008 at the latest or shall ensure, by that date, that management and labour introduce the requisite provisions by way of agreement. Member States may, if necessary to take account of particular difficulties, have up to one additional year to comply with this Directive. Member States shall take all necessary steps to be able to guarantee the results imposed by this Directive. They shall forthwith communicate to the Commission the texts of those measures.

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. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

The obligation to transpose this Directive into national law shall be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.

Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 34

Repeal

1. With effect from 15 August 2009 Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC shall be repealed without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex I, Part B.

2. References made to the repealed Directives shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex II.

Article 35

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 36

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 5 July 2006.

For the European Parliament	*For the Council*
The President	*The President*
J. BORRELL FONTELLES	P. LEHTOMÄKI

ANNEX I

PART A

Repealed Directives with their successive amendments

Council Directive 75/117/EEC	OJ L 45, 19.2.1975, p. 19
Council Directive 76/207/EEC	OJ L 39, 14.2.1976, p. 40
Directive 2002/73/EC of the European Parliament and of the Council	OJ L 269, 5.10.2002, p. 15
Council Directive 86/378/EEC	OJ L 225, 12.8.1986, p. 40
Council Directive 96/97/EC	OJ L 46, 17.2.1997, p. 20
Council Directive 97/80/EC	OJ L 14, 20.1.1998, p. 6
Council Directive 98/52/EC	OJ L 205, 22.7.1998, p. 66

PART B

List of time limits for transposition into national law and application dates

(referred to in Article 34(1))

Directive	Time-limit for transposition	Date of application
Directive 75/117/EEC	19.2.1976	
Directive 76/207/EEC	14.8.1978	
Directive 86/378/EEC	1.1.1993	
Directive 96/97/EC	1.7.1997	17.5.1990 in relation to workers, except for those workers or those claiming under them who had before that date initiated legal proceedings or raised an equivalent claim under national law. Article 8 of Directive 86/378/EEC — 1.1.1993 at the latest. Article 6(1)(i), first indent of Directive 86/378/EEC –1.1.1999 at the latest.
Directive 97/80/EC	1.1.2001	As regards the United Kingdom of Great Britain and Northern Ireland 22.7.2001
Directive 98/52/EC	22.7.2001	
Directive 2002/73/EC	5.10.2005	

ANNEX II

Correlation table

Directive 75/117/EEC	Directive 76/207/EEC	Directive 86/378/EEC	Directive 97/80/EC	This Directive
—	Article 1(1)	Article 1	Article 1	Article 1
—	Article 1(2)	—	—	—
—	Article 2(2), first indent	—	—	Article 2(1), (a)
—	Article 2(2), second indent	—	Article 2(2)	Article 2(1), (b)
—	Article 2(2), third and fourth indents	—	—	Article 2(1), (c) and (d)
—	—	—	—	Article 2(1), (e)
—	—	Article 2(1)	—	Article 2(1), (f)
—	Article 2(3) and (4) and Article 2(7) third subparagraph	—	—	Article 2(2)
—	Article 2(8)	—	—	Article 3
Article 1	—	—	—	Article 4
—	—	Article 5(1)	—	Article 5
—	—	Article 3	—	Article 6
—	—	Article 4	—	Article 7(1)
—	—	—	—	Article 7(2)
		Article 2(2)		Article 8(1)
—	—	Article 2(3)	—	Article 8(2)
—	—	Article 6	—	Article 9
—	—	Article 8	—	Article 10
—	—	Article 9	—	Article 11
—	—	(Article 2 of Directive 96/97/EC)	—	Article 12
—	—	Article 9a	—	Article 13
—	Articles 2(1) and 3 (1)	—	Article 2(1)	Article 14(1)
—	Article 2(6)	—	—	Article 14(2)
—	Article 2(7), second subparagraph	—	—	Article 15
—	Article 2(7), fourth subparagraph, second and third sentence	—	—	Article 16
Article 2	Article 6(1)	Article 10	—	Article 17(1)
—	Article 6(3)	—	—	Article 17(2)
—	Article 6(4)	—	—	Article 17(3)

Directive 75/117/EEC	Directive 76/207/EEC	Directive 86/378/EEC	Directive 97/80/EC	This Directive
—	Article 6(2)	—	—	Article 18
—	—	—	Articles 3 and 4	Article 19
—	Article 8a	—	—	Article 20
—	Article 8b	—	—	Article 21
—	Article 8c	—	—	Article 22
Articles 3 and 6	Article 3 (2)(a)	—	—	Article 23(a)
Article 4	Article 3(2)(b)	Article 7(a)	—	Article 23(b)
—	—	Article 7(b)	—	Article 23(c)
Article 5	Article 7	Article 11	—	Article 24
Article 6	—	—	—	—
—	Article 8d	—	—	Article 25
	Article 2(5)			Article 26
—	Article 8e(1)	—	Article 4(2)	Article 27(1)
—	Article 8e(2)	—	Article 6	Article 27(2)
—	Article 2(7) first subparagraph	Article 5(2)	—	Article 28(1)
—	Article 2(7) fourth subparagraph first sentence			Article 28(2)
—	Article 1(1a)			Article 29
Article 7	Article 8	—	Article 5	Article 30
Article 9	Article 10	Article 12(2)	Article 7, fourth subparagraph	Article 31(1) and (2)
—	Article 9(2)	—	—	Article 31(3)
—	—	—	—	Article 32
Article 8	Article 9(1), first subparagraph and 9 (2) and (3)	Article 12(1)	Article 7, first, second and third subparagraphs	Article 33
—	Article 9(1), second subparagraph	—	—	—
—	—	—	—	Article 34
—	—	—	—	Article 35
—	—	—	—	Article 36
—	—	Annex	—	—

COUNCIL 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

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 Commission,

Having regard to the Opinion of the European Parliament [1],

Having regard to the Opinion of the European Economic and Social Committee [2],

Having regard to the opinion of the Committee of the Regions [3],

Whereas:

(1) In accordance with Article 6 of the Treaty on European Union, the 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 the Member States, and 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 and the 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.

(3) 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 and the freedom of religion.

(4) Equality between men and women is a fundamental principle of the European Union. Articles 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas.

(5) Article 2 of the Treaty establishing the European Community provides that promoting such equality is one of the Community's essential tasks. Similarly, Article 3(2) of the Treaty requires the Community to aim to eliminate inequalities and to promote equality between men and women in all its activities.

(6) The Commission announced its intention of proposing a directive on sex discrimination outside of the labour market in its Communication on the Social Policy Agenda. Such a proposal is fully consistent with Council Decision 2001/51/EC of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001-2005) [4] covering all Community policies and aimed at promoting equality for men and women by adjusting these policies and implementing practical measures to improve the situation of men and women in society.

(7) At its meeting in Nice of 7 and 9 December 2000, the European Council called on the Commission to reinforce equality-related rights by adopting a proposal for a directive on promoting gender equality in areas other than employment and professional life.

[1] Opinion delivered on 30 March 2004 (not yet published in the Official Journal).
[2] OJ C 241, 28.9.2004, p. 44.
[3] OJ C 121, 30.4.2004, p. 27.
[4] OJ L 17, 19.1.2001, p. 22.

(8) The Community has adopted a range of legal instruments to prevent and combat sex discrimination in the labour market. These instruments have demonstrated the value of legislation in the fight against discrimination.

(9) Discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life.

(10) Problems are particularly apparent in the area of the access to and supply of goods and services. Discrimination based on sex, should therefore be prevented and eliminated in this area. As in the case of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin [1], this objective can be better achieved by means of Community legislation.

(11) Such legislation should prohibit discrimination based on sex in the access to and supply of goods and services. Goods should be taken to be those within the meaning of the provisions of the Treaty establishing the European Community relating to the free movement of goods. Services should be taken to be those within the meaning of Article 50 of that Treaty.

(12) To prevent discrimination based on sex, this Directive should apply to both direct discrimination and indirect discrimination. Direct discrimination occurs only when one person is treated less favourably, on grounds of sex, than another person in a comparable situation. Accordingly, for example, differences between men and women in the provision of healthcare services, which result from the physical differences between men and women, do not relate to comparable situations and therefore, do not constitute discrimination.

(13) The prohibition of discrimination should apply to persons providing goods and services, which are available to the public and which are offered outside the area of private and family life and the transactions carried out in this context. It should not apply to the content of media or advertising nor to public or private education.

(14) All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. An individual who provides goods or services may have a number of subjective reasons for his or her choice of contractual partner. As long as the choice of partner is not based on that person's sex, this Directive should not prejudice the individual's freedom to choose a contractual partner.

(15) There are already a number of existing legal instruments for the implementation of the principle of equal treatment between men and women in matters of employment and occupation. Therefore, this Directive should not apply in this field. The same reasoning applies to matters of self-employment insofar as they are covered by existing legal instruments. The Directive should apply only to insurance and pensions which are private, voluntary and separate from the employment relationship.

(16) Differences in treatment may be accepted only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events). Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities.

(17) The principle of equal treatment in the access to goods and services does not require that facilities should always be provided to men and women on a shared basis, as long as they are not provided more favourably to members of one sex.

(18) The use of actuarial factors related to sex is widespread in the provision of insurance and other related financial services. In order to ensure equal treatment between men and women, the use of sex as an actuarial factor should not result in differences in individuals' premiums and benefits. To avoid a sudden readjustment of the market, the implementation of this rule should apply only to new contracts concluded after the date of transposition of this Directive.

[1] OJ L 180, 19.7.2000, p. 22.

(19) Certain categories of risks may vary between the sexes. In some cases, sex is one but not necessarily the only determining factor in the assessment of risks insured. For contracts insuring those types of risks, Member States may decide to permit exemptions from the rule of unisex premiums and benefits, as long as they can ensure that underlying actuarial and statistical data on which the calculations are based, are reliable, regularly up-dated and available to the public. Exemptions are allowed only where national legislation has not already applied the unisex rule. Five years after transposition of this Directive, Member States should re-examine the justification for these exemptions, taking into account the most recent actuarial and statistical data and a report by the Commission three years after the date of transposition of this Directive.

(20) Less favourable treatment of women for reasons of pregnancy and maternity should be considered a form of direct discrimination based on sex and therefore prohibited in insurance and related financial services. Costs related to risks of pregnancy and maternity should therefore not be attributed to the members of one sex only.

(21) Persons who have been subject to discrimination based on sex should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other 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.

(22) The rules on the burden of proof should 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 should shift back to the defendant when evidence of such discrimination is brought.

(23) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.

(24) With a view to promoting the principle of equal treatment, Member States should encourage dialogue with relevant stakeholders, which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex in the area of access to and supply of goods and services.

(25) Protection against discrimination based on sex should itself 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. The body or bodies may be the same as those with responsibility at national level for the defence of human rights or the safeguarding of individuals' rights, or the implementation of the principle of equal treatment.

(26) 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.

(27) Member States should provide for effective, proportionate and dissuasive penalties in cases of breaches of the obligations under this Directive.

(28) Since the objectives of this Directive, namely to ensure a common high 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 effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. 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 those objectives.

(29) In accordance with paragraph 34 of the interinstitutional agreement on better law-making [1], 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,

[1] OJ C 321, 31.12.2003, p. 1.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

(a) direct discrimination: where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;

(b) indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;

(c) harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

(d) sexual harassment: where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 3

Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.

2. This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.

3. This Directive shall not apply to the content of media and advertising nor to education.

4. This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.

Article 4

Principle of equal treatment

1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that

(a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;

(b) there shall be no indirect discrimination based on sex.

2. This Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.

3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.

4. Instruction to direct or indirect discrimination on the grounds of sex shall be deemed to be discrimination within the meaning of this Directive.

5. This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Article 5

Actuarial factors

1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits.

Member States may defer implementation of the measures necessary to comply with this paragraph until two years after 21 December 2007 at the latest. In that case the Member States concerned shall immediately inform the Commission.

Article 6

Positive action

With a view to ensuring full equality in practice between men and women, 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 sex.

Article 7

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between men and women than those laid down in this Directive.

2. The implementation of this Directive shall in 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 8

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 the 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 introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation.

3. 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, 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.

4. Paragraphs 1 and 3 shall be without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.

Article 9

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 proceedings brought in accordance with Article 8(3).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.

Article 10

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect persons from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 11

Dialogue with relevant stakeholders

With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex in the area of access to and supply of goods and services.

CHAPTER III

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 12

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights, or the implementation of the principle of equal treatment.

2. Member States shall ensure that the competencies of the bodies referred to in paragraph 1 include:

(a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 8(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER IV

FINAL PROVISIONS

Article 13

Compliance

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected in relation to the access to and supply of goods and services within the scope of this Directive, 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

Penalties

Member States shall lay down the rules on penalties 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 penalties, which may comprise the payment of compensation to the victim, shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 21 December 2007 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 15

Dissemination of information

Member States shall take care 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 all appropriate means throughout their territory.

Article 16

Reports

1. Member States shall communicate all available information concerning the application of this Directive to the Commission, by 21 December 2009. and every five years thereafter.

The Commission shall draw up a summary report, which shall include a review of the current practices of Member States in relation to Article 5 with regard to the use of sex as a factor in the calculation of premiums and benefits. It shall submit this report to the European Parliament and to the Council no later 21 December 2010. Where appropriate, the Commission shall accompany its report with proposals to modify the Directive.

2. The Commission's report shall take into account the viewpoints of relevant stakeholders.

Article 17

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 21 December 2007 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

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

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 18

Entry into force

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

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 13 December 2004.

For the Council
The President
B. R. BOT

COUNCIL DIRECTIVE 2000/43/EC

of 29 June 2000

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

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) The Treaty on European Union marks a new stage in the process of creating an ever closer union among the peoples of Europe.

(2) 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 the Member States, and should respect 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.

(3) 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 and the 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.

(4) It is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.

(5) The European Parliament has adopted a number of Resolutions on the fight against racism in the European Union.

(6) The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.

(7) The European Council in Tampere, on 15 and 16 October 1999, invited the Commission to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty as regards the fight against racism and xenophobia.

(8) The Employment Guidelines 2000 agreed by the European Council in Helsinki, on 10 and 11 December 1999, stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.

(9) Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice.

(10) The Commission presented a communication on racism, xenophobia and anti-Semitism in December 1995.

(11) The Council adopted on 15 July 1996 Joint Action (96/443/JHA) concerning action to combat racism and xenophobia [5] under which the Member States undertake to ensure effective judicial cooperation in respect of offences based on racist or xenophobic behaviour.

(12) To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services.

[1] Not yet published in the Official Journal.
[2] Opinion delivered on 18.5.2000 (not yet published in the Official Journal).
[3] Opinion delivered on 12.4.2000 (not yet published in the Official Journal).
[4] Opinion delivered on 31.5.2000 (not yet published in the Official Journal).
[5] OJ L 185, 24.7.1996, p. 5.

(13) To this end, any direct or indirect discrimination based on racial or ethnic origin 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 to occupation.

(14) In implementing the principle of equal treatment irrespective of racial or ethnic origin, 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.

(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) It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members.

(17) 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 racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.

(18) In very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin 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.

(19) Persons who have been subject to discrimination based on racial and ethnic origin 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, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.

(20) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

(21) 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.

(22) 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.

(23) Member States should promote dialogue between the social partners and with non-governmental organisations to address different forms of discrimination and to combat them.

(24) Protection against discrimination based on racial or ethnic origin would itself 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.

(25) 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.

(26) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

(27) The Member States may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements, provided that the Member States take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive.

(28) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty, the objective of this Directive, namely ensuring a common high 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,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, 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 based on racial or ethnic origin.

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 grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin 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 discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin 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 grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3

Scope

1. Within the limits of the powers conferred upon 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 and 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;

(e) social protection, including social security and healthcare;

(f) social advantages;

(g) education;

(h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference 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 on 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

Genuine and determining occupational requirements

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin 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.

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 racial or ethnic origin.

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, 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 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 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 proceedings brought in accordance with Article 7(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 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 take care 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 all appropriate means throughout their territory.

Article 11

Social dialogue

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

2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry 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 the relevant national implementing measures.

Article 12

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 grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

CHAPTER III

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

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 IV

FINAL PROVISIONS

Article 14

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 individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.

Article 15

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. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 16

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003 or may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements. In such cases, Member States shall ensure that by 19 July 2003, management and labour introduce the necessary measures by agreement, Member States 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.

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

Article 17

Report

1. Member States shall communicate to the Commission by 19 July 2005, 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 views of the European Monitoring Centre on Racism and Xenophobia, as well as 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 18

Entry into force

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

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Luxembourg, 29 June 2000.

For the Council

The President

M. ARCANJO

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DECISION ON THE MERITS

3 June 2008

Mental Disability Advocacy Center (MDAC) v. Bulgaria

Complaint No. 41/2007

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 230th session attended by:

Mrs	Polonca KONČAR, President
Mssrs	Andrzej SWIATKOWSKI, First Vice-President
	Tekin AKILLIOGLU, Second Vice-President
	Jean-Michel BELORGEY, General Rapporteur
	Alfredo BRUTO DA COSTA
	Nikitas ALIPRANTIS
	Stein EVJU
Mrs	Csilla KOLLONAY LEHOCZKY
Mssrs	Lucien FRANCOIS
	Lauri LEPPIK
	Colm O'CINNEIDE
Mrs	Monika SCHLACHTER
	Lyudmila HARUTYUNYAN

Assisted by Mr Régis BRILLAT, Executive Secretary,

Having deliberated on 1 April 2008 and 3 June 2008,

On the basis of the report presented by Mrs Polonca Končar,

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint dated 15 February 2007 was registered on 20 February 2007. The Mental Disability Advocacy Centre (MDAC) alleges that the situation in Bulgaria is not in conformity with Article 17§2 alone and in conjunction with Article E of the Revised European Social Charter (the "Revised Charter") because children living in homes for intellectually disabled children in Bulgaria receive no education.

2. On 26 June 2007, the Committee declared the complaint admissible.

3. In accordance with Article 7§1 and §2 of the Protocol providing for a system of collective complaints ("the Protocol") and with the Committee's decision on the admissibility of the complaint, on 2 July 2007 the Executive Secretary communicated the text of the admissibility decision to the Bulgarian Government ("the Government"), the MDAC, the Contracting Parties to the Protocol and the states that have made a declaration in accordance with Article D§2 of the Revised Charter, and on 6 July 2007 to the international employers' organisations and trade unions referred to in Article 27§2 of the 1961 European Social Charter, i.e. the European Trade Union Confederation (ETUC), Businesseurope (former UNICE) and the International Organisation of Employers (IOE).

4. In accordance with Article 31§1 of the Committee's Rules, the Committee set a deadline of 28 September 2007 for presentation of the Government's submissions on the merits. It also set 28 September 2007 as the deadline for the Contracting Parties to the Protocol, the states that have made a declaration in accordance with Article D§2 of the Revised Charter and the international employers' organisations and trade unions referred to in paragraph 2 of Article 27 of the 1961 European Social Charter to submit any observations on the merits.

5. The Government's submissions on the merits of the complaint were registered on 1 October 2007.

6. In accordance with Article 31§2 of the Rules, the President of the Committee invited the MDAC to reply to these submissions by 30 November 2007. The MDAC's reply was registered on 30 November 2007 and forwarded to the Government on 6 December 2007.

SUBMISSIONS OF THE PARTIES

a. The complainant organisation

7. The MDAC asks the Committee to find that the Government's failure to provide education for children with moderate, severe or profound intellectual disabilities living in homes for mentally disabled children in Bulgaria violates Article 17§2 of the Revised Charter, alone and in conjunction with Article E.

b. The Government

8. The Government invites the Committee:

i. to recognise its efforts to secure equal access to education;

ii. to note the legal and practical steps that have been taken to overcome the problems of offering children living in homes for mentally disabled children access to schooling, and its political commitment to ensuring that these continue to be implemented and put into practice, in accordance with the objectives of the Revised Charter and subject to available resources;

iii. to reject the MDAC's application as unfounded.

RELEVANT DOMESTIC LAW

9. The relevant provisions of Bulgarian law concerning access to education for mentally disabled children are as follows:

10. The Constitution of the Republic of Bulgaria of 13 July 1991;

Articles 6 and 53 of the Constitution read:

Article 6

"1. All persons are born free and equal in dignity and rights.

2. All persons shall be equal before the law. There shall be no privileges or restriction of rights on grounds of race, national or social origin, ethnic affiliation, sex, origin, religion, education, opinion, political affiliation, personal or social status or wealth."

Article 53

"1. Everyone shall have the right to education.

2. School attendance up to the age of 16 shall be compulsory.

3. Primary and secondary education in state and municipal schools shall be free. In circumstances established by law, higher educational establishments shall provide education free of charge.

4. Higher educational establishments shall enjoy academic autonomy.

5. Citizens and organisations shall be free to found schools in accordance with conditions and procedures established by law. The education they provide shall comply with the requirements of the state.

6. The state shall promote education by opening and financing schools, by supporting capable school and university students, and by providing opportunities for occupational training and retraining. It shall exercise control over all kinds and levels of schooling.

11. National Education Act 1991, as amended by the Act of 2002

Article 4:

"(1) All citizens shall have the right to education. They shall be entitled to constantly heighten their education and qualifications.
(2) Restrictions or privileges based on race, nationality, sex, ethnic and social origin, religion and social status shall be inadmissible."

Article 7:

"(1) Schooling up to the age of 16 shall be compulsory.
(2) (Amended Official Journal (OJ) No. 36/1998) Schooling shall start at the age of 7, where such age shall have been attained in the year of enrolment in the first (1st) grade. Children who have turned 6 shall also be entitled to enrolment in the first (1st) grade provided their physical and mental development, at their parents' or guardians' discretion, so allows."

Article 9:

"(1) Every citizen shall exercise his right to education in the school and type of education of his choice in keeping with his personal preferences and potential.
(2) The right pursuant to Paragraph (1) for minors shall be used by their parents or guardians."

Article 14:

"Schools and kindergartens shall create conditions for the normal physical and mental development of children and pupils."

Article 16:

"State educational requirements shall be applicable to: (…)
8. (Amended, OJ No. 90/2002) teaching of children and pupils with special educational needs and/or chronic conditions"

Article 21:

(Amended, OJ No. 90/2002)
"(1) Children with special educational needs and/or chronic conditions shall be enrolled at kindergartens pursuant to Article 18.
(2) Kindergartens under Paragraph (1) shall be obligated to accept children with special educational needs and/or chronic conditions.
(3) Special kindergartens and auxiliary units may also be established for children with special educational needs and/or chronic conditions.
(4) Children with special educational needs and/or chronic conditions shall be enrolled in the kindergartens and auxiliary units under Paragraph (3) only where all other opportunities for education at state-owned or municipal kindergartens and auxiliary units have been exhausted and where the parents or guardians have expressed such a wish in writing."

Article 27:

(Amended, OJ No. 90/2002)

"(1) Children with special educational needs and/or chronic conditions shall be offered integrated education at the schools under Article 26, Paragraph (1), Items 1 through 10.

(2) Schools under Paragraph (1) shall be obligated to accept children with special educational needs and/or chronic conditions.

(3) Special schools and auxiliary units may also be established for children with special educational needs and/or chronic conditions.

(4) Children with special educational needs and/or chronic conditions shall be enrolled in the schools and auxiliary units under Paragraph (3) only where all other opportunities for education at state-owned or municipal schools have been exhausted and where the parents or guardians have expressed such a wish in writing."

Article 43:

"(1) (Previous Article 43, OJ 36/1998, amended, OJ No. 90/2002) The Ministry of Education and Science shall ensure favourable conditions for identifying and training particularly gifted children. It shall establish furtherance funds to award scholarships to gifted children, as well as scholarship funds for children with chronic ailments and for children with special educational needs.

(2) (New, OJ No. 36/1998) The Ministry of Education and Science shall ensure additional educational opportunities for potential drop-out students."

12. Integration of Disabled Persons Act

Act of 14 September 2006 amending and extending the Integration of Disabled Persons Act of 17 September 2004.

Chapter II - Education and vocational training

Article 16

"(1) Teams for the comprehensive educational assessment and integrated education of children with disabilities shall be set up at the regional inspectorates of the Ministry of Education and Science.

(2) Special integrated education centres, under the authority of the Ministry of Education and Science, shall be opened with a view to facilitating the integrated education of children with disabilities."

Article 17

"The Ministry of Education and Science shall provide:

(1) Education for children with disabilities at pre-school and school age in the schools and kindergartens referred to in Article 26, paragraph (1)3, and Article 18 of the National Education Act;

(2) An environment conducive to integrated education for children with disabilities;

(3) Appropriate remedial speech and hearing therapy and corrective treatment for children suffering from partial or total loss of visual acuity;

(4) Modern schoolbooks, teaching materials, technologies and technical tools for the education of children with disabilities up to the age of 18 or until the end of their secondary education;

(5) Vocational training for children with disabilities."

Article 18

"The Ministry of Education and Science shall make provision for the education of children with special educational needs who are not integrated into the mainstream education environment."

13. Implementing regulation of the National Education Act (revised)
(published on 30 July 1999 and amended on several occasions, the last on 8 November 2005)

Article 6a

(new Article, adopted in 2003)
"The team in charge of assessing difficult cases in terms of educational needs may:
…
(4) single out up to two pupils with special educational needs per class; these pupils shall be transferred to the least crowded classes.
…
(8) … (b) facilitate the integrated education of children with special educational needs by co-ordinating, supervising and providing methodological assistance to teams in kindergartens and schools into which children with special educational needs and/or chronic conditions have been integrated."

Article 7

(text amended in 2003)
"Kindergartens, schools and auxiliary units shall work with funding authorities to provide an environment conducive to the integrated education of children with special educational needs and/or chronic conditions."

Article 26

"(1) Kindergartens are preparatory institutions forming part of the national education system, in which children are educated and taught from the age of three up to their entry into the first year of primary school.
(2) (text amended in 2003) Children with special educational needs and/or chronic conditions shall be integrated into the kindergartens described in paragraph (1) above, which are legally required to accept them.

Article 27

"(1) Kindergartens may be:
1. full-time, part-time or organised on a weekly basis;
2. (text amended in 2003)special schools for children with special educational needs and/or chronic conditions."

Article 28

(text amended in 2003)
"(2) The kindergartens referred to in Article 27, paragraph (1)2, shall admit children with special educational needs and/or chronic conditions, subject to the written consent of parents or guardians, where all other possibilities of attending the kindergartens referred to in Article 27 (1)1 have been exhausted.
(3) The kindergartens referred to in Article 27 (1)1 shall cater for up to two children with special educational needs per group."

Article 50

"(6) (text amended in 2001) State and municipal schools shall cater for up to five pupils with chronic physical or sensory conditions per class. Vocational schools shall also cater for children placed in orphanages.
(7) (text amended in 2003) In cases other than those provided for in paragraph (6) above, state and municipal schools may also provide integrated education for two pupils per class with special educational needs on a proposal by the team in charge of comprehensive educational assessment."

14. Order no 6 on children with special educational needs and/or chronic conditions (published in August 2002)

Article 2

(1) Children with special educational needs and/or chronic conditions shall be given an integrated education in mainstream kindergartens, schools and auxiliary units.
(2) Children with special educational needs and/or chronic conditions may be educated in special kindergartens, schools and auxiliary units.
(3) Children shall attend special schools only where all other possibilities of attending mainstream kindergartens and schools have been exhausted, subject to the explicit consent of parents or tutors."

15. Case-law

Case no 13789/06, Sofia court of first instance, decision of 18 May 2007

"The court finds that the requirement for the Ministry of Education to create a conducive environment is a prerequisite to integrated schooling. Therefore, the equal right to education of children with disabilities is only effective if such an environment is created in every school … and the failure to create such an environment amounts in itself to unequal treatment of children with disabilities in that they do not then have the same opportunities as children without disabilities" (pages 7-8).

THE LAW

THE ALLEGED VIOLATION OF ARTICLES 17§2 AND E OF THE REVISED SOCIAL CHARTER

16. Article 17§2 of the Revised Charter reads:

Article 17 – The right of children and young persons to social, legal and economic protection

Part I: "*Children and young persons have the right to appropriate social, legal and economic protection*."

Part II: "*With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed*:

(…)

2 to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools."

17. Article E of the Revised Charter reads:

Article E – Non-discrimination

"*The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status*."

A. Submissions of the parties

a. The complainant organisation

18. The MDAC maintains that Bulgaria's failure to provide education for the children falling within the subject matter of the scope of the complaint violates its obligations under Article 17§2 of the Revised Charter, alone and in conjunction with Article E. It argues that Article 17§2 of the Revised Charter requires the Government to provide primary education for all children, including children with intellectual disabilities.

19. The MDAC restricts the scope of its complaint to the situation of children with moderate, severe or profound intellectual disabilities living in homes for mentally disabled children (hereafter "HMDCs"), thus excluding children with mild intellectual disabilities and those not living in HMDCs.

20. The MDAC states that HMDCs come under the authority of the Ministry of Labour and Social Policy. They admit children aged over 2. Most of these children have been diagnosed as having moderate, severe or profound intellectual disabilities and have been either abandoned by their parents or orphaned. The HMDCs are residential establishments open throughout the year, in which the children spend all their time. There are other kinds of centres for intellectually disabled children in Bulgaria but they are not the subject of the complaint. The complaint concerns the 28 HMDCs throughout the country. According to the MDAC no education is provided in HMDCs and the Government has made little effort to educate children in these homes.

21. According to the MDAC, in order to meet certain quality standards education systems must satisfy the criteria of availability, accessibility, acceptability and adaptability, as laid down by the UN Committee on Economic, Social and Cultural Rights in its general comment no. 13 on the right to education (E/C.12/1999/10 of 8 December 1999, §6).

22. The MDAC states that until a reform in 2002, children with moderate, severe or profound intellectual disabilities were considered to be uneducable and hence given no access to education. Under the National Education Act 2002, the Bulgarian state has undertaken to provide these children with education.

23. The complaint is based on various sources, in particular the 2005 report of the Bulgarian child protection agency. This included figures on the situation in 18 HMDCs. According to the data in this report, only 32 children (i.e. 2.8%) living in the HMDCs which were visited were being taught in mainstream primary schools while 39 children (i.e. 3.4%) were in special schools, meaning that a total of only 71 children were attending any kind of school. In certain establishments, as in Sofia, none of the children attended schools, whereas in others, such as the one in Turnava, all the children were in school, though this was solely attributable to the personal initiative of the director. The MDAC claims that certain children are refused admission even though they want to go to school and are apt, in that they are able to write

their full names and ages despite never having attended school. It concludes that the existing education system in Bulgaria is clearly depriving these children of access to education, which is a direct infringement of their right to education without discrimination.

24. The complainant also alleges that ordinary schools are not equipped to the abilities and needs of children from HMDCs. Teacher training is inadequate and teaching materials for intellectually disabled children are either totally unavailable or unsuited to their needs. According to the MDAC, this means that Bulgaria is in direct violation of the right to education and directly discriminates against these children on account of their disability.

25. In respect of the children who do not attend an outside educational structure, the complainant highlights that HMDCs are not educational institutions and therefore the children are ineligible for a diploma attesting completion of primary school education. They are therefore legally prevented from entering secondary education. The MDAC concludes that the treatment of children in HMDCs does not satisfy the criterion of the acceptability of the education provided and cannot be considered to be a form of education.

26. Finally, the MDAC maintains that the Government cannot rely on lack of resources or argue that it is implementing these rights gradually to show that it is not discriminating against disabled children with regard to their access to education. It notes firstly that certain measures are not expensive, such as informing directors of HMDCs of the contents of the 2002 legislation so that they know that from now on the children in their charge are not only “educable” but also entitled to be educated in ordinary or special schools. The same applies where it comes to informing the municipal officials to whom HMDCs are accountable as well as local schools. The MDAC states that, in practice, HMDC directors and municipal officials know little or nothing about the changes created by the 2002 legislation. The MDAC also states that the Government has chosen to use the resources that are available for educating disabled children to improve access to schools for children with physical disabilities while spending very little on the education of intellectually disabled children. According to the MDAC, the Government's failure to provide education for children with moderate, severe or profound intellectual disabilities is the result of serious and unreasonable policy failures and not of the alleged resource shortages.

b. The Government

27. The Government describes its efforts to implement the right of intellectually disabled children to equal access to education.

28. In particular, it argues that Bulgarian legislation offers sufficient safeguards. Article 6 of the Constitution embodies the principle of equality before the law and prohibits all discrimination. Article 53 establishes the right to education. The Government also refers to the legislative and practical steps it has taken to overcome the problems of access to education of children living in HMDCs. In particular, the National Education Act 1991, as amended by the

Act of 10 September 2002, requires schools to admit disabled children and create the conditions for their integration. The Government has also adopted several action plans. It refers specifically to the national plan for integrating children with special educational needs and/or chronic conditions into the national education system, approved by the government in December 2003, which implements Regulation No. 6 and lays down a timetable for integration from 1 January 2004 to 1 January 2007. It also cites the action plans on Bulgarian mental health policy (2004-2012) and on equal opportunities for disabled persons (2006-2007 and 2008-2015).

29. The Government also refers to its political commitment to these measures and to ensuring that they are implemented, in accordance with the Revised Charter and subject to available resources.

30. The Government says that the trend is towards integrating most children with disabilities into mainstream schools. Its education policy is to reduce the number of special schools and increase the number of children with special educational needs in mainstream schools. This calls for the adaptation of premises to these children's specific needs, appropriate school textbooks and other written material and equipment, and specialist staff qualified to work with children with disabilities. Teams to assess the needs of disabled children are gradually being introduced. Training has been organised for regional education inspectorates, nursery school heads, teachers and representatives of local government.

31. The Government acknowledges that a high number of children do not attend school or leave school very early. However this does not just concern intellectually disabled children and so, according to the Government, the MDAC's contention that such children are being systematically discriminated against is unfounded.

32. The Government reiterates that it has a consistent and clearly defined policy on the integration of children living in special institutions, which extends to its education policy. This is an ongoing process, the visible results of which will become evident in the long term and which will require considerable financial input. The Government hopes to achieve the Revised Charter's objectives "within a reasonable period of time", with measurable progress and with the fullest possible use of available resources.

B – Assessment of the Committee

i – The alleged violation of Article 17§2 of the Revised Charter

Preliminary remarks

33. Referring to its admissibility decision and the issue of the delimitation of the material scope of Articles 15 and 17, the Committee considers that the fact that the right to education of persons with disabilities is guaranteed by

Article 15§1 of the Revised Charter does not exclude that relevant issues relating to the right of children and young persons with disabilities to education may not be examined in the framework of Article 17§2, *inter alia*.

34. The Committee begins by pointing out that both the first and the second paragraphs of Article 17 of the Revised Charter guarantee children's right to education. The Committee considers that Article 17§2 applies fully in this case as it covers all children and hence concerns children with intellectual disabilities. The Committee recalls in this respect that:

"Therefore Article 17 as a whole requires states to establish and maintain an education system that is both accessible and effective. In assessing whether the system is effective the Committee will examine under Article 17: … whether, considering that equal access to education should be guaranteed for all children, particular attention is paid to vulnerable groups such as children from minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant teenagers, teenage mothers, children deprived of their liberty etc. and whether necessary special measures have been taken to ensure equal access to education for these children" *(Conclusions 2003, Bulgaria, Article 17§2).*

"States need to ensure a high quality of teaching and to ensure that there is equal access to education for all children, in particular vulnerable groups" *(Conclusions 2005, Bulgaria, Article 17§2).*

35. Firstly, as regards taking special account of children with disabilities, the Committee points out that, while it is acceptable for a distinction to be made between children with and without disabilities in the application of Article 17§2, the integration of children with disabilities into mainstream schools in which arrangements are made to cater for their special needs should be the norm and teaching in specialised schools must be the exception (Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §49).

36. In addition, for any special education that is set up to be in conformity with Article 17§2, the children concerned must be given sufficient instruction and training and complete their schooling in equivalent proportions to those of children in mainstream schools (Conclusions 2005, Bulgaria, Article 17§2).

37. The Committee considers that all education provided by states must fulfil the criteria of availability, accessibility, acceptability and adaptability. It notes in this respect General Comment No. 13 of the Committee on Economic, Social and Cultural Rights of the United Nations International Covenant on Economic, Social and Cultural Rights on the right to education (document E/C.12/1999/10 of 8 December 1999, §6). In the present case, the criteria of accessibility and adaptability are at stake, i.e. educational institutions and curricula have to be accessible to everyone, without discrimination and teaching has to be designed to respond to children with special needs.

38. As regards the respect for the right to education of intellectually disabled children residing in HMDCs, the Committee takes note of the efforts made by the Government, particularly through the adoption of legislation and the setting up of action plans. It considers this to be a necessary first step but

one that is insufficient to bring a situation into conformity with the Revised Charter. It reiterates that "the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact" (International Commission of Jurists v. Portugal, Complaint No. 1/1998, decision on the merits of 10 September 1999, §32). Consequently, the manner in which this legislation and these action plans are implemented is decisive.

39. The Committee points out that when it is exceptionally complex and expensive to secure one of the rights protected by the Revised Charter, the measures taken by the state to achieve the Revised Charter's aims must fulfil the following three criteria: "(i) a reasonable timeframe, (ii) a measurable progress and (iii) a financing consistent with the maximum use of available resources" (European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §37; Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §53). It also recalls that "States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities" and that they must also take "practical action to give full effect to the rights recognised in the Charter" (Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §53). Similarly, "States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources" (European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §35).

40. The Committee points out that where precise facts are used to support allegations that a state has infringed the Revised Charter, it is for the Government to answer the allegations using specific evidence such as measures introduced, statistics or examples of relevant case-law (see European Roma Rights Centre v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §50). The MDAC has submitted precise elements to the Committee with a view to demonstrate that the manner in which Bulgaria's legislation and action plans are implemented is highly inadequate. The Committee notes that the Government, however, has failed to provide evidence to refute these.

41. In addition, the Committee notes that the Government describes the situation of children with disabilities in general and not the specific case of children with moderate, severe or profound intellectual disabilities residing in HMDCs, who are the subjects of this complaint.

42. To be able to assess the situation of these children, the Committee must therefore rely on the data referred to in the 2005 report prepared by the Bulgarian national child protection agency, which is mentioned by the MDAC in its complaint and not disputed by the Government.

43. The Committee refers to Order No. 6 on children with special educational needs and/or chronic conditions, 2002, which entitles children with any type of intellectual disability to be educated in special schools or mainstream schools of their parent's or tutor's choice. The Committee notes that only 2.8% of the children with intellectual disabilities residing in HMDCs are integrated in mainstream primary schools, which is extremely low whereas integration should be the norm. Mainstream educational institutions and curricula are not accessible in practice to these children. There also appears to be insufficient evidence to show real attempts to integrate these children into mainstream education. The Committee considers therefore that the criterion of accessibility is not fulfilled.

44. For the very few children integrated into mainstream primary schools, the way in which they are dealt with should be suited to their special needs. The Committee finds on this point in particular that teachers have not been trained sufficiently to teach intellectually disabled children and teaching materials are inadequate in mainstream schools. These schools are therefore not suited to meet the needs of children with intellectual disabilities and hence to provide their education. The Committee concludes that neither therefore is the criterion of adaptability met.

45. The Committee notes that only 3.4% of children with intellectual disabilities residing in HMDCs attend the special classes set up for them. Despite the fact that special classes should not be the norm but only an exception to mainstream education, the figure is very low and demonstrates that special education is not accessible to children with intellectual disabilities residing in HMDCs.

46. As to the educational activities that intellectually disabled children follow within the HMDCs, the Committee takes note that the HMDCs are not themselves be regarded as educational institutions, that, consequently, the children are ineligible for a diploma attesting completion of primary school education and that they are therefore prevented from entering secondary education. The Committee notes, in addition, that the programmes of activity implemented at HMDCs were drawn up by the Ministry of Labour and Social Policy before the 2002 reform, at a time when intellectually disabled children were still officially regarded as being uneducable. The Committee also notes that it has been confirmed by various eye-witness reports and studies that the children do not receive any education in the HMDCs. The Committee concludes that the activities pursued by intellectually disabled children living in HMDCs who attend neither a mainstream school nor a special class cannot be considered to be a form of education.

47. As to the Government's argument that the right of children with intellectual disabilities residing in HMDCs to education is being implemented progressively, the Committee is aware of Bulgaria's financial constraints. It notes that any progress that has been made has been very slow and mainly concerns the adoption of legislation and policies (or action plans), with little or no implementation. It would have been possible to take some specific steps at no excessive additional cost (for example HMDC directors and the municipal

officials to whom HMDCs and primary schools are accountable could have been informed about and given training on the new legislation and action plans). The choices made by the Government resulted in the situation described above (see in particular §§ 43 et 45). Progress is therefore patently insufficient at the current rate and there is no prospect that the situation will be in conformity with article 17§2 within a reasonable time. Consequently, the Committee considers that the measures taken do not fulfil the three criteria referred to above, i.e. a reasonable timeframe, measurable progress and financing consistent with the maximum use of available resources. In view of this situation, the Committee considers that Bulgaria's financial constraints cannot be used to justify the fact that children with intellectual disabilities in HMDCs cannot enjoy their right to an education.

48. Consequently, the Committee holds that the situation in Bulgaria constitutes a violation of Article 17§2 of the Revised Charter because children with moderate, severe or profound intellectual disabilities residing in HMDCs do not have the effective right to an education.

ii – The alleged violation of Article 17§2 of the Revised Charter read in conjunction with Article E

49. Article E prohibits any discrimination in the enjoyment of the rights set forth in the Revised Charter. Although disability is not explicitly included in the list of grounds of discrimination prohibited by Article E, the Committee has found previously that it is "adequately covered by the reference to 'other status'" (Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §51).

50. The Committee has previously observed that:

"The wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in interpreting Article 14 and most recently in the Thlimmenos case [*Thlimmenos v. Greece* [GC], no 34369/97, ECHR 2000-IV, §44)], the principle of equality that is reflected therein means treating equals equally and unequals unequally. In particular it is said in the above mentioned case:

> 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.

In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality." (Autism-Europe v. France, Collective Complaint No. 13/2002, decision on the merits of 4 November 2003, §52).

51. Therefore, the Committee notes that failure to take appropriate measures to take account of existing differences may amount to discrimination.

52. The Committee recalls its case law regarding disputes about discrimination in matters covered by the Revised Charter, adopted in the framework of reporting procedure, that the burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment. It also applies to the collective complaints procedure. The Committee therefore relies on the specific data sent to it by the complainant organisation, such as its statistics which show unexplained differences. It is then for the Government to demonstrate that there is no ground for this allegation of discrimination.

53. The Committee refers to the data cited above, according to which only 6.2% of the intellectually disabled children living in HMDCs are educated in mainstream primary schools or in special schools. It notes that, in reply, the Government states that a high percentage of children in Bulgaria do not go to school and that this does not just apply to children with intellectual disabilities. However, the Government fails to support this assertion with statistical data or to specify whether this is already a problem at primary school level or affects only secondary schools. The Committee underlines that it has already noted that, for the period 1997-2000, primary school attendance rates were 93% for girls and 95% for boys, despite a regrettable, excessively high drop-out rate (Conclusions 2005, Article 17§2, Bulgaria). The disparity between these figures is so great that it demonstrates that there is discrimination against children with intellectual disabilities residing in HMDCs in comparison with all other children with regard to access to education in Bulgaria.

54. Consequently, the Committee holds that the situation in Bulgaria constitutes a violation of Article 17§2 of the Revised Charter read in conjunction with Article E because of the discrimination against children with moderate, severe or profound intellectual disabilities residing in HMDCs as a result of the low number of such children receiving any type of education when compared to other children.

CONCLUSION

55. For these reasons the Committee concludes

- unanimously that there is a violation of Article 17§2 of the Revised Charter because children with moderate, severe or profound intellectual disabilities residing in HMDCs do not have an effective right to education;
- by 12 votes to 1 that there is a violation of Article 17§2 of the Revised Charter taken in conjunction with Article E because there is discrimination against children with moderate, severe or profound intellectual disabilities residing in HMDCs as a result of the low number of such children receiving any type of education when compared to other children.

Polonca KONČAR
President and Rapporteur

Régis BRILLAT
Executive secretary

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DECISION ON THE MERITS

COMPLAINT No. 13/2002

By Autism - Europe
against France

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (hereafter referred to as "the Committee"), during its 197th session attended by:

Messrs	Jean-Michel BELORGEY, President
	Nikitas ALIPRANTIS, Vice-President
Ms	Polonca KONCAR, Vice-President
Messrs	Stein EVJU, General Rapporteur
	Rolf BIRK
	Matti MIKKOLA
	Konrad GRILLBERGER
	Tekin AKILLIOĞLU
	Alfredo BRUTO DA COSTA
Ms	Csilla KOLLONAY LEHOCZKY
Messrs	Gerard QUINN
	Lucien FRANCOIS
	Andrzej SWIATKOWSKI

Assisted by Mr Régis BRILLAT, Executive Secretary of the European Social Charter

After having deliberated on the 3 and 4 November 2003,

On the basis of the report presented by Mr Gerard QUINN,

Delivers the following decision adopted on this last date:

PROCEDURE

1. On 12 December 2002, the Committee declared the complaint admissible.

2. In accordance with Article 7§1 and §2 of the Protocol providing for a system of collective complaints and with the Committee's decision on the admissibility of the complaint, the Executive Secretary communicated, on 13 December 2002, the text of the admissibility decision to the French Government, to Autism-Europe, to the Contracting Parties to the Protocol, to the states that have made a declaration in accordance with Article D§2 of the revised European Social Charter, as well as to the European Trade Union Confederation (ETUC), the Union of the Confederations of Industry and Employers of Europe (UNICE) and the International Organisation of Employers (IOE), inviting them to submit their observations on the merits of the complaint. In accordance with Article 25§2 of the Committee's Rules of Procedure, the President fixed a deadline of 15 February 2003 for the presentation of observations.

3. On 11 February 2003, the French Government presented its observations on the merits of the complaint.

4. The President set 11 April 2003 as the deadline for Autism-Europe to present its observations in response to the Government. The observations were registered on 10 April 2003.

5. During its 193rd session (31 March – 4 April 2003), the European Committee of Social Rights decided, in accordance with Article 7§4 of the Protocol providing for a system of collective complaints and Article 29§1 of the Committee's Rules of Procedure, to organise a public hearing.

6. The hearing took place in public at the Human Rights Building in Strasbourg on 29 September 2003. Autism-Europe was represented by E. FRIEDEL, Lawyer, and by Ms D. PAGETTI-VIVANTI, President of Autism-Europe. The Government was represented by Mr A. BUCHET, Deputy Director of Human Rights, Legal Affairs Department at the Ministry of Foreign Affairs, Mr P. DIDIER-COURBIN, Deputy Director for Persons with Disabilities, General Directorate of Social Action at the Ministry for Health, the Family and Disabled Persons, Ms M-C. COURTEIX, Head of the task force: School adaptation and integration, Directorate for school education at the Ministry for National Education, and Ms J. VILLIGER, Office for Disabled Adults, General Directorate of Social Action at the Ministry for Health, the Family and Disabled Persons.

According to Article 29§2 of its Rules of Procedure, the Committee invited the ETUC to participate in the hearing. ETUC was represented by Mr G. FONTENEAU, Social Adviser, and by Mr K. LÖRCHER, Legal Adviser.

The Committee heard addresses by E. FRIEDEL, Mr. A. BUCHET, and Mr. G. FONTENEAU and replies to questions put by members of the Committee.

SUBMISSIONS OF THE PARTICIPANTS IN THE PROCEDURE

a) The Complainant Organisation

7. Autism-Europe asked the Committee:

- to rule that France is failing to satisfactorily apply its obligations under Articles 15§1 and 17§1 of Part II of the Revised European Social Charter because children and adults with autism do not and are not likely to effectively exercise, in sufficient numbers and to an adequate standard, their right to education in mainstream schooling or through adequately supported placements in specialised institutions that offer education and related services;

  and

- to rule that France is in violation of the non-discrimination principle embodied in Article E of Part V of the Revised European Social Charter since persons with autism do not benefit from the right to education recognized to persons with disabilities by Article 15§1 and generally set out in Article 17§1 of Part II of the Charter.

The complainant alleged that France is not taking enough action as required under the revised European Social Charter to secure children and adults with autism a right to education as effective as that of all the other children.

b) The French Government

8. The French Government (hereafter "the Government") asked the Committee to reject the complaint as unfounded in each respect. It considers that the relevant legislation and the practice concerning the provision of education for persons with autism did not infringe Articles 15, 17 and E of the Revised European Social Charter (hereinafter Revised Charter).

c) The European Trade Union Confederation (ETUC)

9. The ETUC argues that France does not comply with Articles 15, 17 and E of the Revised Charter.

RELEVANT DOMESTIC LAW

10. On the basis of the submissions by the parties, the relevant domestic law on the provision of education for persons with autism may be summarised as follows:

The right to education of persons with disabilities is enshrined in two Acts:

- Act no. 75/534 of 30 June 1975, People with disabilities (policy) act,

- and Act no. 75/535 of 30 June 1975 on social and medico-social institutions,

Part of Act no. 75/534 has been enshrined in Act no. 89/486 of 10 July 1989 laying down framework provisions on education. Another piece of legislation makes more detailed

provision for persons with autism (Act no. 96/1076 of 11 December 1996 on social and medico-social institutions and making adapted provision for persons with autism). All the above legislation has now been codified in the Code of Social Action and the Education Code respectively.

11. The relevant provisions of the Education Code are Articles L.111-1, L.112-1 to L.112-3, and L.351-1.

Article L.111-1 provides that:

> "the right to education is secured to all".

More particularly, and dealing with children and young persons with disabilities, Article L.112-1 states that:

> "Schooling is compulsory for children and young persons with disabilities. They shall meet the compulsory-education requirement either through integration in the ordinary education system or, failing that, through special education, as decided by the *départemen*t special education board in accordance with the individual's particular needs".

Article L.112-2 continues:

> "Educational integration of young people with disabilities shall be facilitated".

The scope of special education is defined by Article L.112-3, which provides:

> "Special education shall combine educational, psychological, social, medical and paramedical action; it shall be delivered either at establishments within the general system or by specialist establishments or services….".

With respect to the delivery of special education Article L.351-1 provides that:

> "… The state shall pay for the education and initial vocational training of children and adolescents with disabilities:
>
> 1. preferably, by integrating into ordinary classes … all children capable of being integrated despite their disabilities;
> 2. or by making qualified staff for whom the education minister is responsible available to establishments and services set up and maintained by other ministries, by public law entities or by authorised non-profit groups or bodies …
> 3. or by entering into contracts or partnerships with private education establishments …"

That is, Article L.112-1 and Article L.351-1 establish a statutory preference in favour of the education of children with disabilities in the mainstream.

12. The relevant provisions of the Code of Social Action are Articles L.114-1, L.114-2, L.116-1, L.116-2, L.242-4 and 10, and L.246-1.

According to Article L.114-1, the State is obliged to guarantee the right of persons with disabilities to have access to fundamental rights, including the right to education.

The right to the enjoyment of these rights in a mainstream environment is acknowledged by Article L.114-2 insofar as it provides that:

"The action taken shall, whenever the aptitudes of the person with disability and the capabilities of the family so allow, ensure access for the minor or adult with disability to those institutions open to the whole population…".

The overall goals of social and medical action are set out under Article L.116-1 and 2 as follows:

"Social and medico-social action shall promote, within an inter-ministerial framework, the autonomy and protection of persons … prevent exclusion and correct its effects. It shall be based on continuous evaluation of needs and of expectations … in particular those of people with disabilities … and on making facilities and allowances available to them. It shall be performed by the state, the local authorities and the public establishments run by them, social-security agencies, the voluntary sector and social and medico-social institutions…

Social and medico-social action shall be so conducted as to respect the equal dignity of all human beings, with the aim of making adapted provision to meet the needs of each individual and affording them equitable access throughout the country."

Early intervention is mandated by Article L.242-4, which provides that:

"The earliest possible provision is necessary. It shall be possible for it to continue for as long as the condition of the person with the disability warrants it and without any limit of age or duration ….".

With respect to the financing of these measures, Article L.242-10 reads:

"Expenses for accommodation and care in special education establishments and vocational establishments, together with the cost of outside care in connection with such education, with the exception of expenses falling to be met by the state under Article L.242-1[1], shall be wholly met by the sickness insurance schemes, subject to the rates which are the basis for calculation of benefit. Where such costs are not covered by the sickness-insurance schemes, they shall be covered by social assistance[2]…."

Article L.246-1 makes more particular provision for persons with autism:

"Any person with a disability resulting from autism syndrome or related disorders shall receive, regardless of age, multidisciplinary provision catering for his or her specific needs and difficulties. Such provision shall be adapted to the condition and age of the individual and have regard to the resources available. It may be educational, therapeutic or social."

13. To summarise, persons with autism may attend mainstreaming education, either in their own right (individual mainstreaming) in ordinary classes with the assistance of special auxiliary staff, or as part of a group (collective mainstreaming) through school integration classes (CLIS) at primary level and educational integration units (UPI) at secondary level. Persons who, by reason of the severity of their autism, cannot integrate the ordinary educational system may receive special education in a specialised institution or through medico-social services (SESSAD – special education and domiciliary care services). Specialised institutions include: IME – medical-educational institutes; IMP – medical-teaching institutes; IMPRO – medical-occupational institutes; MAS – Special residential establishments and FDT – double-charging establishment for the most severely disabled.

14. The individual mainstreaming into regular schooling is financed through the general education budget. However, the mainstreaming of individuals through collective mainstreaming is financed through the sickness-insurance budget. Also all the above

[1] This article expressly refers to the aforementioned Article L.351-1 of the Education Code.

[2] These provisions also appear in Article L.321-1 of the Social Security Code.

forms of special education are financed mainly through the sickness-insurance budget and, in the case of autism, by the special appropriations system addressed to it. Teachers in special education and special auxiliary staff in these specialised institutions are paid out of the national education budget.

15. According to the prevalence rate used, the number of persons with autism varies largely. The complainant assumed that, on the basis of the most recent scientific knowledge, the appropriate prevalence rate is 16 per 10 000 persons. As a consequence, it is claimed that there are approximately 100 000 persons with autism in France, of whom 25 000 children and young people. The Government opted for a prevalence rate of 4-5.6 per 10 000 persons: accordingly, there are approximately 7,000 children and 20,000 adults with autism in France. The complaint alleges that a certain number of French children with autism attend institutions in Belgium.

AS TO THE LAW

I. ARGUMENTS OF THE PARTIES

16. Autism-Europe initially argued, but did not pursue at the hearing, that the relevant parts of French law are as such, in violation of Articles 15§1 and 17§1 of the Revised Charter. Having abandoned that line of argumentation the complainant argued instead that the implementation of the law, or the *de facto,* situation, is in violation of the said Articles. More specifically, the complainant finally argued that, in practice, insufficient provision is made for the education of children and adults with autism due to identifiable shortfalls – both quantitative and qualitative - in the provision of both mainstream education as well as in the so-called special education sector.

17. The Committee therefore finds it unnecessary to proceed further with respect to the original argument. Accordingly, its analysis will be confined to the question whether the relevant French practice constitutes, as alleged by the complainant, a violation of Articles 15§1, 17§1 and E of the Revised Charter.

18. Articles 15§1, 17§1 and E of the Revised Charter read as follows:

"Article 15 - The right of persons with disabilities to independence, social integration and participation in the life of the community

> With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:
> 1. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private;
> ……

Article 17 - The right of children and young persons to social, legal and economic protection

> With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:
> 1. a to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
> ……

Article E – Non-discrimination

> The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status. "

A. The alleged unavailability of special education institutions and services

19. Autism-Europe argued that the special education institutions and socio-medical services allocated for the education of children and adults with autism have been historically inadequate. The 1995-2000 catch-up plan for persons with autism failed to overcome the backlog; likewise, the 2001-2003 multi-annual plan on disabled children, young persons and adults, which addressed also persons with autism, is alleged to be far from filling the gap. It also asserted that 75 000 persons with autism (of whom 19 000 are children) are in need of special education, but that only 10% of them have a place (about 8,000 places in all are currently available).

20. According to Autism-Europe, the current situation as regards placements in special education stands as follows:

Situation as compiled by Autism-Europe: Number of places per 75 000 persons with autism in France

Number in 1995	Actually established 1995-2000	To be opened 2001-2003	Total	Remaining needs	Rate of satisfaction
5400	1400	1053	7853	67147	11.6%

Official figures[3]: number of places per 48 000 persons with autism in France

Number in 1995	Officially established 1995-2000	To be opened 2001-2003	Total	Remaining needs	Rate of satisfaction
5400	2033	1053	8486	39514	21.4%

[3] As from DGAS, Report to the Parliament on the implementation of Act no.96/1076, "Autism: evaluation of action 1995-2000", December 2000. The difference as regards the estimate of the number of persons with autism is due to the retained incidence rate of the disability.

21. The complainant alleges that even if the official French rate of prevalence is accepted (which it asserts is lower that the one retained by the Health World Organisation), the finances dedicated to the 1995-2000 catch-up plan could only envisage the creation of 1 400 wholly new places, and not the 2033 places officially claimed to be opened. It further alleges that the 2001-2003 multi-annual plan would not really help to change the situation since it would only enable the creation of 1053 additional places for a budget of € 22.87 million.

22. According to the complainant, on average, 300 places have been created annually since 1995, which represents an annual increasing rate of 0.7% in comparison with the official needs. At this pace, it will take one hundred years to resorb the deficit of places, and this without taking into account the natural increase of the autistic population, which, on the basis of the official figures, it is estimates will grow by 160 persons per year.

23. In reply the Government acknowledged that the catch-up plan of 1995-2000 had fallen short of real needs. In its written memorials, the Government indicated that, within the framework of the 2001-2003 multi-annual plan or other exceptional plans, these special appropriations amounting in total to about €30 million enabled, or will enable, the creation of 1053 places reserved specifically for persons with autism. It further asserted that 1756 SESSAD (special education and domiciliary care) places for the educational integration of children with disabilities, including autistic children, and young people had been created (on a budget of € 36.95 million), and 507 were planned in 2003. In total 3228 SESSAD places have been created between 2001 and 2003. It asserted that there were 5500 places in specialist residential establishments (MAS), residential establishments with medical facilities (FAM) and special employment centers (CAT) for severely disabled adults, some of whom would include autistic persons. Finally, it asserted that the 2003 Social Security Finance Act set aside € 70 million for severely disabled adults and € 9 million for improving facilities in establishments and other services and on the educational integration of disabled children through the establishment of additional places in residential and non-residential centers with educational and medical facilities and in SESSAD (special education and domiciliary care services).

24. At the hearing, the Government indicated that 94 000 children and young persons with disabilities (0-20 years of age) are taken care of in special education institutions, socio-medical services, or health institutions. More precisely, as regards autism, it reaffirmed that, through the catch-up plan of 1995-2000, a total of about 2033 places (820 for children and 1213 for adults) have been created. In addition, the multi-annual plan 2001-2003 and special appropriations has finally permitted, as of September 2003, the creation of some other 1306 places for children, young people and adults with autism.

25. The Government acknowledged that part of figures provided did not concern directly persons with autism, but in general disabled or seriously disabled persons. However, it argued that, on the one hand, the approach chosen by France is not the provision of specialised services for any category of disabled persons, but their reception in multipurpose establishments and services; and, on the other hand, that statistic programmes aiming at disaggregating data concerning specifically persons with autism (which currently do not exist) have been recently launched.

26. In any event, the Government considered that, even if the creation of places, and thereby the allocation of resources, were insufficient to cover all needs, the catch-up for educational provision of autistic persons did not only lie in allocating additional funding, but also in diversifying the offer of services at *département* level by implementing Act no. 2002/2 containing reforms of social and medico-social provision.

B. Separation and limitation of budgetary resources

27. Autism-Europe advanced a structural reason why there is inadequate funding for the education of children and young adults with autism and argued that this violates Article 15§1 in combination with Article 17§1. Special education, it is alleged, is at an automatic disadvantage because it does not fall under the finance Act and is not therefore considered to be a public service that the State is obliged to provide. Hence, unlike ordinary education, its financing is not calculated according to the number of children in the system and those forecast for the future.

28. Autism-Europe observed that the financing of special education comes mainly under the sickness-insurance budget approved through the social security finance Act, to the exception of teachers provided by the national system to the special education sector who are paid by the State budget. This implies for the complainant that the expenditure is not determined according to the real needs of the number of people with disabilities who need adapted educational provision. Thus, it argued that, because of the budgeting mechanism chosen, persons with disabilities do not in practice (despite the legislation) benefit from the right to education because they cannot do so for as long as the funding of special education placements remains outside the national education system and is treated as “social assistance” or “care” to which health or social-action expenditure limits apply.

29. As far as persons with autism are concerned, the complainant specifically argued that, unless France alters its budgetary and financial policy, the shortfall on educational provision for autistic persons will never be made up and the quantitative needs will never be met.

30. The Government contested the complainant’s argument and considered that, on the basis of Article L.112-1 of the Education Code, children with disabilities are fully covered by the educational public service requirement, either through ordinary or special education. According to Article L.112-3, special education is much more than just a form of care, since it combines educational, psychological, social, medical and paramedical inputs. Moreover, the Government recalled that special education is not financed solely by the sickness insurance scheme since the state pays for its educational component (Article L.242-1 of the Social Action Code). Accordingly, 5 400 teachers are assigned to medical-social establishments and services and health establishments to assist 94,000 children and young persons with disabilities.

31. Finally, the Government contested that the financing of the part of special education met by the sickness insurance system through the ONDAM - the national objective for sickness insurance expenditure - is less generous than what would be a state financing within the education budget. On the contrary, it held that such a system is more flexible because the growth rate applied to the expenditure objective for services and establishments, depending on the social security system, is determined by public health needs and national priorities.

C. The alleged inadequacy of early intervention

32. Autism-Europe argued that early intervention to assist children with autism is virtually non-existent.

33. The Government considered that early medical-social action centers (CAMSPs) make specific provision for the early detection of disability, or risk of disability, and outpatient treatment by multidisciplinary teams for children under six with sensory, motor or mental disabilities. From 1996, the number of these centers has sharply increased: they are now 260 in all but one of the *departments,* and the 2001-2003 three-year plan for disabled children, young persons and adults has set aside € 3 million a year to finance their establishment and extension. The recently established four autism resource centers in Brest, Reims, Montpellier and Tours are responsible for carrying out diagnoses in particularly complex or sensitive cases. The complainant sustained that this information concerned disabled children as a whole rather than children with autism.

D. The alleged inadequacy of mainstream education

34. Notwithstanding the regulations in force, the complainant argued that the mainstreaming of autistic children and young people is still the exception rather than the rule and, even when it occurs, it is confined to an average of just a few hours per week. The complainant asserted that structures charged with integration – school integration classes (CLIS), educational integration units (UPI) and the domiciliary care and special education services (SESSAD), are generally and even officially acknowledged as insufficient in number[4]. The complainant cited official figures concerning mainstreaming. According to the report of the Senate, only 7% of children with disabilities (about 60,000 as a whole) are integrated into ordinary schools[5]. According to the Ministry of Education, mainstreamed disabled children and young people represent 1.3% of the total school population in each department, while the Court of Auditors rates their integration to less than 1%[6]. At the hearing, the complainant asserted that out of 6,000 children with autism who could be mainstreamed only 250 are individually integrated, that is about 5%. Another 400 are collectively integrated, making a total of 650 on a total school population of 15 million children, teenagers and students.

[4] Ministry of Employment and Solidarity (General Inspectorate of Social Affairs), Ministry of Education (General Inspectorate of Education), Report on access to education for children and young people with disabilities, March 1999; M. Fardeau , DGAS Report to the Ministry of Employment and Solidarity, Disability: a comparative and forward analysis of provision.
[5] Senate, P. Blanc, Report of the Social Affairs Commission on the policy for compensating disability.
[6] Court of Auditors, Life with a disability, Public report, June 2003.

35. The Government contested this argument and affirmed that for the State mainstreaming is a priority, both in legislation (Articles L.114-1 of the Social Action and Family Code in general terms and Articles L.112-1 and L.112-3 of the Education Code, Education Act, No. 89-486) and in relevant regulations (*Handiscol* circular), and also through the provision of the necessary resources.

36. The Government asserted that full-time or part-time integration may occur individually or collectively through the creation of special classes (CLIS and UPIS) within ordinary schools. In its written memorials, it indicated that, at the start of the 2001-2002 academic year there were 3381 CLIS (compared with 3170 the previous year) and 303 UPIS (compared with 202). At the hearing, the Government contested the complainant's figures about mainstreaming of persons with autism, but it was unable to offer precise data concerning them. It only affirmed that, in 2002-2003, the total number of disabled persons integrated into ordinary school amounted to 89 000 (67 000 at primary level and 22 000 at secondary level).

37. The Government pointed out that the *Handiscol* project assists in the integration process by providing information, assistance in improving access to school establishments, training of teachers, and the supply of support staff to accompany children who need it.

38. Finally, the Government indicated a new range of measures decided on 21 January 2003 for further improving the integration of pupils with disabilities by developing special classes in secondary schools and increasing the number of special auxiliary staff to 6,000 (Decree no. 40/2003 on auxiliary staff).

E. The alleged deficiencies in special education: administrative unwieldiness and teacher training

39. Autism-Europe alleged that persons with autism find it hard to receive adapted education in specialised institutions because administrative unwieldiness gets in the way of providing new specialised facilities. The long and time-consuming administrative process is also held to be at the origin of French persons with autism integrating Belgian special education institutions.

40. The complainant affirmed that there are no binding rules requiring the teaching staff of specialised education facilities to be specifically trained to cater for autistic persons[7] and the training for staff is in fact non-existent or ill-adapted. This appears to be confirmed by official sources[8].

41. The Government contested the allegation and indicated all measures implemented so far to train professionals working with autistic persons:

- for seven years the National training and study centre for maladjusted children (CNEIFEI) organises an autism module as part of its training for teachers studying for a specialised teaching certificate in educational adjustment and integration (CAPSAIS, option D). In 2002-2003, 12 specialist teacher trainees and 97 other persons (national education personnel and parents) took part in this module;

[7] There is only Circular no. 98/232 on training for staff working with persons with autism.

[8] Ministry of Employment and Solidarity (General Inspectorate of Social Affairs), Ministry of Education (General Inspectorate of Education), Report on access to education for children and young people with disabilities, March 1999.

- since 1998, seventy continuing training sessions have been held each year, attended by an average of 500 trainees, to form professional working with persons with autism;
- new measures announced by the Government include training for all staff and the development of specialist teacher training in university teacher training institutions (IUFM).

42. In addition, the Government held that Act No. 2002/2 on social and medical-social action should help reducing the number of steps and time required to set-up specialist establishments.

F. The alleged deficiencies in the educational placements of adults with autism

43. As a consequence of the lack of legal rules, Autism-Europe argued that educational provision for autistic adults is non-existent.

44. The Government contested the allegation and described all the different medical and medical-social establishments and services catering for adults with disabilities, thereby including adults with autism.

G. Reliance on Hospitalisation of Children and Adults with Autism

45. Autism-Europe alleged that, as a consequence of the lack of places, persons with autism seek care abroad, mainly in Belgium, and that hospitals cannot be considered "sufficient and adequate" institutions and services for educational provision of autistic persons. This latter aspect, the complainant added, is confirmed by official sources[9].

46. The Government contested the allegation and indicated that the newly planned places already referred to are particularly concerned with offering autistic persons local accommodation so that they are not cut off from their families. Moreover, placement in psychiatric hospital occurs when specialist care, which like all medical care is prescribed by doctors, is necessary for persons with autism, as for anyone else.

II. ASSESSMENT OF THE COMMITTEE

47. The Committee considers that the arguments of the complainant alleging the violation of Articles 15§1and 17§1 and of Article E are so intertwined as to be inseparable. Its assessment, therefore, will deal with the question whether the situation in France is in conformity with Articles 15§1 and 17§1 whether alone or when read in combination with Article E of the Revised Charter.

48. As emphasised in the General Introduction to its Conclusions of 2003 (p. 10), the Committee views Article 15 of the Revised Charter as both reflecting and advancing a profound shift of values in all European countries over the past decade away from treating them as objects of pity and towards respecting them as equal citizens – an approach that the Council of Europe contributed to promote, with the adoption by the Committee of Ministers of Recommendation (92) 6 of 1992 on a coherent policy for people with disabilities. The underlying vision of Article 15 is one of equal citizenship for persons with

[9] Ministry of Employment and Solidarity (General Inspectorate of Social Affairs), Ministry of Education (General Inspectorate of Education), Report on access to education for children and young people with disabilities, March 1999.

disabilities and, fittingly, the primary rights are those of "independence, social integration and participation in the life of the community". Securing a right to education for children and others with disabilities plays an obviously important role in advancing these citizenship rights. This explains why education is now specifically mentioned in the revised Article 15 and why such an emphasis is placed on achieving that education "in the framework of general schemes, wherever possible". It should be noted that Article 15 applies to all persons with disabilities regardless of the nature and origin of their disability and irrespective of their age. It thus clearly covers both children and adults with autism.

49. Article 17 is predicated on the need to ensure that children and young persons grow up in an environment which encourages the "full development of their personality and of their physical and mental capacities". This approach is just as important for children with disabilities as it is for others and arguably more in circumstances where the effects of ineffective or untimely intervention are ever likely to be undone. The Committee views Article 17, which deals more generally, *inter alia,* with the right to education for all, as also embodying the modern approach of mainstreaming. Article 17§1, in particular, requires the establishment and maintenance of sufficient and adequate institutions and services for the purpose of education. Since Article 17§1 deals only with children and young persons it is important to read it in conjunction with Article 15§1 as far as adults are concerned.

50. Autism-Europe also argued that Article E of the Revised Charter is violated since the net result of alleged shortfalls is that persons with autism do not benefit, as effectively as other citizens, from a right to education as embodied both in Articles 15§1 and 17§1.

51. The Committee considers that the insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein. It further considers that its function is to help secure the equal effective enjoyment of all the rights concerned regardless of difference. Therefore, it does not constitute an autonomous right which could in itself provide independent grounds for a complaint. It follows that the Committee understands the arguments of the complainant as implying that the situation as alleged violates Articles 15§1 and 17§1 when read in combination with Article E of the Revised Charter.

Although disability is not explicitly listed as a prohibited ground of discrimination under Article E, the Committee considers that it is adequately covered by the reference to "other status". Such an interpretative approach, which is justified in its own rights, is fully consistent with both the letter and the spirit of the Political Declaration adopted by the 2nd European conference of ministers responsible for integration policies for people with disabilities (Malaga, April, 2003), which reaffirmed the anti-discriminatory and human rights framework as the appropriate one for development of European policy in this field.

52. The Committee observes further that the wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in interpreting Article 14 and most recently in the Thlimmenos case [*Thlimmenos c. Grèce* [GC], n° 34369/97, CEDH 2000-IV, § 44)], the principle of equality that is reflected therein means treating equals equally and unequals unequally. In particular it is said in the above mentioned case:

> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.

In this regard, the Committee considers that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.

53. The Committee recalls, as stated in its decision relative to Complaint No.1/1998 (International Commission of Jurist v. Portugal, § 32), that the implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.

54. In the light of the afore-mentioned, the Committee notes that in the case of autistic children and adults, notwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required, and even after the enactment of the Disabled Persons Policy Act of 30 June 1975, France has failed to achieve sufficient progress in advancing the provision of education for persons with autism. It specifically notes that most of the French official documents, in particular those submitted during the procedure, still use a more restrictive definition of autism than that adopted by the World Heath Organisation and that there are still insufficient official statistics with which to rationally measure progress through time. The Committee considers that the fact that the establishments specialising in the education and care of disabled children (particularly those with autism) are not in general financed from the same budget as normal schools, does not in itself amount to discrimination, since it is primarily for States themselves to decide on the modalities of funding.

Nevertheless, it considers, as the authorities themselves acknowledge, and whether a broad or narrow definition of autism is adopted, that the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled. It is also established, and not contested by the authorities, that there is a chronic shortage of care and support facilities for autistic adults.

CONCLUSION

For these reasons, the Committee concludes by 11 votes to 2 that the situation constitutes a violation of Articles 15§1 and 17§1 whether alone or read in combination with Article E of the revised European Social Charter.

Gerard QUINN	Jean-Michel BELORGEY	Régis BRILLAT
Rapporteur	President	Executive Secretary

I

(Legislative acts)

DIRECTIVES

DIRECTIVE 2010/64/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 20 October 2010

on the right to interpretation and translation in criminal proceedings

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular point (b) of the second subparagraph of Article 82(2) thereof,

Having regard to the initiative of the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Finland and the Kingdom of Sweden [1],

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) The Union has set itself the objective of maintaining and developing an area of freedom, security and justice. According to the Presidency Conclusions of the European Council in Tampere of 15 and 16 October 1999, and in particular point 33 thereof, the principle of mutual recognition of judgments and other decisions of judicial authorities should become the cornerstone of judicial cooperation in civil and criminal matters within the Union because enhanced mutual recognition and the necessary approximation of legislation would facilitate cooperation between competent authorities and the judicial protection of individual rights.

(2) On 29 November 2000, the Council, in accordance with the Tampere Conclusions, adopted a programme of measures to implement the principle of mutual recognition of decisions in criminal matters [3]. The introduction to the programme states that mutual recognition is 'designed to strengthen cooperation between Member States but also to enhance the protection of individual rights'.

(3) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. The extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.

(4) Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States' rules, but also trust that those rules are correctly applied.

(5) Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter) enshrine the right to a fair trial. Article 48(2) of the Charter guarantees respect for the right of defence. This Directive respects those rights and should be implemented accordingly.

[1] OJ C 69, 18.3.2010, p. 1.

[2] Position of the European Parliament of 16 June 2010 (not yet published in the Official Journal) and decision of the Council of 7 October 2010.

[3] OJ C 12, 15.1.2001, p. 10.

(6) Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.

(7) Strengthening mutual trust requires a more consistent implementation of the rights and guarantees set out in Article 6 of the ECHR. It also requires, by means of this Directive and other measures, further development within the Union of the minimum standards set out in the ECHR and the Charter.

(8) Article 82(2) of the Treaty on the Functioning of the European Union provides for the establishment of minimum rules applicable in the Member States so as to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. Point (b) of the second subparagraph of Article 82(2) refers to 'the rights of individuals in criminal procedure' as one of the areas in which minimum rules may be established.

(9) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the fields of interpretation and translation in criminal proceedings.

(10) On 30 November 2009, the Council adopted a resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [1]. Taking a step-by-step approach, the Roadmap called for the adoption of measures regarding the right to translation and interpretation (measure A), the right to information on rights and information about the charges (measure B), the right to legal advice and legal aid (measure C), the right to communication with relatives, employers and consular authorities (measure D), and special safeguards for suspected or accused persons who are vulnerable (measure E).

(11) In the Stockholm programme, adopted on 10 December 2009, the European Council welcomed the Roadmap and made it part of the Stockholm programme (point 2.4). The European Council underlined the non-exhaustive character of the Roadmap, by inviting the Commission to examine further elements of minimum procedural rights for suspected and accused persons, and to assess whether other issues, for instance the presumption of innocence, need to be addressed, in order to promote better cooperation in that area.

(12) This Directive relates to measure A of the Roadmap. It lays down common minimum rules to be applied in the fields of interpretation and translation in criminal proceedings with a view to enhancing mutual trust among Member States.

(13) This Directive draws on the Commission proposal for a Council Framework Decision on the right to interpretation and to translation in criminal proceedings of 8 July 2009, and on the Commission proposal for a Directive of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings of 9 March 2010.

(14) The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial.

(15) The rights provided for in this Directive should also apply, as necessary accompanying measures, to the execution of a European arrest warrant [2] within the limits provided for by this Directive. Executing Members States should provide, and bear the costs of, interpretation and translation for the benefit of the requested persons who do not speak or understand the language of the proceedings.

(16) In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions in relation to relatively minor offences. That may be the case, for example, in relation to traffic offences which are committed on a large scale and which might be established following a traffic control. In such situations, it would be unreasonable to require that the competent authority ensure all the rights under this Directive. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by such an authority and there is a right of appeal to a court having jurisdiction in criminal matters, this Directive should therefore apply only to the proceedings before that court following such an appeal.

[1] OJ C 295, 4.12.2009, p. 1.

[2] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1).

(17) This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings.

(18) Interpretation for the benefit of the suspected or accused persons should be provided without delay. However, where a certain period of time elapses before interpretation is provided, that should not constitute an infringement of the requirement that interpretation be provided without delay, as long as that period of time is reasonable in the circumstances.

(19) Communication between suspected or accused persons and their legal counsel should be interpreted in accordance with this Directive. Suspected or accused persons should be able, inter alia, to explain their version of the events to their legal counsel, point out any statements with which they disagree and make their legal counsel aware of any facts that should be put forward in their defence.

(20) For the purposes of the preparation of the defence, communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings, or with the lodging of an appeal or other procedural applications, such as an application for bail, should be interpreted where necessary in order to safeguard the fairness of the proceedings.

(21) Member States should ensure that there is a procedure or mechanism in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter. Such procedure or mechanism implies that competent authorities verify in any appropriate manner, including by consulting the suspected or accused persons concerned, whether they speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.

(22) Interpretation and translation under this Directive should be provided in the native language of the suspected or accused persons or in any other language that they speak or understand in order to allow them fully to exercise their right of defence, and in order to safeguard the fairness of the proceedings.

(23) The respect for the right to interpretation and translation contained in this Directive should not compromise any other procedural right provided under national law.

(24) Member States should ensure that control can be exercised over the adequacy of the interpretation and translation provided when the competent authorities have been put on notice in a given case.

(25) The suspected or accused persons or the persons subject to proceedings for the execution of a European arrest warrant should have the right to challenge the finding that there is no need for interpretation, in accordance with procedures in national law. That right does not entail the obligation for Member States to provide for a separate mechanism or complaint procedure in which such finding may be challenged and should not prejudice the time limits applicable to the execution of a European arrest warrant.

(26) When the quality of the interpretation is considered insufficient to ensure the right to a fair trial, the competent authorities should be able to replace the appointed interpreter.

(27) The duty of care towards suspected or accused persons who are in a potentially weak position, in particular because of any physical impairments which affect their ability to communicate effectively, underpins a fair administration of justice. The prosecution, law enforcement and judicial authorities should therefore ensure that such persons are able to exercise effectively the rights provided for in this Directive, for example by taking into account any potential vulnerability that affects their ability to follow the proceedings and to make themselves understood, and by taking appropriate steps to ensure those rights are guaranteed.

(28) When using videoconferencing for the purpose of remote interpretation, the competent authorities should be able to rely on the tools that are being developed in the context of European e-Justice (e.g. information on courts with videoconferencing equipment or manuals).

(29) This Directive should be evaluated in the light of the practical experience gained. If appropriate, it should be amended so as to improve the safeguards which it lays down.

(30) Safeguarding the fairness of the proceedings requires that essential documents, or at least the relevant passages of such documents, be translated for the benefit of suspected or accused persons in accordance with this Directive. Certain documents should always be considered essential for that purpose and should therefore be translated, such as any decision depriving a person of his liberty, any charge or indictment, and any judgment. It is for the competent authorities of the Member States to decide, on their own motion or upon a request of suspected or accused persons or of their legal counsel, which other documents are essential to safeguard the fairness of the proceedings and should therefore be translated as well.

(31) Member States should facilitate access to national databases of legal translators and interpreters where such databases exist. In that context, particular attention should be paid to the aim of providing access to existing databases through the e-Justice portal, as planned in the multiannual European e-Justice action plan 2009-2013 of 27 November 2008 ([1]).

(32) This Directive should set minimum rules. Member States should be able to extend the rights set out in this Directive in order to provide a higher level of protection also in situations not explicitly dealt with in this Directive. The level of protection should never fall below the standards provided by the ECHR or the Charter as interpreted in the case-law of the European Court of Human Rights or the Court of Justice of the European Union.

(33) The provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-law of the European Court of Human Rights and the Court of Justice of the European Union.

(34) Since the objective of this Directive, namely establishing common minimum rules, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. 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.

(35) In accordance with Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, those Member States have notified their wish to take part in the adoption and application of this Directive.

(36) In accordance with Articles 1 and 2 of the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

1. This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant.

2. The right referred to in paragraph 1 shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.

([1]) OJ C 75, 31.3.2009, p. 1.

4. This Directive does not affect national law concerning the presence of legal counsel during any stage of the criminal proceedings, nor does it affect national law concerning the right of access of a suspected or accused person to documents in criminal proceedings.

Article 2

Right to interpretation

1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

3. The right to interpretation under paragraphs 1 and 2 includes appropriate assistance for persons with hearing or speech impediments.

4. Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

6. Where appropriate, communication technology such as videoconferencing, telephone or the Internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.

7. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide persons subject to such proceedings who do not speak or understand the language of the proceedings with interpretation in accordance with this Article.

8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 3

Right to translation of essential documents

1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

4. There shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.

6. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document.

7. As an exception to the general rules established in paragraphs 1, 2, 3 and 6, an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.

8. Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily.

9. Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 4

Costs of interpretation and translation

Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings.

Article 5

Quality of the interpretation and translation

1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9).

2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.

3. Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive.

Article 6

Training

Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication.

Article 7

Record-keeping

Member States shall ensure that when a suspected or accused person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter pursuant to Article 2, when an oral translation or oral summary of essential documents has been provided in the presence of such an authority pursuant to Article 3(7), or when a person has waived the right to translation pursuant to Article 3(8), it will be noted that these events have occurred, using the recording procedure in accordance with the law of the Member State concerned.

Article 8

Non-regression

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

Article 9

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 27 October 2013.

2. Member States shall transmit the text of those measures to the Commission.

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

Article 10

Report

The Commission shall, by 27 October 2014, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

Article 11

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 12

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at Strasbourg, 20 October 2010.

For the European Parliament	*For the Council*
The President	*The President*
J. BUZEK	O. CHASTEL

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 (recast)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 141(3) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) 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 [3] and Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [4] have been significantly amended [5]. Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [6] and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [7] also contain provisions which have as their purpose the implementation of the principle of equal treatment between men and women. Now that new amendments are being made to the said Directives, it is desirable, for reasons of clarity, that the provisions in question should be recast by bringing together in a single text the main provisions existing in this field as well as certain developments arising out of the case-law of the Court of Justice of the European Communities (hereinafter referred to as the Court of Justice).

(2) Equality between men and women is a fundamental principle of Community law under Article 2 and Article 3 (2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to promote it in all its activities.

(3) The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person.

(4) Article 141(3) of the Treaty now provides a specific legal basis for the adoption of Community measures to ensure the application of the principle of equal opportunities and equal treatment in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

(5) Articles 21 and 23 of the Charter of Fundamental Rights of the European Union also prohibit any discrimination on grounds of sex and enshrine the right to equal treatment between men and women in all areas, including employment, work and pay.

(6) Harassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive. These forms of discrimination occur not only in the workplace, but also in the context of access to employment, vocational training and promotion. They should therefore be prohibited and should be subject to effective, proportionate and dissuasive penalties.

(7) In this context, employers and those responsible for vocational training should be encouraged to take measures to combat all forms of discrimination on grounds of sex and, in particular, to take preventive measures against harassment and sexual harassment in the workplace and in access to employment, vocational training and promotion, in accordance with national law and practice.

(8) The principle of equal pay for equal work or work of equal value as laid down by Article 141 of the Treaty and consistently upheld in the case-law of the Court of Justice constitutes an important aspect of the principle of equal treatment between men and women and an essential and

[1] OJ C 157, 28.6.2005, p. 83.

[2] Opinion of the European Parliament of 6 July 2005 (not yet published in the Official Journal), Council Common Position of 10 March 2006(OJ C 126 E, 30.5.2006, p. 33) and Position of the European Parliament of 1 June 2006 (not yet published in the Official Journal).

[3] OJ L 39, 14.2.1976, p. 40. Directive as amended by Directive 2002/73/EC of the European Parliament and of the Council (OJ L 269, 5.10.2002, p. 15).

[4] OJ L 225, 12.8.1986, p. 40. Directive as amended by Directive 96/97/EC (OJ L 46, 17.2.1997, p. 20).

[5] See Annex I Part A.

[6] OJ L 45, 19.2.1975, p. 19.

[7] OJ L 14, 20.1.1998, p. 6. Directive as amended by Directive 98/52/EC (OJ L 205, 22.7.1998, p. 66).

indispensable part of the *acquis communautaire*, including the case-law of the Court concerning sex discrimination. It is therefore appropriate to make further provision for its implementation.

(9) In accordance with settled case-law of the Court of Justice, in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation.

(10) The Court of Justice has established that, in certain circumstances, the principle of equal pay is not limited to situations in which men and women work for the same employer.

(11) The Member States, in collaboration with the social partners, should continue to address the problem of the continuing gender-based wage differentials and marked gender segregation on the labour market by means such as flexible working time arrangements which enable both men and women to combine family and work commitments more successfully. This could also include appropriate parental leave arrangements which could be taken up by either parent as well as the provision of accessible and affordable child-care facilities and care for dependent persons.

(12) Specific measures should be adopted to ensure the implementation of the principle of equal treatment in occupational social security schemes and to define its scope more clearly.

(13) In its judgment of 17 May 1990 in Case C-262/88 ([1]), the Court of Justice determined that all forms of occupational pension constitute an element of pay within the meaning of Article 141 of the Treaty.

(14) Although the concept of pay within the meaning of Article 141 of the Treaty does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, notwithstanding the fact that such scheme forms part of a general statutory scheme. According to the judgments of the Court of Justice in Cases C-7/93 ([2]) and C-351/00 ([3]), that condition will be satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary. For reasons of clarity, it is therefore appropriate to make specific provision to that effect.

([1]) C-262/88: Barber v Guardian Royal Exchange Assurance Group (1990 ECR I-1889).

([2]) C-7/93: Bestuur van het Algemeen Burgerlijk Pensioenfonds v G. A. Beune (1994 ECR I-4471).

([3]) C-351/00: Pirkko Niemi (2002 ECR I-7007).

(15) The Court of Justice has confirmed that whilst the contributions of male and female workers to a defined-benefit pension scheme are covered by Article 141 of the Treaty, any inequality in employers' contributions paid under funded defined-benefit schemes which is due to the use of actuarial factors differing according to sex is not to be assessed in the light of that same provision.

(16) By way of example, in the case of funded defined-benefit schemes, certain elements, such as conversion into a capital sum of part of a periodic pension, transfer of pension rights, a reversionary pension payable to a dependant in return for the surrender of part of a pension or a reduced pension where the worker opts to take earlier retirement, may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented.

(17) It is well established that benefits payable under occupational social security schemes are not to be considered as remuneration insofar as they are attributable to periods of employment prior to 17 May 1990, except in the case of workers or those claiming under them who initiated legal proceedings or brought an equivalent claim under the applicable national law before that date. It is therefore necessary to limit the implementation of the principle of equal treatment accordingly.

(18) The Court of Justice has consistently held that the Barber Protocol ([4]) does not affect the right to join an occupational pension scheme and that the limitation of the effects in time of the judgment in Case C-262/88 does not apply to the right to join an occupational pension scheme. The Court of Justice also ruled that the national rules relating to time limits for bringing actions under national law may be relied on against workers who assert their right to join an occupational pension scheme, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice. The Court of Justice has also pointed out that the fact that a worker can claim retroactively to join an occupational pension scheme does not allow the worker to avoid paying the contributions relating to the period of membership concerned.

(19) Ensuring equal access to employment and the vocational training leading thereto is fundamental to the application of the principle of equal treatment of men and women in matters of employment and occupation. Any exception to this principle should therefore be limited to those occupational activities which necessitate the employment of a person of a particular sex by reason of their nature or the context in which they are carried out, provided that the objective sought is legitimate and complies with the principle of proportionality.

([4]) Protocol 17 concerning Article 141 of the Treaty establishing the European Community (1992).

(20) 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. Measures within the meaning of Article 141(4) of the Treaty may include membership or the continuation of the activity of organisations or unions whose main objective is the promotion, in practice, of the principle of equal treatment between men and women.

(21) 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 one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between men and women.

(22) In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.

(23) It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.

(24) The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. This Directive should therefore be without prejudice to Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding ([1]). This Directive should further be without prejudice to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC ([2]).

(25) For reasons of clarity, it is also appropriate to make express provision for the protection of the employment rights of women on maternity leave and in particular their right to return to the same or an equivalent post, to suffer no detriment in their terms and conditions as a result of taking such leave and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

(26) In the Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council, of 29 June 2000 on the balanced participation of women and men in family and working life ([3]), Member States were encouraged to consider examining the scope for their respective legal systems to grant working men an individual and non-transferable right to paternity leave, while maintaining their rights relating to employment.

(27) Similar considerations apply to the granting by Member States to men and women of an individual and non-transferable right to leave subsequent to the adoption of a child. It is for the Member States to determine whether or not to grant such a right to paternity and/or adoption leave and also to determine any conditions, other than dismissal and return to work, which are outside the scope of this Directive.

(28) The effective implementation of the principle of equal treatment requires appropriate procedures to be put in place by the Member States.

(29) The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment.

(30) The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a *prima facie* case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.

(31) With a view to further improving the level of protection offered by this Directive, associations, organisations and other legal entities should also be empowered to engage in proceedings, as the Member States so determine, either on behalf or in support of a complainant, without prejudice to national rules of procedure concerning representation and defence.

(32) Having regard to the fundamental nature of the right to effective legal protection, it is appropriate to ensure that workers continue to enjoy such protection even after the relationship giving rise to an alleged breach of the principle

([1]) OJ L 348, 28.11.1992, p. 1.

([2]) OJ L 145, 19.6.1996, p. 4. Directive as amended by Directive 97/75/EC (OJ L 10, 16.1.1998, p. 24).

([3]) OJ C 218, 31.7.2000, p. 5.

of equal treatment has ended. An employee defending or giving evidence on behalf of a person protected under this Directive should be entitled to the same protection.

(33) It has been clearly established by the Court of Justice that in order to be effective, the principle of equal treatment implies that the compensation awarded for any breach must be adequate in relation to the damage sustained. It is therefore appropriate to exclude the fixing of any prior upper limit for such compensation, except where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive was the refusal to take his/her job application into consideration.

(34) In order to enhance the effective implementation of the principle of equal treatment, Member States should promote dialogue between the social partners and, within the framework of national practice, with non-governmental organisations.

(35) Member States should provide for effective, proportionate and dissuasive penalties for breaches of the obligations under this Directive.

(36) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. 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 those objectives.

(37) For the sake of a better understanding of the different treatment of men and women in matters of employment and occupation, comparable statistics disaggregated by sex should continue to be developed, analysed and made available at the appropriate levels.

(38) Equal treatment of men and women in matters of employment and occupation cannot be restricted to legislative measures. Instead, the European Union and the Member States should continue to promote the raising of public awareness of wage discrimination and the changing of public attitudes, involving all parties concerned at public and private level to the greatest possible extent. The dialogue between the social partners could play an important role in this process.

(39) The obligation to transpose this Directive into national law should be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.

(40) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law and application of the Directives set out in Annex I, Part B.

(41) In accordance with paragraph 34 of the Interinstitutional agreement on better law-making [1], 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 this Directive and the transposition measures and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

(b) working conditions, including pay;

(c) occupational social security schemes.

It also contains provisions to ensure that such implementation is made more effective by the establishment of appropriate procedures.

Article 2

Definitions

1. For the purposes of this Directive, the following definitions shall apply:

(a) 'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation;

(b) 'indirect discrimination': where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

(c) 'harassment': where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

[1] OJ C 321, 31.12.2003, p. 1.

(d) 'sexual harassment': where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

(e) 'pay': the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer;

(f) 'occupational social security schemes': schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1] whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.

2. For the purposes of this Directive, discrimination includes:

(a) harassment and sexual harassment, as well as any less favourable treatment based on a person's rejection of or submission to such conduct;

(b) instruction to discriminate against persons on grounds of sex;

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC.

Article 3

Positive action

Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

[1] OJ L 6, 10.1.1979, p. 24.

TITLE II

SPECIFIC PROVISIONS

CHAPTER 1

Equal pay

Article 4

Prohibition of discrimination

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

CHAPTER 2

Equal treatment in occupational social security schemes

Article 5

Prohibition of discrimination

Without prejudice to Article 4, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:

(a) the scope of such schemes and the conditions of access to them;

(b) the obligation to contribute and the calculation of contributions;

(c) the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.

Article 6

Personal scope

This Chapter shall apply to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment and to retired and disabled workers, and to those claiming under them, in accordance with national law and/or practice.

Article 7

Material scope

1. This Chapter applies to:

(a) occupational social security schemes which provide protection against the following risks:

(i) sickness,

(ii) invalidity,

(iii) old age, including early retirement,

(iv) industrial accidents and occupational diseases,

(v) unemployment;

(b) occupational social security schemes which provide for other social benefits, in cash or in kind, and in particular survivors' benefits and family allowances, if such benefits constitute a consideration paid by the employer to the worker by reason of the latter's employment.

2. This Chapter also applies to pension schemes for a particular category of worker such as that of public servants if the benefits payable under the scheme are paid by reason of the employment relationship with the public employer. The fact that such a scheme forms part of a general statutory scheme shall be without prejudice in that respect.

Article 8

Exclusions from the material scope

1. This Chapter does not apply to:

(a) individual contracts for self-employed persons;

(b) single-member schemes for self-employed persons;

(c) insurance contracts to which the employer is not a party, in the case of workers;

(d) optional provisions of occupational social security schemes offered to participants individually to guarantee them:

(i) either additional benefits,

(ii) or a choice of date on which the normal benefits for self-employed persons will start, or a choice between several benefits;

(e) occupational social security schemes in so far as benefits are financed by contributions paid by workers on a voluntary basis.

2. This Chapter does not preclude an employer granting to persons who have already reached the retirement age for the purposes of granting a pension by virtue of an occupational social security scheme, but who have not yet reached the retirement age for the purposes of granting a statutory retirement pension, a pension supplement, the aim of which is to make equal or more nearly equal the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex in the same situation who have already reached the statutory retirement age, until the persons benefiting from the supplement reach the statutory retirement age.

Article 9

Examples of discrimination

1. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:

(a) determining the persons who may participate in an occupational social security scheme;

(b) fixing the compulsory or optional nature of participation in an occupational social security scheme;

(c) laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;

(d) laying down different rules, except as provided for in points (h) and (j), for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;

(e) setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;

(f) fixing different retirement ages;

(g) suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;

(h) setting different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex in the case of defined-contribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the scheme's funding is implemented;

(i) setting different levels for workers' contributions;

(j) setting different levels for employers' contributions, except:

(i) in the case of defined-contribution schemes if the aim is to equalise the amount of the final benefits or to make them more nearly equal for both sexes,

(ii) in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined;

(k) laying down different standards or standards applicable only to workers of a specified sex, except as provided for in points (h) and (j), as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

2. Where the granting of benefits within the scope of this Chapter is left to the discretion of the scheme's management bodies, the latter shall comply with the principle of equal treatment.

Article 10

Implementation as regards self-employed persons

1. Member States shall take the necessary steps to ensure that the provisions of occupational social security schemes for self-employed persons contrary to the principle of equal treatment are revised with effect from 1 January 1993 at the latest or for Member States whose accession took place after that date, at the date that Directive 86/378/EEC became applicable in their territory.

2. This Chapter shall not preclude rights and obligations relating to a period of membership of an occupational social security scheme for self-employed persons prior to revision of that scheme from remaining subject to the provisions of the scheme in force during that period.

Article 11

Possibility of deferral as regards self-employed persons

As regards occupational social security schemes for self-employed persons, Member States may defer compulsory application of the principle of equal treatment with regard to:

(a) determination of pensionable age for the granting of old-age or retirement pensions, and the possible implications for other benefits:

(i) either until the date on which such equality is achieved in statutory schemes,

(ii) or, at the latest, until such equality is prescribed by a directive;

(b) survivors' pensions until Community law establishes the principle of equal treatment in statutory social security schemes in that regard;

(c) the application of Article 9(1)(i) in relation to the use of actuarial calculation factors, until 1 January 1999 or for Member States whose accession took place after that date until the date that Directive 86/378/EEC became applicable in their territory.

Article 12

Retroactive effect

1. Any measure implementing this Chapter, as regards workers, shall cover all benefits under occupational social security schemes derived from periods of employment subsequent to 17 May 1990 and shall apply retroactively to that date, without prejudice to workers or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under national law. In that event, the implementation measures shall apply retroactively to 8 April 1976 and shall cover all the benefits derived from periods of employment after that date. For Member States which acceded to the Community after 8 April 1976, and before 17 May 1990, that date shall be replaced by the date on which Article 141 of the Treaty became applicable in their territory.

2. The second sentence of paragraph 1 shall not prevent national rules relating to time limits for bringing actions under national law from being relied on against workers or those claiming under them who initiated legal proceedings or raised an equivalent claim under national law before 17 May 1990, provided that they are not less favourable for that type of action than for similar actions of a domestic nature and that they do not render the exercise of rights conferred by Community law impossible in practice.

3. For Member States whose accession took place after 17 May 1990 and which were on 1 January 1994 Contracting Parties to the Agreement on the European Economic Area, the date of 17 May 1990 in the first sentence of paragraph 1 shall be replaced by 1 January 1994.

4. For other Member States whose accession took place after 17 May 1990, the date of 17 May 1990 in paragraphs 1 and 2 shall be replaced by the date on which Article 141 of the Treaty became applicable in their territory.

Article 13

Flexible pensionable age

Where men and women may claim a flexible pensionable age under the same conditions, this shall not be deemed to be incompatible with this Chapter.

CHAPTER 3

Equal treatment as regards access to employment, vocational training and promotion and working conditions

Article 14

Prohibition of discrimination

1. There shall be no direct or indirect discrimination on grounds of sex in the public or 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, as well as pay as provided for in Article 141 of the Treaty;

(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. Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex 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 its objective is legitimate and the requirement is proportionate.

Article 15

Return from maternity leave

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

Article 16

Paternity and adoption leave

This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.

TITLE III

HORIZONTAL PROVISIONS

CHAPTER 1

Remedies and enforcement

Section 1

Remedies

Article 17

Defence of rights

1. Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial 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/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 equal treatment.

Article 18

Compensation or reparation

Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered. Such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration.

Section 2

Burden of proof

Article 19

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. 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.

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) the situations covered by Article 141 of the Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC;

(b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

5. This Article shall not apply to criminal procedures, unless otherwise provided by the Member States.

CHAPTER 2

Promotion of equal treatment — dialogue

Article 20

Equality bodies

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on grounds of sex. These bodies may form part of agencies with responsibility at national level for the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

(a) without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 17(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination;

(d) at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality.

Article 21

Social dialogue

1. Member States shall, in accordance with national traditions and practice, take adequate measures to promote social dialogue between the social partners with a view to fostering equal treatment, including, for example, through the monitoring of practices in the workplace, in access to employment, vocational training and promotion, as well as through the monitoring of collective agreements, codes of conduct, research or exchange of experience and good practice.

2. Where consistent with national traditions and practice, Member States shall encourage the social partners, without prejudice to their autonomy, to promote equality between men and women, and flexible working arrangements, with the aim of facilitating the reconciliation of work and private life, and to conclude, at the appropriate level, agreements laying down anti-discrimination rules in the fields referred to in Article 1 which fall within the scope of collective bargaining. These agreements shall respect the provisions of this Directive and the relevant national implementing measures.

3. Member States shall, in accordance with national law, collective agreements or practice, encourage employers to promote equal treatment for men and women in a planned and systematic way in the workplace, in access to employment, vocational training and promotion.

4. To this end, employers shall be encouraged to provide at appropriate regular intervals employees and/or their representatives with appropriate information on equal treatment for men and women in the undertaking.

Such information may include an overview of the proportions of men and women at different levels of the organisation; their pay and pay differentials; and possible measures to improve the situation in cooperation with employees' representatives.

Article 22

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 grounds of sex with a view to promoting the principle of equal treatment.

CHAPTER 3

General horizontal provisions

Article 23

Compliance

Member States shall take all necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations or any other arrangements shall be, or may be, declared null and void or are amended;

(c) occupational social security schemes containing such provisions may not be approved or extended by administrative measures.

Article 24

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees, including those who are employees' representatives provided for by national laws and/or practices, 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 25

Penalties

Member States shall lay down the rules on penalties 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 penalties, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 5 October 2005 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 26

Prevention of discrimination

Member States shall encourage, in accordance with national law, collective agreements or practice, employers and those responsible for access to vocational training to take effective measures to prevent all forms of discrimination on grounds of sex, in particular harassment and sexual harassment in the workplace, in access to employment, vocational training and promotion.

Article 27

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. Implementation of this Directive shall under no circumstances be sufficient grounds for a reduction in the level of protection of workers in the areas to which it applies, without prejudice to the Member States' right to respond to changes in the situation by introducing laws, regulations and administrative provisions which differ from those in force on the notification of this Directive, provided that the provisions of this Directive are complied with.

Article 28

Relationship to Community and national provisions

1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

2. This Directive shall be without prejudice to the provisions of Directive 96/34/EC and Directive 92/85/EEC.

Article 29

Gender mainstreaming

Member States shall actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provisions, policies and activities in the areas referred to in this Directive.

Article 30

Dissemination of information

Member States shall ensure that measures taken pursuant to this Directive, together with the provisions already in force, are brought to the attention of all the persons concerned by all suitable means and, where appropriate, at the workplace.

TITLE IV

FINAL PROVISIONS

Article 31

Reports

1. By 15 February 2011, the Member States shall communicate to the Commission 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. Without prejudice to paragraph 1, Member States shall communicate to the Commission, every four years, the texts of any measures adopted pursuant to Article 141(4) of the Treaty, as well as reports on these measures and their implementation. On the basis of that information, the Commission will adopt and publish every four years a report establishing a comparative assessment of any measures in the light of Declaration No 28 annexed to the Final Act of the Treaty of Amsterdam.

3. Member States shall assess the occupational activities referred to in Article 14(2), in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment periodically, but at least every 8 years.

Article 32

Review

By 15 February 2011 at the latest, the Commission shall review the operation of this Directive and if appropriate, propose any amendments it deems necessary.

Article 33

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 15 August 2008 at the latest or shall ensure, by that date, that management and labour introduce the requisite provisions by way of agreement. Member States may, if necessary to take account of particular difficulties, have up to one additional year to comply with this Directive. Member States shall take all necessary steps to be able to guarantee the results imposed by this Directive. They shall forthwith communicate to the Commission the texts of those measures.

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. They shall also include a statement that references in existing laws, regulations and administrative provisions to the Directives repealed by this Directive shall be construed as references to this Directive. Member States shall determine how such reference is to be made and how that statement is to be formulated.

The obligation to transpose this Directive into national law shall be confined to those provisions which represent a substantive change as compared with the earlier Directives. The obligation to transpose the provisions which are substantially unchanged arises under the earlier Directives.

Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 34

Repeal

1. With effect from 15 August 2009 Directives 75/117/EEC, 76/207/EEC, 86/378/EEC and 97/80/EC shall be repealed without prejudice to the obligations of the Member States relating to the time-limits for transposition into national law and application of the Directives set out in Annex I, Part B.

2. References made to the repealed Directives shall be construed as being made to this Directive and should be read in accordance with the correlation table in Annex II.

Article 35

Entry into force

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 36

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg, 5 July 2006.

For the European Parliament	*For the Council*
The President	*The President*
J. BORRELL FONTELLES	P. LEHTOMÄKI

ANNEX I

PART A

Repealed Directives with their successive amendments

Council Directive 75/117/EEC	OJ L 45, 19.2.1975, p. 19
Council Directive 76/207/EEC	OJ L 39, 14.2.1976, p. 40
Directive 2002/73/EC of the European Parliament and of the Council	OJ L 269, 5.10.2002, p. 15
Council Directive 86/378/EEC	OJ L 225, 12.8.1986, p. 40
Council Directive 96/97/EC	OJ L 46, 17.2.1997, p. 20
Council Directive 97/80/EC	OJ L 14, 20.1.1998, p. 6
Council Directive 98/52/EC	OJ L 205, 22.7.1998, p. 66

PART B

List of time limits for transposition into national law and application dates

(referred to in Article 34(1))

Directive	Time-limit for transposition	Date of application
Directive 75/117/EEC	19.2.1976	
Directive 76/207/EEC	14.8.1978	
Directive 86/378/EEC	1.1.1993	
Directive 96/97/EC	1.7.1997	17.5.1990 in relation to workers, except for those workers or those claiming under them who had before that date initiated legal proceedings or raised an equivalent claim under national law. Article 8 of Directive 86/378/EEC — 1.1.1993 at the latest. Article 6(1)(i), first indent of Directive 86/378/EEC –1.1.1999 at the latest.
Directive 97/80/EC	1.1.2001	As regards the United Kingdom of Great Britain and Northern Ireland 22.7.2001
Directive 98/52/EC	22.7.2001	
Directive 2002/73/EC	5.10.2005	

ANNEX II

Correlation table

Directive 75/117/EEC	Directive 76/207/EEC	Directive 86/378/EEC	Directive 97/80/EC	This Directive
—	Article 1(1)	Article 1	Article 1	Article 1
—	Article 1(2)	—	—	—
—	Article 2(2), first indent	—	—	Article 2(1), (a)
—	Article 2(2), second indent	—	Article 2(2)	Article 2(1), (b)
—	Article 2(2), third and fourth indents	—	—	Article 2(1), (c) and (d)
—	—	—	—	Article 2(1), (e)
—	—	Article 2(1)	—	Article 2(1), (f)
—	Article 2(3) and (4) and Article 2(7) third subparagraph	—	—	Article 2(2)
—	Article 2(8)	—	—	Article 3
Article 1	—	—	—	Article 4
—	—	Article 5(1)	—	Article 5
—	—	Article 3	—	Article 6
—	—	Article 4	—	Article 7(1)
—	—	—	—	Article 7(2)
		Article 2(2)		Article 8(1)
—	—	Article 2(3)	—	Article 8(2)
—	—	Article 6	—	Article 9
—	—	Article 8	—	Article 10
—	—	Article 9	—	Article 11
—	—	(Article 2 of Directive 96/97/EC)	—	Article 12
—	—	Article 9a	—	Article 13
—	Articles 2(1) and 3 (1)	—	Article 2(1)	Article 14(1)
—	Article 2(6)	—	—	Article 14(2)
—	Article 2(7), second subparagraph	—	—	Article 15
—	Article 2(7), fourth subparagraph, second and third sentence	—	—	Article 16
Article 2	Article 6(1)	Article 10	—	Article 17(1)
—	Article 6(3)	—	—	Article 17(2)
—	Article 6(4)	—	—	Article 17(3)

Directive 75/117/EEC	Directive 76/207/EEC	Directive 86/378/EEC	Directive 97/80/EC	This Directive
—	Article 6(2)	—	—	Article 18
—	—	—	Articles 3 and 4	Article 19
—	Article 8a	—	—	Article 20
—	Article 8b	—	—	Article 21
—	Article 8c	—	—	Article 22
Articles 3 and 6	Article 3 (2)(a)	—	—	Article 23(a)
Article 4	Article 3(2)(b)	Article 7(a)	—	Article 23(b)
—	—	Article 7(b)	—	Article 23(c)
Article 5	Article 7	Article 11	—	Article 24
Article 6	—	—	—	—
—	Article 8d	—	—	Article 25
	Article 2(5)			Article 26
—	Article 8e(1)	—	Article 4(2)	Article 27(1)
—	Article 8e(2)	—	Article 6	Article 27(2)
—	Article 2(7) first subparagraph	Article 5(2)	—	Article 28(1)
—	Article 2(7) fourth subparagraph first sentence			Article 28(2)
—	Article 1(1a)			Article 29
Article 7	Article 8	—	Article 5	Article 30
Article 9	Article 10	Article 12(2)	Article 7, fourth subparagraph	Article 31(1) and (2)
—	Article 9(2)	—	—	Article 31(3)
—	—	—	—	Article 32
Article 8	Article 9(1), first subparagraph and 9 (2) and (3)	Article 12(1)	Article 7, first, second and third subparagraphs	Article 33
—	Article 9(1), second subparagraph	—	—	—
—	—	—	—	Article 34
—	—	—	—	Article 35
—	—	—	—	Article 36
—	—	Annex	—	—

COUNCIL 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

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 Commission,

Having regard to the Opinion of the European Parliament [1],

Having regard to the Opinion of the European Economic and Social Committee [2],

Having regard to the opinion of the Committee of the Regions [3],

Whereas:

(1) In accordance with Article 6 of the Treaty on European Union, the 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 the Member States, and 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 and the 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.

(3) 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 and the freedom of religion.

(4) Equality between men and women is a fundamental principle of the European Union. Articles 21 and 23 of the Charter of Fundamental Rights of the European Union prohibit any discrimination on grounds of sex and require equality between men and women to be ensured in all areas.

(5) Article 2 of the Treaty establishing the European Community provides that promoting such equality is one of the Community's essential tasks. Similarly, Article 3(2) of the Treaty requires the Community to aim to eliminate inequalities and to promote equality between men and women in all its activities.

(6) The Commission announced its intention of proposing a directive on sex discrimination outside of the labour market in its Communication on the Social Policy Agenda. Such a proposal is fully consistent with Council Decision 2001/51/EC of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001-2005) [4] covering all Community policies and aimed at promoting equality for men and women by adjusting these policies and implementing practical measures to improve the situation of men and women in society.

(7) At its meeting in Nice of 7 and 9 December 2000, the European Council called on the Commission to reinforce equality-related rights by adopting a proposal for a directive on promoting gender equality in areas other than employment and professional life.

[1] Opinion delivered on 30 March 2004 (not yet published in the Official Journal).
[2] OJ C 241, 28.9.2004, p. 44.
[3] OJ C 121, 30.4.2004, p. 27.
[4] OJ L 17, 19.1.2001, p. 22.

(8) The Community has adopted a range of legal instruments to prevent and combat sex discrimination in the labour market. These instruments have demonstrated the value of legislation in the fight against discrimination.

(9) Discrimination based on sex, including harassment and sexual harassment, also takes place in areas outside of the labour market. Such discrimination can be equally damaging, acting as a barrier to the full and successful integration of men and women into economic and social life.

(10) Problems are particularly apparent in the area of the access to and supply of goods and services. Discrimination based on sex, should therefore be prevented and eliminated in this area. As in the case of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin [1], this objective can be better achieved by means of Community legislation.

(11) Such legislation should prohibit discrimination based on sex in the access to and supply of goods and services. Goods should be taken to be those within the meaning of the provisions of the Treaty establishing the European Community relating to the free movement of goods. Services should be taken to be those within the meaning of Article 50 of that Treaty.

(12) To prevent discrimination based on sex, this Directive should apply to both direct discrimination and indirect discrimination. Direct discrimination occurs only when one person is treated less favourably, on grounds of sex, than another person in a comparable situation. Accordingly, for example, differences between men and women in the provision of healthcare services, which result from the physical differences between men and women, do not relate to comparable situations and therefore, do not constitute discrimination.

(13) The prohibition of discrimination should apply to persons providing goods and services, which are available to the public and which are offered outside the area of private and family life and the transactions carried out in this context. It should not apply to the content of media or advertising nor to public or private education.

(14) All individuals enjoy the freedom to contract, including the freedom to choose a contractual partner for a transaction. An individual who provides goods or services may have a number of subjective reasons for his or her choice of contractual partner. As long as the choice of partner is not based on that person's sex, this Directive should not prejudice the individual's freedom to choose a contractual partner.

(15) There are already a number of existing legal instruments for the implementation of the principle of equal treatment between men and women in matters of employment and occupation. Therefore, this Directive should not apply in this field. The same reasoning applies to matters of self-employment insofar as they are covered by existing legal instruments. The Directive should apply only to insurance and pensions which are private, voluntary and separate from the employment relationship.

(16) Differences in treatment may be accepted only if they are justified by a legitimate aim. A legitimate aim may, for example, be the protection of victims of sex-related violence (in cases such as the establishment of single-sex shelters), reasons of privacy and decency (in cases such as the provision of accommodation by a person in a part of that person's home), the promotion of gender equality or of the interests of men or women (for example single-sex voluntary bodies), the freedom of association (in cases of membership of single-sex private clubs), and the organisation of sporting activities (for example single-sex sports events). Any limitation should nevertheless be appropriate and necessary in accordance with the criteria derived from case law of the Court of Justice of the European Communities.

(17) The principle of equal treatment in the access to goods and services does not require that facilities should always be provided to men and women on a shared basis, as long as they are not provided more favourably to members of one sex.

(18) The use of actuarial factors related to sex is widespread in the provision of insurance and other related financial services. In order to ensure equal treatment between men and women, the use of sex as an actuarial factor should not result in differences in individuals' premiums and benefits. To avoid a sudden readjustment of the market, the implementation of this rule should apply only to new contracts concluded after the date of transposition of this Directive.

[1] OJ L 180, 19.7.2000, p. 22.

(19) Certain categories of risks may vary between the sexes. In some cases, sex is one but not necessarily the only determining factor in the assessment of risks insured. For contracts insuring those types of risks, Member States may decide to permit exemptions from the rule of unisex premiums and benefits, as long as they can ensure that underlying actuarial and statistical data on which the calculations are based, are reliable, regularly up-dated and available to the public. Exemptions are allowed only where national legislation has not already applied the unisex rule. Five years after transposition of this Directive, Member States should re-examine the justification for these exemptions, taking into account the most recent actuarial and statistical data and a report by the Commission three years after the date of transposition of this Directive.

(20) Less favourable treatment of women for reasons of pregnancy and maternity should be considered a form of direct discrimination based on sex and therefore prohibited in insurance and related financial services. Costs related to risks of pregnancy and maternity should therefore not be attributed to the members of one sex only.

(21) Persons who have been subject to discrimination based on sex should have adequate means of legal protection. To provide a more effective level of protection, associations, organisations and other 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.

(22) The rules on the burden of proof should 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 should shift back to the defendant when evidence of such discrimination is brought.

(23) The effective implementation of the principle of equal treatment requires adequate judicial protection against victimisation.

(24) With a view to promoting the principle of equal treatment, Member States should encourage dialogue with relevant stakeholders, which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex in the area of access to and supply of goods and services.

(25) Protection against discrimination based on sex should itself 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. The body or bodies may be the same as those with responsibility at national level for the defence of human rights or the safeguarding of individuals' rights, or the implementation of the principle of equal treatment.

(26) 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.

(27) Member States should provide for effective, proportionate and dissuasive penalties in cases of breaches of the obligations under this Directive.

(28) Since the objectives of this Directive, namely to ensure a common high 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 effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. 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 those objectives.

(29) In accordance with paragraph 34 of the interinstitutional agreement on better law-making [1], 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,

[1] OJ C 321, 31.12.2003, p. 1.

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination based on sex in access to and supply of goods and services, with a view to putting into effect in the Member States the principle of equal treatment between men and women.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

(a) direct discrimination: where one person is treated less favourably, on grounds of sex, than another is, has been or would be treated in a comparable situation;

(b) indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;

(c) harassment: where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

(d) sexual harassment: where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 3

Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.

2. This Directive does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.

3. This Directive shall not apply to the content of media and advertising nor to education.

4. This Directive shall not apply to matters of employment and occupation. This Directive shall not apply to matters of self-employment, insofar as these matters are covered by other Community legislative acts.

Article 4

Principle of equal treatment

1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that

(a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;

(b) there shall be no indirect discrimination based on sex.

2. This Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.

3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.

4. Instruction to direct or indirect discrimination on the grounds of sex shall be deemed to be discrimination within the meaning of this Directive.

5. This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Article 5

Actuarial factors

1. Member States shall ensure that in all new contracts concluded after 21 December 2007 at the latest, the use of sex as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services shall not result in differences in individuals' premiums and benefits.

2. Notwithstanding paragraph 1, Member States may decide before 21 December 2007 to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. The Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission.

3. In any event, costs related to pregnancy and maternity shall not result in differences in individuals' premiums and benefits.

Member States may defer implementation of the measures necessary to comply with this paragraph until two years after 21 December 2007 at the latest. In that case the Member States concerned shall immediately inform the Commission.

Article 6

Positive action

With a view to ensuring full equality in practice between men and women, 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 sex.

Article 7

Minimum requirements

1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment between men and women than those laid down in this Directive.

2. The implementation of this Directive shall in 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 8

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 the 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 introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation, as the Member States so determine, for the loss and damage sustained by a person injured as a result of discrimination within the meaning of this Directive, in a way which is dissuasive and proportionate to the damage suffered. The fixing of a prior upper limit shall not restrict such compensation or reparation.

3. 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, 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.

4. Paragraphs 1 and 3 shall be without prejudice to national rules on time limits for bringing actions relating to the principle of equal treatment.

Article 9

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 proceedings brought in accordance with Article 8(3).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.

Article 10

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect persons from any adverse treatment or adverse consequence as a reaction to a complaint or to legal proceedings aimed at enforcing compliance with the principle of equal treatment.

Article 11

Dialogue with relevant stakeholders

With a view to promoting the principle of equal treatment, Member States shall encourage dialogue with relevant stakeholders which have, in accordance with national law and practice, a legitimate interest in contributing to the fight against discrimination on grounds of sex in the area of access to and supply of goods and services.

CHAPTER III

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 12

1. Member States shall designate and make the necessary arrangements for a body or bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights, or the implementation of the principle of equal treatment.

2. Member States shall ensure that the competencies of the bodies referred to in paragraph 1 include:

(a) without prejudice to the rights of victims and of associations, organisations or other legal entities referred to in Article 8(3), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination;

(b) conducting independent surveys concerning discrimination;

(c) publishing independent reports and making recommendations on any issue relating to such discrimination.

CHAPTER IV

FINAL PROVISIONS

Article 13

Compliance

Member States shall take the necessary measures to ensure that the principle of equal treatment is respected in relation to the access to and supply of goods and services within the scope of this Directive, 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

Penalties

Member States shall lay down the rules on penalties 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 penalties, which may comprise the payment of compensation to the victim, shall be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 21 December 2007 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 15

Dissemination of information

Member States shall take care 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 all appropriate means throughout their territory.

Article 16

Reports

1. Member States shall communicate all available information concerning the application of this Directive to the Commission, by 21 December 2009. and every five years thereafter.

The Commission shall draw up a summary report, which shall include a review of the current practices of Member States in relation to Article 5 with regard to the use of sex as a factor in the calculation of premiums and benefits. It shall submit this report to the European Parliament and to the Council no later 21 December 2010. Where appropriate, the Commission shall accompany its report with proposals to modify the Directive.

2. The Commission's report shall take into account the viewpoints of relevant stakeholders.

Article 17

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 21 December 2007 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

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

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 18

Entry into force

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

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 13 December 2004.

For the Council
The President
B. R. BOT

COUNCIL DIRECTIVE 2000/43/EC

of 29 June 2000

implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

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) The Treaty on European Union marks a new stage in the process of creating an ever closer union among the peoples of Europe.

(2) 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 the Member States, and should respect 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.

(3) 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 and the 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.

(4) It is important to respect such fundamental rights and freedoms, including the right to freedom of association. It is also important, in the context of the access to and provision of goods and services, to respect the protection of private and family life and transactions carried out in this context.

(5) The European Parliament has adopted a number of Resolutions on the fight against racism in the European Union.

(6) The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.

(7) The European Council in Tampere, on 15 and 16 October 1999, invited the Commission to come forward as soon as possible with proposals implementing Article 13 of the EC Treaty as regards the fight against racism and xenophobia.

(8) The Employment Guidelines 2000 agreed by the European Council in Helsinki, on 10 and 11 December 1999, stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.

(9) Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice.

(10) The Commission presented a communication on racism, xenophobia and anti-Semitism in December 1995.

(11) The Council adopted on 15 July 1996 Joint Action (96/443/JHA) concerning action to combat racism and xenophobia [5] under which the Member States undertake to ensure effective judicial cooperation in respect of offences based on racist or xenophobic behaviour.

(12) To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services.

[1] Not yet published in the Official Journal.
[2] Opinion delivered on 18.5.2000 (not yet published in the Official Journal).
[3] Opinion delivered on 12.4.2000 (not yet published in the Official Journal).
[4] Opinion delivered on 31.5.2000 (not yet published in the Official Journal).
[5] OJ L 185, 24.7.1996, p. 5.

(13) To this end, any direct or indirect discrimination based on racial or ethnic origin 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 to occupation.

(14) In implementing the principle of equal treatment irrespective of racial or ethnic origin, 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.

(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) It is important to protect all natural persons against discrimination on grounds of racial or ethnic origin. Member States should also provide, where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination on grounds of the racial or ethnic origin of their members.

(17) 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 racial or ethnic origin, and such measures may permit organisations of persons of a particular racial or ethnic origin where their main object is the promotion of the special needs of those persons.

(18) In very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin 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.

(19) Persons who have been subject to discrimination based on racial and ethnic origin 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, as the Member States so determine, either on behalf or in support of any victim, in proceedings, without prejudice to national rules of procedure concerning representation and defence before the courts.

(20) The effective implementation of the principle of equality requires adequate judicial protection against victimisation.

(21) 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.

(22) 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.

(23) Member States should promote dialogue between the social partners and with non-governmental organisations to address different forms of discrimination and to combat them.

(24) Protection against discrimination based on racial or ethnic origin would itself 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.

(25) 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.

(26) Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive.

(27) The Member States may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements, provided that the Member States take all the necessary steps to ensure that they can at all times guarantee the results imposed by this Directive.

(28) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty, the objective of this Directive, namely ensuring a common high 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,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, 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 based on racial or ethnic origin.

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 grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin 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 discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin 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 grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Article 3

Scope

1. Within the limits of the powers conferred upon 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 and 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;

(e) social protection, including social security and healthcare;

(f) social advantages;

(g) education;

(h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference 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 on 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

Genuine and determining occupational requirements

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin 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.

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 racial or ethnic origin.

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, 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 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 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 proceedings brought in accordance with Article 7(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 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 take care 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 all appropriate means throughout their territory.

Article 11

Social dialogue

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

2. Where consistent with national traditions and practice, Member States shall encourage the two sides of the industry 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 the relevant national implementing measures.

Article 12

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 grounds of racial and ethnic origin with a view to promoting the principle of equal treatment.

CHAPTER III

BODIES FOR THE PROMOTION OF EQUAL TREATMENT

Article 13

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

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 IV

FINAL PROVISIONS

Article 14

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 individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making associations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended.

Article 15

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. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 16

Implementation

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19 July 2003 or may entrust management and labour, at their joint request, with the implementation of this Directive as regards provisions falling within the scope of collective agreements. In such cases, Member States shall ensure that by 19 July 2003, management and labour introduce the necessary measures by agreement, Member States 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.

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

Article 17

Report

1. Member States shall communicate to the Commission by 19 July 2005, 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 views of the European Monitoring Centre on Racism and Xenophobia, as well as 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 18

Entry into force

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

Article 19

Addressees

This Directive is addressed to the Member States.

Done at Luxembourg, 29 June 2000.

For the Council

The President

M. ARCANJO

JUDGMENT OF THE COURT (Second Chamber)

19 April 2012 (*)

(Directives 2000/43/EC, 2000/78/EC and 2006/54/EC – Equal treatment in employment and occupation – Worker showing that he meets the requirements listed in a job advertisement – Right of that worker to have access to information indicating whether the employer has recruited another applicant)

In Case C-415/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Germany), made by decision of 20 May 2010, received at the Court on 20 August 2010, in the proceedings

Galina Meister

v

Speech Design Carrier Systems GmbH,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas (Rapporteur), A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2011,

after considering the observations submitted on behalf of:

– Galina Meister, by R. Wißbar, Rechtsanwalt,

– Speech Design Carrier Systems GmbH, by U. Kappelhoff, Rechtsanwältin,

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the European Commission, by V. Kreuschitz, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 8(1) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), Article 10(1) 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 Article 19(1) of 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 2006 L 204, p. 23).

2 The reference has been made in proceedings between Ms Meister and Speech Design Carrier Systems GMbH ('Speech Design') concerning the discrimination on the grounds of sex, age and ethnic origin that she claims to have suffered during a recruitment procedure.

Legal context

European Union legislation

Directive 2000/43

3 Recital 15 in the preamble to Directive 2000/43 states that '[t]he 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'.

4 Under Recital 21 of that directive, '[t]he 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.'

5 Under Article 1 of the directive:

'The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.'

6 Article 3(1) of the same directive 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:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…'

7 Article 7(1) of Directive 2000/43 provides:

'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the 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.'

8 Article 8 of that directive, entitled 'Burden of proof', is worded as follows:

'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 proceedings brought in accordance with Article 7(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.'

Directive 2000/78

9 Recital 15 in the preamble to Directive 2000/78 states that '[t]he 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'.

10 Recital 31 of that directive states that '[t]he 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'.

11 Under Article 1 of the directive:

'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'.

12 Article 3(1) of the same directive 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:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…'

13 Article 9(1) of Directive 2000/78 provides:

'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the 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.'

14 Article 10 of the directive, entitled 'Burden of proof', states:

'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 proceedings brought in accordance with Article 9(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.'

Directive 2006/54

15 Recital 30 in the preamble to Directive 2006/54 is worded as follows:

'The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.'

16 Under Article 1 of that directive:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

…'

17 Article 14(1) of the same directive states:

'There shall be no direct or indirect discrimination on grounds of sex in the public or 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;

…'

18 Article 17(1) of Directive 2006/54 provides:

'Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial 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.'

19 Article 19 of that directive, entitled 'Burden of proof', is worded as follows:

'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. 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.

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) the situations covered by Article 141 of the [EC] Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC;

(b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

5. This Article shall not apply to criminal procedures, unless otherwise provided by the Member States.'

National legislation

20 Paragraph 1 of the General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz), of 14 August 2006 (BGBl. 2006 I, p. 1897), in the version applicable at the material time ('the AGG'), is worded as follows:

'The purpose of this Law is to prevent or to eliminate discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.'

21 Under Paragraph 3(1) of the AGG:

'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 Paragraph 1. Direct discrimination on the ground of sex shall also be taken to occur within the meaning of Paragraph 2(1) Nos 1 to 4 where a woman is treated less favourably on account of pregnancy or maternity.'

22 Paragraph 6(1) of the AGG states:

'For the purposes of this Law, "worker" means:

1. persons in salaried employment;

2. persons employed for the purposes of their vocational training;

3. persons of similar status to salaried persons on account of their dependent economic status, including those who work from home and those comparable to persons who work from home.

"Worker" shall also refer to job applicants and persons whose employment relationship has ended.'

23 Under Paragraph 7(1) of AGG workers must not suffer discrimination on any of the grounds referred to in Paragraph 1. That prohibition also applies where the person responsible for the

discrimination merely assumes, when exercising the discrimination, that one of the grounds given in Paragraph 1 exists.

24 Under Paragraph 15(2) of the AGG:

'The worker may claim appropriate financial compensation for non-pecuniary damage. In the event of non-recruitment, the compensation shall not exceed three months' salary if the worker would not have been recruited even if the selection had been free from discrimination.'

25 Paragraph 22 of the AGG provides:

'Where, in the event of conflict, one of the parties is able to establish factual evidence from which it may be presumed that there has been discrimination on one of the grounds referred to in Paragraph 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

26 Ms Meister, a Russian national, was born on 7 September 1961. She holds a Russian degree in systems engineering, the equivalence of which to a German degree awarded by a Fachhochschule (university of applied science) has been recognised in Germany.

27 Speech Design published a newspaper advertisement for the purposes of recruiting an 'experienced software developer', to which Ms Meister responded by applying for the post on 5 October 2006. By a letter of 11 October 2006, Speech Design rejected her application without inviting her to a job interview. Not long afterwards, a second advertisement, with the same content as the first, was published by that company on the internet. On 19 October 2006 Ms Meister reapplied, but Speech Design once again rejected her application, without inviting her to an interview and without telling her on what ground her application was unsuccessful.

28 There is nothing in the file before the Court to suggest that Speech Design claimed that Ms Meister's level of expertise did not correspond to that sought in that recruitment process.

29 Being of the view that she met the requirements of the post in question, Ms Meister considered that she suffered less favourable treatment than another person in a comparable situation, on the grounds of her sex, age and ethnic origin. She therefore brought an action against Speech Design before the Arbeitsgericht (Labour Court), seeking, first, compensation from that company for employment discrimination and, secondly, the production of the file for the person who was engaged, which would enable her to prove that she is more qualified than that person.

30 As Ms Meister's action was dismissed at first instance, she brought an appeal against that judgment before the Landesarbeitsgericht (Higher Labour Court) which also dismissed her appeal. She brought an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court). That court questions whether Ms Meister can claim a right to information on the basis of Directives 2000/43, 2000/78 and 2006/54 and, if so, what are the consequences of a refusal of disclosure by Speech Design.

31 In those circumstances, the Bundesarbeitsgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are Article 19(1) of Directive 2006/54 …, Article 8(1) of … Directive 2000/43 … and Article 10(1) of … Directive 2000/78 … to be interpreted as meaning that, where a worker shows that he meets the requirements for a post advertised by an employer, he has a right vis-à-vis that employer, if he does not obtain the post, to information as to whether the employer has engaged another applicant and, if so, as to the criteria on the basis of which that appointment has been made?

2. If the answer to the first question is affirmative:

Where the employer does not disclose the requested information, does that fact give rise to a presumption that the discrimination alleged by the worker exists?'

Consideration of the questions referred

The first question

32 By its first question, the referring court asks, in essence, whether Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54 must be interpreted as entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process and, if so, on the basis of which criteria.

33 At the outset, it should be recalled that it follows from Article 3(1)(a) of Directive 2000/43, Article 3(1)(a) of Directive 2000/78 and indent (a) of the second subparagraph of Article 1 and Article 14(1)(a) of Directive 2006/54 that those directives apply to a person seeking employment, and also in regard to the selection criteria and recruitment conditions of that employment.

34 Those same directives provide, in essence, in Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54, that the Member States are 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.

35 It should be noted that the wording of those provisions is almost identical to that of Article 4(1) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6), a provision which the Court has interpreted, in particular in Case C-104/10 *Kelly* [2011] ECR I-0000. Article 4(1), which was repealed by Directive 2006/54 with effect from 15 August 2009, along with Directive 97/80 in its entirety, made cases of discrimination on the grounds of sex subject to the same legal rules on the burden of proof as the directives in question in the main proceedings.

36 Interpreting Article 4(1) of Directive 97/80 in *Kelly*, the Court held in paragraph 30 of the judgment that it is the person who considers himself to have been wronged because the principle of equal treatment has not been applied to him who must initially establish the facts from which it may be presumed that there has been direct or indirect discrimination. It is only where that person has established such facts that it is then for the defendant to prove that there has been no breach of the principle of non-discrimination.

37 The Court also held that the assessment of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice (*Kelly*, paragraph 31), as stated in Recital 15 of Directives 2000/43 and 2000/78 and Recital 30 of Directive 2006/54.

38 Moreover, the Court stated that Directive 97/80, pursuant to Article 1 thereof, seeks to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies (*Kelly*, paragraph 33). In that regard, it should be noted that Article 7(1) of Directive 2000/43, Article 9(1) of Directive 2000/78 and Article 17(1) of Directive 2006/54 refer to the same principle.

39 In those circumstances the Court concluded, at paragraph 34 of *Kelly,* that although Article 4(1) of that Directive 97/80 does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them to information in order that they may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision, it is not however inconceivable that a refusal of disclosure by the defendant, in the context of establishing such facts, is liable to compromise the achievement of the objective pursued by that directive and, in particular to deprive that provision of its effectiveness.

40 As was noted at paragraph 35 of the present judgment, Directive 97/80 was repealed and replaced by Directive 2006/54. However, having regard to the wording and scheme of the articles concerned by the present reference for a preliminary ruling, there is nothing to suggest that, in adopting Directives 2000/43, 2000/78 and 2006/54, the European Union legislator intended to amend the rules on the burden of proof established by Article 4(1) of Directive 97/80. Consequently, in the context of establishing the facts from which it may be presumed that there has been direct or indirect discrimination, it must be ensured that a refusal of disclosure by the defendant is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54.

41 According to the wording of the second and third subparagraphs respectively of Article 4(3) TEU, the Member States inter alia 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and 'shall … refrain from any measure which could jeopardise the attainment of the Union's objectives', including those pursued by directives (see Case C-61/11 PPU *El Dridi* [2011] ECR I-0000, paragraph 56, and *Kelly*, paragraph 36).

42 Therefore, it is for the referring court to ensure that the refusal of disclosure by Speech Design, in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination against Ms Meister, is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54. It must, in particular, take account of all the circumstances of the main proceedings, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been such discrimination have been established.

43 In that regard, it should be recalled that, as is clear from Recital 15 of Directives 2000/43 and 2000/78 and Recital 30 of Directive 2006/54, national law or the national practices of the Member States may provide, in particular, that indirect discrimination may be established by any means including on the basis of statistical evidence.

44 Among the factors which may be taken into account is, in particular, the fact that, unlike in *Kelly,* the employer in question in the main proceedings seems to have refused Ms Meister any access to the information that she seeks to have disclosed.

45 Moreover, as the Advocate General noted in paragraphs 35 to 37 of his Opinion, account can also be taken of, in particular, the fact that Speech Design does not dispute that Ms Meister's level of expertise matches that referred to in the job advertisement, as well as the facts that, notwithstanding this, the employer did not invite her to a job interview and she was not invited to interview under the new procedure to select applicants for the post in question.

46 In the light of the foregoing, the answer to the first question is that Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54 must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.

47 Nevertheless, it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It

is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.

The second question

48 In view of the answer given to the first question, there is no need to reply to the second question referred by the national court.

Costs

49 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 (Second Chamber) hereby rules:

Article 8(1) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and Article 19(1) of 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 must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.

Nevertheless, it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.

[Signatures]

** Language of the case: German.

JUDGMENT OF THE COURT (Second Chamber)

21 July 2011 (*)

(Directives 76/207/EEC, 97/80/EC and 2002/73/EC – Access to vocational training – Equal treatment for men and women – Rejection of candidature – Access of an applicant for vocational training to information on the qualifications of the other applicants)

In Case C-104/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 29 January 2010, received by the Court on 24 February 2010, in the proceedings

Patrick Kelly

v

National University of Ireland (University College, Dublin),

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, A. Arabadjiev, A. Rosas (Rapporteur), U. Lõhmus and P. Lindh, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 January 2011,

after considering the observations submitted on behalf of:

– Mr Kelly, in person,

– the National University of Ireland (University College, Dublin), by M. Bolger SC, instructed by E. O'Sullivan, Solicitor,

– the German Government, by J. Möller, acting as Agent,

– the European Commission, by M. van Beek and N. Yerrell, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of European Union law and, in particular, of Article 4 of 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 (OJ 1976 L 39, p. 40), Article 4(1) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6) and Article 1(3) of Directive

2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Directive 76/207 (OJ 2002 L 269, p. 15).

2 The reference has been made in the course of legal proceedings brought by Mr Kelly against the National University of Ireland (University College Dublin) ('UCD'), following the latter's refusal to disclose unredacted documents relating to the selection procedure for a vocational training course.

Legal context

European Union legislation

Directive 76/207

3 Directive 76/207, applicable at the time of the facts which gave rise to the complaint of discrimination on grounds of sex, that is to say, during March and April 2002, provided in Article 4 as follows:

'Application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States shall take all necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex.'

4 Article 6 of that directive provided:

'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.'

Directive 2002/73

5 Directive 76/207 was amended by Directive 2002/73, the first subparagraph of Article 2(1) of which states that Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive by 5 October 2005 at the latest.

6 Directive 2002/73 revokes, in particular, Article 4 of Directive 76/207 and, pursuant to Article 1(3), gives the following wording to Article 3 of Directive 76/207:

'1. Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

…

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

…

2. To that end, 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 shall be, or may be declared, null and void or are amended.'

Directive 97/80

7 Directive 97/80, the date of transposition of which was fixed at 1 January 2001, institutes rules relating to the burden of proof in cases of discrimination based on sex.

8 According to recital 13 in the preamble to that directive, the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice.

9 Recital 18 in the preamble to that directive states that the Court of Justice has held that the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, 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.

10 Article 1 of that directive states that its aim is to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.

11 Under Article 3(1)(a) of Directive 97/80, the directive is to apply to the situations covered by Directive 76/207.

12 Article 4(1) of Directive 97/80 reads as follows:

'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.'

National legislation

13 It is apparent from the decision for reference that the principles relating to disclosure of documents under Order 57A rule 6(6) of the Circuit Court Rules correspond to the principles relating to discovery and inspection of documents under Order 32 of the Rules of the Circuit 2001-2006 and Order 31 of the Rules of the Superior Courts 1986, as amended.

14 Pursuant to those rules, discovery will be granted where it can be shown that the documents sought are relevant to the issues in the proceedings and, in particular, necessary for disposing fairly of the matter.

15 Notwithstanding the fact that documents are considered both relevant and necessary, their production may be refused where the documents, inter alia, are privileged or subject to confidentiality.

16 In case of conflict between the right to obtain production of a document, on the one hand, and the duty to protect confidentiality or to uphold any other countervailing obligation or entitlement, on the other, the national court hearing the action must balance both the nature of the claim advanced and the degree of confidentiality alleged, as against the public interest in full disclosure as part of the administration of justice.

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 Mr Kelly is a qualified teacher and resident in Dublin.

18 UCD is a higher education establishment. For the academic period 2002-2004, it was offering a course entitled 'Master's degree in Social Science (Social Worker) mode A'.

19 On 23 December 2001, Mr Kelly submitted an application to UCD seeking admission to the course. At the end of the selection process he was informed by letter dated 15 March 2002 that his application had not been successful.

20 Dissatisfied with that decision, Mr Kelly made a formal complaint of discrimination on grounds of sex to the Director of the Equality Tribunal in April 2002, claiming that he was better qualified than the least-qualified female candidate to be offered a place.

21 On 2 November 2006, an Equality Officer handling the complaint under the aegis of the Director of the Equality Tribunal reached a decision concluding that the complainant had failed to establish prima facie discrimination on grounds of sex. Mr Kelly appealed against that decision to the Circuit Court.

22 On 4 January 2007 Mr Kelly also applied to the Circuit Court, under Order 57A rule 6(6) of the Circuit Court Rules, seeking from UCD copies of certain specified documents ('the disclosure application'). He requested copies of the retained applications, copies of the documents appended to or included with those applications, and copies of the 'scoring sheets' of the candidates whose application forms had been retained.

23 The President of the Circuit Court refused the disclosure application by order of 12 March 2007. On 14 March 2007, Mr. Kelly appealed against that order to the High Court.

24 On 23 April 2007, Mr Kelly also applied to the High Court for a reference for a preliminary ruling to be made to the Court of Justice of the European Communities. On 14 March 2008, the High Court decided that such a reference was premature since it had not finally determined whether access to the documents in question could be granted under national law. Once it had completed its examination, the High Court concluded that, pursuant to national law, UCD did not have to disclose, pursuant to Mr Kelly's application, the documents in unredacted form.

25 Being unsure as to whether refusal of the disclosure request is contrary to European Union law, the High Court referred the following questions to the Court for a preliminary ruling:

'1. Does Article 4(1) of Council Directive 97/80 … entitle an applicant for vocational training, who believes that he or she has been denied access to vocational training because the principle of equal treatment was not applied to him or her, to information on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training so that the applicant can "establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination"?

2. Does Article 4 of Council Directive 76/207 … entitle an applicant for vocational training, who believes that he or she has been denied access to vocational training "on the basis of the same criteria" and discriminated against "on grounds of sex" in terms of accessing vocational training, to information held by the course provider on the

respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training?

3. Does Article [1(3)] of Council Directive 2002/73 … prohibiting "direct or indirect discrimination on the grounds of sex" in relation to "access" to vocational training entitle an applicant for vocational training, who claims to have been discriminated against "on the grounds of sex" in terms of accessing vocational training, to information held by the course provider on the respective qualifications of the other applicants for the course in question and in particular the applicants who were not denied access to vocational training?

4. Does the nature of the obligation under paragraph 3 of Article 267 TFEU differ in a Member State with an adversarial (as opposed to inquisitorial) legal system and, if so, in what respect?

5. Can any entitlement to information under the aforesaid directives be affected by the operation of national or European laws relating to confidentiality?'

Consideration of the questions referred

The first question

26 By its first question, the national court asks, in essence, whether Article 4(1) of Council Directive 97/80 must be interpreted as entitling an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision.

Arguments of the parties

27 Mr Kelly submits that under Article 4(1) of Directive 97/80 persons who consider themselves wronged because the principle of equal treatment has not been applied to them are entitled to information that would, if that principle has wrongly not been applied to them, establish, or assist in establishing, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination. For applicants for a course of vocational training who consider themselves wronged because that principle has not been applied to them, this includes information on the qualifications of the other applicants.

28 The German Government contends that there is nothing in the wording of Article 4(1) of Directive 97/80 to indicate the grant of a right to disclosure. UCD and the Commission share its view that that provision sets out the conditions in which the burden of proof is shifted from the claimant to the respondent. According to those parties, that shift occurs only where a candidate has already established facts from which it may be presumed that there has been direct or indirect discrimination.

Findings of the Court

29 Directive 97/80 provides in Article 4(1) that the Member States are to take such measures as are necessary 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 that principle (see Case C-196/02 *Nikoloudi* [2005] ECR I-1789, paragraph 68).

30 Thus, it is the person who considers himself to have been wronged because the principle of equal treatment has not been applied to him who must initially establish the facts from which it may be presumed that there has been direct or indirect discrimination. It is only

where that person has established such facts that it is then for the defendant to prove that there has been no breach of the principle of non-discrimination.

31 In that regard, it is apparent from recital 13 in the preamble to Directive 97/80 that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice.

32 In consequence, it is for the national court or some other competent Irish body to assess, in accordance with Irish law and/or national practice, whether Mr Kelly has established the facts from which it may be presumed that there has been direct or indirect discrimination.

33 Nevertheless, it must be stated that Directive 97/80, pursuant to Article 1 thereof, seeks to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies.

34 Thus, although Article 4(1) of that directive does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them to information in order that they may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision, the fact remains that it cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving that provision in particular of its effectiveness.

35 In that regard, it must be borne in mind that Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness (see Case C-61/11 PPU *El Dridi* [2011] ECR I-0000, paragraph 55).

36 According to the wording of the second and third subparagraphs respectively of Article 4(3) TEU, the Member States inter alia 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and 'shall … refrain from any measure which could jeopardise the attainment of the Union's objectives', including those pursued by directives (see *El Dridi*, paragraph 56).

37 In the present case, it is, however, apparent from the decision for reference that, although the President of the Circuit Court refused the disclosure application, UCD offered to provide Mr Kelly with part of the information requested, which he does not dispute.

38 Accordingly, the answer to the first question is that Article 4(1) of Council Directive 97/80 must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision.

39 Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving, in particular, Article 4(1) thereof of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings.

The second and third questions

40 By its second and third questions, which should be examined together, the national court asks, in essence, whether Article 4 of Directive 76/207 or Article 1(3) of Directive 2002/73 must be interpreted as entitling an applicant for vocational training to information held by the course provider on the qualifications of the other applicants for the course in question, either because he believes that he has been denied access to vocational training on the basis of the same criteria as the other candidates and discriminated against on grounds of sex, referred to in Article 4 of Directive 76/207, or because that applicant complains that he was discriminated against on the grounds of sex, referred to in Article 1(3) of Directive 2002/73, in terms of accessing that vocational training.

Arguments of the parties

41 Mr Kelly submits that Article 4 of Directive 76/207 and Article 1(3) of Directive 2002/73 entitle persons who believe that they have been denied access to a vocational training course because of sex discrimination to information on the qualifications of the other applicants for that vocational training course.

42 The German Government and the Commission contend that those provisions contain substantive rules prohibiting discrimination on grounds of sex and that they do not extend to the issue of procedural rules. They argue that those provisions are not sufficiently specific to be understood as affording entitlement to a specific measure, such as entitlement to information.

Findings of the Court

43 It does not emerge from the wording of Article 4 of Directive 76/207 or Article 1(3) of Directive 2002/73 that an applicant for vocational training is entitled to access to information held by the course provider concerning the qualifications of other applicants for that course.

44 Article 4(c) of Directive 76/207 provides that application of the principle of equal treatment with regard to access to all types and to all levels, of vocational guidance, vocational training, advanced vocational training and retraining, means that Member States are to take all necessary measures to ensure that, without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational training is to be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex.

45 Article 1(3) of Directive 2002/73 provides that application of the principle of equal treatment means that there is to be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience. To that end, Member States are to take the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

46 Those provisions seek to implement the application of the principle of equal treatment as regards access to training but, in accordance with the third paragraph of Article 288 TFEU, leave it, as to form and methods, to the national authorities to take the necessary measures to ensure that 'any laws, regulations and administrative provisions' contrary to that principle are abolished.

47 Thus, it is not possible to derive from those provisions a specific obligation to grant an applicant for vocational training access to information concerning the qualifications of other applicants for that course.

48 Accordingly, the answer to the second and third questions is that Article 4 of Directive 76/207 and Article 1(3) of Directive 2002/73 must be interpreted as meaning that they do not entitle an applicant for vocational training to information held by the course provider on the qualifications of the other applicants for the course in question, either because he believes that he has been denied access to vocational training on the basis of the same

criteria as the other candidates and discriminated against on grounds of sex, referred to in Article 4 of Directive 76/207, or because that applicant complains that he was discriminated against on the grounds of sex, referred to in Article 1(3) of Directive 2002/73, in terms of accessing that vocational training.

The fifth question

49 By its fifth question, which it is appropriate to consider before the fourth question, the national court asks whether any entitlement to information under Directives 76/207, 97/80 and 2002/73 is affected by rules of national or European Union law relating to confidentiality.

50 Having regard to the answer to the first three questions and given that, under the procedure laid down in Article 267 TFEU, the Court has no jurisdiction to interpret national law, that task being exclusively for the national court (see Case C-53/04 *Marrosu and Sardino* [2006] ECR I-7213, paragraph 54, and Joined Cases C-250/09 and C-268/09 *Georgiev* [2010] ECR I-0000, paragraph 75), the fifth question must be understood as meaning that the national court asks, in essence, whether any right to rely on one of the directives referred to in the first three questions, in order to obtain access to the information held by the provider of vocational training concerning the qualifications of the applicants for that course, can be affected by rules of European Union law relating to confidentiality.

Arguments of the parties

51 According to Mr Kelly, a legally binding European Union act, including a directive as defined in the third paragraph of Article 288 TFEU, cannot be affected by national laws or their operation but only by another legally binding European Union act.

52 UCD and the German Government submit that that question should be answered only in the alternative since there is no entitlement to information as described by the plaintiff in the main proceedings pursuant to the provisions of Article 4 of Directive 76/207 or Article 1(3) of Directive 2002/73. However, if the Court were to conclude that the provisions at issue did afford Mr Kelly such entitlement, confidentiality, which is a concept recognised by European Union law and enshrined in a number of its acts, would take precedence over that entitlement.

Findings of the Court

53 It must be borne in mind that the Court has held, in paragraph 38 of the present judgment, that Article 4(1) of Council Directive 97/80 does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision.

54 Nevertheless, it has also been held, in paragraph 39 of this judgment, that it cannot be excluded that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving Article 4(1) thereof in particular of its effectiveness.

55 In assessing such facts, national courts or other competent bodies must take into account the rules governing confidentiality which follow from European Union legal acts, such as 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 on the free movement of such data (OJ 1995 L 281, p. 31) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009

L 337, p. 11). The protection of personal data is also provided for in Article 8 of the Charter of Fundamental Rights of the European Union.

56 Accordingly, the answer to the fifth question is that, where an applicant for vocational training can rely on Directive 97/80 in order to obtain access to information held by the course provider on the qualifications of the other applicants for the course in question, that entitlement to access can be affected by rules of European Union law relating to confidentiality.

The fourth question

57 By its fourth question, the national court asks whether the nature of the obligation contained in the third paragraph of Article 267 TFEU differs according to whether a Member State has an adversarial rather than an inquisitorial legal system and, if so, in what respect.

Arguments of the parties

58 Mr Kelly argues that a national court's obligation to refer questions to the Court for a preliminary ruling is wider in scope in an adversarial legal system than that on a court of a Member State in which there is an inquisitorial legal system, since it is the parties and not the court who determine the form, content and timing of the proceedings in an adversarial legal system. Thus a national court in such a system cannot materially alter the content of a question raised by a party or submit to the court its own opinion suggesting an answer to the question.

59 UCD, the German Government and the Commission share the view that the nature of the obligation under the third paragraph of Article 267 TFEU does not depend on the individual characteristics of Member States' legal systems. Furthermore, according to Case 283/81 *Cilfit and Others* [1982] ECR 3415, it is for the national court to decide if and, where necessary, how, to make a reference for a preliminary ruling.

Findings of the Court

60 It is apparent from the settled case-law of the Court that Article 267 TFEU establishes a preliminary ruling mechanism which aims to avoid divergences in the interpretation of European Union law that the national courts have to apply and seeks to ensure this application by making available to national courts a means of eliminating difficulties which may be occasioned by the requirement of giving European Union law its full effect within the framework of the judicial systems of the Member States (see, to that effect, Opinion 1/09 [2011] ECR I-0000, paragraph 83 and the case-law cited).

61 Article 267 TFEU confers on national courts the power and, in certain circumstances, an obligation, to make a reference to the Court once the national court considers, either of its own motion or at the request of the parties, that the substance of the dispute involves a question which falls within the scope of the first paragraph of that article. It follows that the national courts have the most extensive power to make a reference to the Court if they consider that a case pending before them raises issues involving an interpretation or assessment of the validity of provisions of European Union law and requiring a decision by them (see, inter alia, Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 88, and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-0000, paragraph 41).

62 Moreover, the Court has already held that the system established by Article 267 TFEU with a view to ensuring that European Union law is interpreted uniformly throughout the Member States institutes direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (see, inter alia, *Cartesio*, paragraph 90).

63 In that regard, the system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (*Cartesio*, paragraph 91).

64 Thus, not only is it for the national court to assess whether an interpretation of European Union law is necessary to enable it to resolve the dispute before it, having regard to the procedural mechanism laid down in Article 267 TFEU, but it is also for that court to decide the manner in which those questions are to be worded.

65 Although that court is at liberty to request the parties to the dispute before it to suggest wording suitable for the question to be referred, the fact remains that it is for it alone ultimately to decide both its form and content.

66 Consequently, the answer to the fourth question is that the obligation contained in the third paragraph of Article 267 TFEU does not differ according to whether a Member State has an adversarial or an inquisitorial legal system.

Costs

67 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 (Second Chamber) hereby rules:

1. **Article 4(1) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision.**

   Nevertheless, it cannot be ruled out that a refusal of disclosure by the defendant, in the context of establishing such facts, could risk compromising the achievement of the objective pursued by that directive and thus depriving Article 4(1) thereof in particular of its effectiveness. It is for the national court to ascertain whether that is the case in the main proceedings.

2. **Article 4 of 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 and Article 1(3) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Directive 76/207 must be interpreted as meaning that they do not entitle an applicant for vocational training to information held by the course provider on the qualifications of the other applicants for the course in question, either because he believes that he has been denied access to vocational training on the basis of the same criteria as the other candidates and discriminated against on grounds of sex, referred to in Article 4 of Directive 76/207, or because that applicant complains that he was discriminated against on the grounds of sex, referred to in Article 1(3) of Directive 2002/73, in terms of accessing that vocational training.**

3. **Where an applicant for vocational training can rely on Directive 97/80 in order to obtain access to information held by the course provider on the qualifications of the other applicants for the course in question, that entitlement to access can be affected by rules of European Union law relating to confidentiality.**

4. **The obligation contained in the third paragraph of Article 267 TFEU does not differ according to whether a Member State has an adversarial or an inquisitorial legal system.**

Signatures

---

* Language of the case: English.

JUDGMENT OF THE COURT (Grand Chamber)

8 March 2011 (*)

(Environment – Aarhus Convention – Public participation in the decision-making process and access to justice in environmental matters – Direct effect)

In Case C-240/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), made by decision of 22 June 2009, received at the Court on 3 July 2009, in the proceedings

Lesoochranárske zoskupenie VLK

v

Ministerstvo životného prostredia Slovenskej republiky,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot (Rapporteur), K. Schiemann and D. Šváby, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, U. Lõhmus, A. Ó Caoimh, M. Safjan and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 4 May 2010,

after considering the observations submitted on behalf of:

– Lesoochranárske zoskupenie VLK, by I. Rajtáková, advokátka,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the German Government, by M. Lumma and B. Klein, acting as Agents,

– the Greek Government, by G. Karipsiadis and T. Papadopoulou, acting as Agents,

– the French Government, by G. de Bergues and S. Menez, acting as Agents,

– the Polish Government, by M. Dowgielewicz, D. Krawczyk and M. Nowacki, acting as Agents,

– the Finnish Government, by J. Heliskoski and M. Pere, acting as Agents,

– the Swedish Government, by A. Falk, acting as Agent,

– the United Kingdom Government, by L. Seeboruth and J. Stratford, acting as Agents,

– the European Commission, by P. Oliver and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention').

2 The reference has been made in proceedings between Lesoochranárske zoskupenie VLK ('zoskupenie'), an association established in accordance with Slovak law whose objective is the protection of the environment, and the Ministerstvo životného prostredia Slovenskej republiky (Ministry of the Environment of the Slovak Republic) ('the Ministerstvo životného prostredia'), concerning the association's request to be a 'party' to the administrative proceedings relating to the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas.

Legal context

International law

3 Article 9 of the Aarhus Convention states:

'1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

(a) having a sufficient interest or, alternatively,

(b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements

referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

…'

4 Article 19(4) and (5) of the Aarhus Convention states:

'4. Any organisation referred to in Article 17 which becomes a Party to this Convention without any of its Member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organisation's Member States is a Party to this Convention, the organisation and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organisation and the Member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organisations referred to in Article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organisations shall also inform the Depositary of any substantial modification to the extent of their competence.'

European Union ('EU') law

5 Article 12(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive') provides:

'Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) in their natural range, prohibiting:

(a) all forms of deliberate capture or killing of specimens of these species in the wild;

(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;

(c) deliberate destruction or taking of eggs from the wild;

(d) deterioration or destruction of breeding sites or resting places.'

6 Article 16(1) of the Habitats Directive further states:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

7 Annex IV to the Habitats Directive relating to animal and plant species of Community interest in need of strict protection, mentions, in particular, the species 'Ursus arctos'.

8 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26) states in recital 5 in the preamble thereto:

'On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.'

9 Article 6 of Directive 2003/4 implements Article 9(1) of the Aarhus Convention, and reproduces almost word for word its provisions.

10 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC states in recitals 5, 9 and 11 in the preamble thereto:

'(5) On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Århus Convention"). Community law should be properly aligned with that Convention with a view to its ratification by the Community;

…

(9) Article 9(2) and (4) of the Århus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.

…

(11) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [OJ 1985 L 175, p. 40], and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [OJ 1996 L 257, p. 26] should be amended to ensure that they are fully compatible with the provisions of the Århus Convention, in particular Article 6 and Article 9(2) and (4) thereof.'

11 Articles 3(7) and 4(4) of Directive 2003/35 introduce respectively Article 10a into Directive 85/337 and Article 15a into Directive 96/61 in order to implement Article 9(2) of the Aarhus Convention, which they reproduce in almost identical terms.

12 Decision 2005/370 states, in recitals 4 to 7 in the preamble thereto:

'(4) Under the terms of the Aarhus Convention, a regional economic integration organisation must declare in its instrument of ratification, acceptance, approval or accession, the extent of its competence in respect of the matters governed by the Convention.

(5) The Community, in accordance with the Treaty, and in particular Article 175(1) thereof, is competent, together with its Member States, for entering into international agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the objectives listed in Article 174 of the Treaty.

(6) The Community and most of its Member States signed the Aarhus Convention in 1998 and since then have pursued their efforts in view of their approval of the Convention. In the meantime, relevant Community legislation is being made consistent with the Convention.

(7) The objective of the Aarhus Convention, as set forth in its Article 1 thereof, is consistent with the objectives of the Community's environmental policy, listed in Article 174 of the Treaty, pursuant to which the Community, which shares competence with its Member States, has already adopted a comprehensive set of legislation which is evolving and contributes to the achievement of the objective of the Convention, not only by its own institutions, but also by public authorities in its Member States.'

13 Article 1 of Decision 2005/370 provides:

'The UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters, (Aarhus Convention) is hereby approved on behalf of the Community.'

14 In its declaration of competence made pursuant to Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Commission stated, in particular, 'that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations'.

15 Articles 10 to 12 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13) aim to ensure access to justice by non-governmental organisations with respect to administrative acts adopted by the institutions and bodies of the European Union or omissions by the latter, in accordance with Article 9(3) of the Aarhus Convention.

Slovak law

16 Pursuant to Article 82(3) of Law No 543/2002 on the protection of nature and the countryside, as amended, (zákon č. 543/2002 Z.z. o ochrane prírody a krajiny), which applies to the dispute in the main proceedings, an association having legal personality is to be regarded as a 'participant' in administrative proceedings, within the meaning of that provision, if, for at least one year, it has had the object of protecting nature and the countryside, and it has given written notice of its participation in those proceedings within the period prescribed in that article. The status of 'participant' confers on it the right to be informed of all pending administrative proceedings relating to the protection of nature and the countryside.

17 In accordance with Article 15a(2) of the Code of Administrative Procedure (Správny poriadok), 'a participant' is entitled to be informed that administrative proceedings have

been initiated, to have access to files submitted by the parties to the administrative proceedings, to attend hearings and on-the-spot inspections, and to produce evidence and other information on the basis of which the decision will be taken.

18 Under Article 250(2) of the Code of Civil Procedure (Občiansky súdny poriadok) any natural or legal person who/which claims that his/its rights, as a party to the administrative proceedings, have been prejudiced by the decision taken or by the procedure followed by the administrative authority is to have the status of an applicant. Any natural or legal person not appearing at the administrative proceedings and whose presence, as a party to the proceedings has been requested, may also be an applicant.

19 According to Article 250(m) of the Code of Civil Procedure, persons having the status of parties to the proceedings are those who were parties to the administrative proceedings and the administrative body whose decision is to be reviewed.

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 The zoskupenie was informed of the initiation of a number of administrative proceedings brought by various hunting associations or other persons concerning the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas or the use of chemical substances in such areas.

21 The zoskupenie therefore applied to the Ministerstvo životného prostredia to be a 'party' to the administrative proceedings concerning the grant of those derogations or authorisations and relied on the Aarhus Convention for that purpose. The Ministerstvo životného prostredia rejected that request and the administrative appeal subsequently brought by the zoskupenie against that rejection.

22 The zoskupenie then brought a contentious appeal against the two decisions, arguing in particular that the provisions in Article 9(3) of the Aarhus Convention had direct effect.

23 In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention of 25 June 1998, given that the principal objective pursued by that international treaty is to change the classic definition of *locus standi* by according the status of a party to proceedings to the public, or the public concerned, as having the direct effect of an international treaty ("self-executing effect") in a situation where the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted Community legislation in order to transpose the treaty concerned into Community law?

2. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, which has become a part of Community law, as having the direct applicability or direct effect of Community law within the meaning of the settled case-law of the Court of Justice?

3. If the answer to the first or the second question is in the affirmative, is it then possible to interpret Article 9(3) of the Aarhus Convention, given the principal objective pursued by that international treaty, as meaning that it is necessary also to include within the concept "act of a public authority" an act consisting in the delivery of decisions, that is to say, that the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an administrative body, the unlawfulness of which lies in its effect on the environment?'

24 By order of the President of the Court of 23 October 2009, the referring court's request that the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure be applied to the present case was rejected.

Consideration of the questions referred

Admissibility

25 The Polish and United Kingdom Governments submit that the questions are admissible only in so far as they concern the provisions of Article 9(3) of the Aarhus Convention, and are inadmissible for the remainder on the ground that the interpretation of EU law requested bears no relation to the actual facts of the main action or its purpose.

26 In answer to those arguments, it is sufficient to note that the questions referred relate essentially only to Article 9(3) of the Aarhus Convention, and do not concern the other subparagraphs of that article.

27 In those circumstances, there are no grounds for the Court to rule that the questions referred are partially inadmissible because they concern provisions other than those in Article 9(3) of the Aarhus Convention.

The first and second questions

28 By its first two questions, which it is appropriate to examine together, the referring court asks essentially whether individuals, and in particular environmental protection associations, where they wish to challenge a decision to derogate from a system of environmental protection, such as that put in place by the Habitats Directive for a species mentioned in Annex IV thereto, may derive a right to bring proceedings under EU law, having regard, in particular, to the provisions of Article 9(3) of the Aarhus Convention on direct effect, to which its questions relate.

29 A preliminary point to be made is that Article 300(7) EC provides that '[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'.

30 The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union (see, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 4 to 6, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7).

31 Since the Aarhus Convention was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the EC Treaty, in particular Article 234 EC thereof, the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention (see, by analogy, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 33, and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I-7001, paragraph 33).

32 Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion (see, by analogy, *Dior and Others*, paragraph 48 and*MerckGenéricos – Produtos Farmacêuticos*, paragraph 34).

33 However, if it were to be held that the European Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, EU law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.

34 Therefore, it is appropriate to examine whether, in the particular field into which Article 9(3) of the Aarhus Convention falls, the European Union has exercised its powers and adopted provisions to implement obligations deriving from it (see, by analogy, *MerckGenéricos – Produtos Farmacêuticos*, paragraph 39).

35 In that connection, it must be observed first of all, that, in the field of environmental protection, the European Union has explicit external competence pursuant to Article 175 EC, read in conjunction with Article 174(2) EC (see, *Commission* v *Ireland*, paragraphs 94 and 95).

36 Furthermore, the Court has held that a specific issue which has not yet been the subject of EU legislation is part of EU law, where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it (see, by analogy, Case C-239/03*Commission* v *France* [2004] ECR I-9325, paragraphs 29 to 31).

37 In the present case, the dispute in the main proceedings concerns whether an environmental protection association may be a 'party' to administrative proceedings concerning, in particular, the grant of derogations to the system of protection for species such as the brown bear. That species is mentioned in Annex IV(a) to the Habitats Directive, so that, under Article 12 thereof, it is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in Article 16 of that directive.

38 It follows that the dispute in the main proceedings falls within the scope of EU law.

39 It is true that, in its declaration of competence made in accordance with Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Community stated, in particular, that 'the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations'.

40 However, it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because, as stated in paragraph 36 of this judgment, a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it relates to a field covered in large measure by it.

41 In that connection, it is irrelevant that Regulation No 1367/2006, which is intended to implement the provisions of Article 9(3) of the Aarhus Convention, only concerns the institutions of the European Union and cannot be regarded as the adoption by the European Union of provisions implementing the obligations which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial proceedings.

42 Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the interest of the latter that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply (see, in particular, Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 28, and Case C-53/96 *Hermès* [1998] ECR I-3603, paragraph 32).

43 It follows that the Court has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention and, in particular, to give a ruling on whether or not they have direct effect.

44 In that connection, a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in particular, Case C-265/03 *Simutenkov* [2005] ECR I-2579, paragraph 21, and Case C-372/06 *Asda Stores* [2007] ECR I-11223, paragraph 82).

45 It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.

46 However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.

47 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 and 45).

48 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (*Impact*, paragraph 46 and the case-law cited).

49 Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 44, and*Impact*, paragraph 54).

52 In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

The third question

53 In the light of the reply given to the first and second questions, it is not necessary to reply to the third question.

Costs

54 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:

Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

[Signatures]

---

* Language of the case: Slovak.

JUDGMENT OF THE COURT (Grand Chamber)

19 January 2010 (*)

(Principle of non-discrimination on grounds of age – Directive 2000/78/EC – National legislation on dismissal not taking into account the period of employment completed before the employee reaches the age of 25 in calculating the notice period – Justification for the measure – National legislation contrary to the directive – Role of the national court)

In Case C-555/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Landesarbeitsgericht Düsseldorf (Germany), made by decision of 21 November 2007, received at the Court on 13 December 2007, in the proceedings

Seda Kücükdeveci

v

Swedex GmbH & Co. KG,

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta, P. Lindh (Rapporteur) and C. Toader, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, P. Kūris, T. von Danwitz, A. Arabadjiev and J.-J. Kasel, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 31 March 2009,

after considering the observations submitted on behalf of:

– Swedex GmbH & Co. KG, by M. Nebeling, Rechtsanwalt,

– the German Government, by M. Lumma and J. Möller, acting as Agents,

– the Czech Government, by M. Smolek, acting as Agent,

– the Danish Government, by J. Bering Liisberg, acting as Agent,

– Ireland, by D. O'Hagan, acting as Agent, and N. Travers BL and A. Collins SC,

– the Netherlands Government, by C. Wissels and M. de Mol, acting as Agents,

– the United Kingdom Government, by I. Rao, acting as Agent, and J. Stratford, Barrister,

– the Commission of the European Communities, by V. Kreuschitz and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the principle of non-discrimination on grounds of age and 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 Kücükdeveci and her former employer Swedex GmbH & Co. KG ('Swedex') concerning the calculation of the notice period applicable to her dismissal.

Legal context

European Union legislation

3 Directive 2000/78 was adopted on the basis of Article 13 EC. Recitals 1, 4 and 25 in the preamble to the directive read as follows:

'(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 [signed at Rome on 4 November 1950] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

…

(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.

…

(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.'

4 According to Article 1 of Directive 2000/78, its purpose 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 of the directive 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;

…'

6 Article 3(1) of the directive 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 6(1) of the directive provides:

'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.'

8 In accordance with the first paragraph of Article 18 of the directive, it was to be transposed into the legal systems of the Member States by 2 December 2003 at the latest. The second paragraph of Article 18 provided, however, that:

'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 …'

9 The Federal Republic of Germany made use of that option, so that the provisions of the directive relating to discrimination on grounds of age and disability were to be transposed in that Member State by 2 December 2006 at the latest.

National legislation

The General Law on equal treatment

10 Paragraphs 1, 2 and 10 of the General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) of 14 August 2006 (BGBl. 2006 I, p. 1897), which transposed Directive 2000/78, provide:

'Paragraph 1 – Object of the Law

The object of this law is to prevent or eliminate discrimination on grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual orientation.

Paragraph 2 – Scope

…

(4) For dismissals, the provisions on general and specific protection against dismissal apply exclusively.

…

Paragraph 10 – Permissible different treatment on grounds of age

Paragraph 8 notwithstanding, different treatment on grounds of age is also permissible if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include in particular the following:

…

1. the setting of special conditions on access to employment and vocational training, employment and occupation, including conditions of remuneration and termination of employment relationships, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection,

…'

Legislation on the notice period for dismissal

11 Paragraph 622 of the German Civil Code (Bürgerliches Gesetzbuch, 'the BGB') provides:

'(1) Notice may be given to terminate the employment relationship of an employee with a notice period of four weeks to the 15th or to the end of a calendar month.

(2) For termination by the employer, the notice period, if the employment relationship in the business or undertaking

1. has lasted for two years, is one month to the end of a calendar month,

2. has lasted five years, is two months to the end of a calendar month,

3. has lasted eight years, is three months to the end of a calendar month,

4. has lasted 10 years, is four months to the end of a calendar month,

5. has lasted 12 years, is five months to the end of a calendar month,

6. has lasted 15 years, is six months to the end of a calendar month,

7. has lasted 20 years, is seven months to the end of a calendar month.

In calculating the length of employment, periods prior to the completion of the employee's 25th year of age are not taken into account.'

The main proceedings and the order for reference

12 Ms Kücükdeveci was born on 12 February 1978. She was employed from 4 June 1996, in other words from the age of 18, by Swedex.

13 Swedex dismissed her by letter of 19 December 2006 with effect, taking account of the statutory notice period, from 31 January 2007. The employer calculated the notice period as if the employee had three years' length of service, although she had been in its employment for 10 years.

14 Ms Kücükdeveci contested her dismissal before the Arbeitsgericht Mönchengladbach (Labour Court, Mönchengladbach). She argued before that court that her period of notice should have been four months from 31 December 2006, that is, to 30 April 2007, pursuant to point 4 of the second sentence of Paragraph 622(2) of the BGB. That period corresponded to 10 years' service. The dispute in the main proceedings is thus between two individuals, Ms Kücükdeveci on the one hand and Swedex on the other.

15 According to Ms Kücükdeveci, in so far as it provides that periods of employment completed before the age of 25 are not to be taken into account in calculating the notice period, the second sentence of Paragraph 622(2) of the BGB is a measure which discriminates on grounds of age, contrary to European Union law, and must be disapplied.

16 The Landesarbeitsgericht Düsseldorf (Higher Labour Court, Düsseldorf), hearing the case on appeal, found that the period for transposing Directive 2000/78 had expired by the date of the dismissal. That court also considered that Paragraph 622 of the BGB contains a difference of treatment directly linked to age, and, while it is not convinced that it is unconstitutional, it regards its compatibility with European Union law as doubtful. It is not sure in this respect whether the possible existence of direct discrimination on grounds of age must be assessed by reference to primary European Union law, as the judgment in Case C-144/04 *Mangold*[2005] ECR I-9981 appears to suggest, or by reference to Directive 2000/78. Noting that the national provision at issue is clear and could not be interpreted, if that were necessary, in a manner compatible with the directive, the court is also uncertain whether, to be able to disapply that provision in a dispute between private individuals, it must first, in order to ensure the protection of the legitimate expectations of persons subject to the law, make a reference to the Court for a preliminary ruling so that the Court can confirm that the provision is incompatible with European Union law.

17 In those circumstances, the Landesarbeitsgericht Düsseldorf decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) (a) Does a national provision under which the periods of notice to be observed by employers are extended incrementally as the length of employment increases, but the employee's periods of employment before the age of 25 are disregarded, infringe the Community law prohibition of discrimination on grounds of age, in particular primary Community law or Directive 2000/78 …?

(b) Can the fact that employers are required to observe only a basic period of notice when terminating the employment of younger employees be justified on the grounds that employers are recognised as having an operational interest in flexibility as regards staffing – an interest which would be adversely affected by longer periods of notice – and that younger employees are not recognised as having the protection available to older employees (by means of longer notice periods) with respect to their employment status or arrangements, for example because, having regard to their age and/or their lesser social, family and private obligations, they are assumed to have greater occupational and personal flexibility and mobility?

(2) If Question 1(a) is answered in the affirmative and Question 1(b) is answered in the negative:

In legal proceedings between private individuals, must a court of a Member State disapply a statutory provision which is explicitly contrary to Community law, or is the legitimate expectation of persons subject to the law – that national laws which are in force will be applied – to be taken into account so that a provision becomes inapplicable only after the Court of Justice has ruled on the disputed provision or a substantially similar provision?'

The questions referred for a preliminary ruling

Question 1

18 By its first question, the referring court asks essentially whether national legislation such as that at issue in the main proceedings, under which periods of employment completed by the employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal, constitutes a difference of treatment on grounds of age prohibited by European Union law, in particular primary law or Directive 2000/78. It is unsure, in particular, whether such legislation is justified on the ground that only a basic notice period is to be observed in the case of dismissal of younger workers, first, in order to enable employers to manage their personnel flexibly, which would not be possible with longer notice periods, and, second, because it is reasonable to require greater personal and occupational mobility from younger workers than from older ones.

19 To answer that question, it must first be ascertained, as the referring court suggests, whether the question should be examined by reference to primary European Union law or to Directive 2000/78.

20 In the first place, that the Council of the European Union adopted Directive 2000/78 on the basis of Article 13 EC, and the Court has held that that directive does not itself lay down the principle of equal treatment in the field of employment and occupation, which derives from various international instruments and from the constitutional traditions common to the Member States, but has the sole purpose of laying down, in that field, a general framework for combating discrimination on various grounds including age (see *Mangold*, paragraph 74).

21 In that context, the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law (see, to that effect, *Mangold*, paragraph 75). Directive 2000/78 gives specific expression to that principle (see, by analogy, Case 43/75 *Defrenne*[1976] ECR 455, paragraph 54).

22 It should also be noted that Article 6(1) TEU provides that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. Under Article 21(1) of the charter, '[a]ny discrimination based on … age … shall be prohibited'.

23 For the principle of non-discrimination on grounds of age to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of European Union law.

24 In contrast to the situation concerned in Case C-427/06 *Bartsch* [2008] ECR I-7245, the allegedly discriminatory conduct adopted in the present case on the basis of the national legislation at issue occurred after the expiry of the period prescribed for the Member State concerned for the transposition of Directive 2000/78, which, for the Federal Republic of Germany, ended on 2 December 2006.

25 On that date, that directive had the effect of bringing within the scope of European Union law the national legislation at issue in the main proceedings, which concerns a matter governed by that directive, in this case the conditions of dismissal.

26 A national provision such as the second sentence of Paragraph 622(2) of the BGB, in that it provides that, in calculating the notice period, periods of employment completed before the employee reaches the age of 25 are not taken into account, affects the conditions of

dismissal of employees. Such a provision must therefore be regarded as laying down rules on the conditions of dismissal.

27 It follows that it is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue in the main proceedings.

28 In the second place, as regards the question whether the legislation at issue in the main proceedings contains a difference of treatment on grounds of age, it should be recalled that under Article 2(1) of Directive 2000/78, for the purposes of that directive, the 'principle of equal treatment' means that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of the directive. Article 2(2)(a) of the directive states that, for the purposes of Article 2(1), direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1 (see Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paragraph 50, and Case C-388/07 *Age Concern England* [2009] ECR I-0000, paragraph 33).

29 In the present case, the second sentence of Paragraph 622(2) of the BGB affords less favourable treatment to employees who entered the employer's service before the age of 25. That national provision thus introduces a difference of treatment between persons with the same length of service, depending on the age at which they joined the undertaking.

30 Thus in the case of two employees each with 20 years' seniority in service, the one who joined the undertaking at the age of 18 will be entitled to a notice period of five months, whereas the period will be seven months for the one who joined at the age of 25. Moreover, as the Advocate General observes in point 36 of his Opinion, the national legislation at issue in the main proceedings disadvantages younger workers generally compared to older ones, in that the former – as the situation of Ms Kücükdeveci shows – may, despite several years' seniority in service in the undertaking, be excluded from benefiting from the progressive extension of notice periods in the case of dismissal according to the length of the employment relationship, from which older workers of comparable seniority will, by contrast, be able to benefit.

31 It follows that the national legislation at issue contains a difference of treatment on grounds of age.

32 In the third place, it must be examined whether that difference of treatment is liable to constitute discrimination prohibited by the principle of non-discrimination on grounds of age given expression by Directive 2000/78.

33 The first subparagraph of Article 6(1) of Directive 2000/78 states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is 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.

34 According to the information provided by the referring court and the statements made at the hearing by the German Government, Paragraph 622 of the BGB originates in a law of 1926. That that law set the threshold at 25 was the outcome of a compromise between, first, the government of the time, which wanted a uniform extension by three months of the notice period for the dismissal of workers aged over 40, second, the supporters of a progressive extension of that period for all workers, and, third, the supporters of a progressive extension of the notice period without taking the period of employment into account, the purpose of the rule being to give employers partial relief from lengthy periods of notice for workers aged under 25.

35 The referring court states that the second sentence of Paragraph 622(2) of the BGB reflects the legislature's assessment that young workers generally react more easily and more rapidly to the loss of their jobs and greater flexibility can be demanded of them. A shorter

notice period for younger workers also facilitates their recruitment by increasing the flexibility of personnel management.

36 Objectives of the kind mentioned by the German Government and the referring court clearly belong to employment and labour market policy within the meaning of Article 6(1) of Directive 2000/78.

37 It remains to be ascertained, in accordance with the wording of that provision, whether the means of achieving such a legitimate aim are 'appropriate and necessary'.

38 The Member States enjoy a broad discretion in the choice of the measures capable of achieving their objectives in the field of social and employment policy (see*Mangold*, paragraph 63, and *Palacios de la Villa*, paragraph 68).

39 The referring court indicates that the aim of the national legislation at issue in the main proceedings is to afford employers greater flexibility in personnel management by alleviating the burden on them in respect of the dismissal of young workers, from whom it is reasonable to expect a greater degree of personal or occupational mobility.

40 However, the legislation is not appropriate for achieving that aim, since it applies to all employees who joined the undertaking before the age of 25, whatever their age at the time of dismissal.

41 As regards the aim pursued by the legislature at the time of adoption of the national legislation at issue in the main proceedings, adduced by the German Government, of strengthening the protection of workers according to their length of service in the undertaking, it is clear that, under that legislation, the extension of the notice period for dismissal according to the employee's seniority in service is delayed for all employees who joined the undertaking before the age of 25, even if the person concerned has a long length of service in the undertaking at the time of dismissal. The legislation cannot therefore be regarded as appropriate for achieving that aim.

42 It should be added that, as the referring court points out, the national legislation at issue in the main proceedings affects young employees unequally, in that it affects young people who enter active life early after little or no vocational training, but not those who start work later after a long period of training.

43 It follows from all the above considerations that the answer to Question 1 is that European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Directive 2000/78, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.

Question 2

44 By its second question, the referring court asks whether, where it is hearing proceedings between individuals, in order to disapply a national provision which it considers to be contrary to European Union law, it must first, to ensure protection of the legitimate expectations of persons subject to the law, make a reference to the Court under Article 267 TFEU, so that the Court can confirm that the legislation is incompatible with European Union law.

45 As regards, first, the role of the national court when called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to European Union law, the Court has held that it is for the national courts to provide the legal protection which individuals derive from the rules of European Union law and to ensure that those rules are fully effective (see, to that effect, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others*[2004] ECR I-8835, paragraph 111, and Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 42).

46 In this respect, where proceedings between individuals are concerned, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92*Faccini Dori* [1994] ECR I-3325, paragraph 20; and *Pfeiffer and Others*, paragraph 108).

47 However, the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts (see, inter alia, to that effect, Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 26; Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; *Faccini Dori*, paragraph 26; Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 40; *Pfeiffer and Others*, paragraph 110; and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-0000, paragraph 106).

48 It follows that, in applying national law, the national court called on to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in question, in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 288 TFEU (see, to that effect, *von Colson and Kamann*, paragraph 26; *Marleasing*, paragraph 8; *Faccini Dori*, paragraph 26; and *Pfeiffer and Others*, paragraph 113). The requirement for national law to be interpreted in conformity with European Union law is inherent in the system of the Treaty, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of European Union law when it determines the dispute before it (see, to that effect, *Pfeiffer and Others*, paragraph 114).

49 According to the national court, however, because of its clarity and precision, the second sentence of Paragraph 622(2) of the BGB is not open to an interpretation in conformity with Directive 2000/78.

50 It must be recalled here that, as stated in paragraph 20 above, Directive 2000/78 merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of European Union law in that it constitutes a specific application of the general principle of equal treatment (see, to that effect, *Mangold*, paragraphs 74 to 76).

51 In those circumstances, it for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (see, to that effect, *Mangold*, paragraph 77).

52 As regards, second, the obligation of the national court, hearing proceedings between individuals, to make a reference to the Court for a preliminary ruling on the interpretation of European Union law before it can disapply a national provision which it considers to be contrary to that law, it is apparent from the order for reference that this aspect of the question has been raised because, under national law, the referring court cannot decline to apply a national provision in force unless that provision has first been declared unconstitutional by the Bundesverfassungsgericht (Federal Constitutional Court).

53 The need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision falling within the scope of European Union law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so.

54 The possibility thus given to the national court by the second paragraph of Article 267 TFEU of asking the Court for a preliminary ruling before disapplying the national provision that is

contrary to European Union law cannot, however, be transformed into an obligation because national law does not allow that court to disapply a provision it considers to be contrary to the constitution unless the provision has first been declared unconstitutional by the Constitutional Court. By reason of the principle of the primacy of European Union law, which extends also to the principle of non-discrimination on grounds of age, contrary national legislation which falls within the scope of European Union law must be disapplied (see, to that effect, *Mangold*, paragraph 77).

55 It follows that the national court, hearing proceedings between individuals, is not obliged but is entitled to make a reference to the Court for a preliminary ruling on the interpretation of the principle of non-discrimination on grounds of age, as given expression by Directive 2000/78, before disapplying a provision of national law which it considers to be contrary to that principle. The optional nature of such a reference is not affected by the conditions of national law under which a court may disapply a national provision which it considers to be contrary to the constitution.

56 In the light of the foregoing, the answer to Question 2 is that it is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court for a preliminary ruling on the interpretation of that principle.

Costs

57 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. **European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.**

2. **It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle.**

[Signatures]

---

* Language of the case: German.

JUDGMENT OF THE COURT (Second Chamber)

10 July 2008 (*)

(Directive 2000/43/EC – Discriminatory criteria for selecting staff – Burden of proof – Penalties)

In Case C-54/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Arbeidshof te Brussel (Belgium), made by decision of 24 January 2007, received at the Court on 6 February 2007, in the proceedings

Centrum voor gelijkheid van kansen en voor racismebestrijding

v

Firma Feryn NV,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann, J. Makarczyk and J.-C. Bonichot (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 28 November 2007,

after considering the observations submitted on behalf of:

– Centrum voor gelijkheid van kansen en voor racismebestrijding, by C. Bayart, advocaat,

– the Belgian Government, by L. Van den Broeck and C. Pochet, acting as Agents,

– Ireland, by D. O'Hagan and P. McGarry, acting as Agents,

– the United Kingdom Government, by T. Harris, acting as Agent, and by T. Ward, barrister, and J. Eady, solicitor,

– the Commission of the European Communities, by M. van Beek and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 March 2008, gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

2 The reference has been made in the course of proceedings between Centrum voor gelijkheid van kansen en voor racismebestrijding (Centre for equal opportunities and combating racism), applicant in the main proceedings, and Firma Feryn NV ('Feryn'), defendant in the main proceedings, following the remarks of one of its directors publicly confirming that his company did not wish to recruit 'immigrants'.

Legal context

Community legislation

3 According to Article 1 of Directive 2000/43, 'the purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment'.

4 Under Article 2(2)(a) of that directive:

'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 grounds of racial or ethnic origin.'

5 Article 3(1)(a) of the Directive states that it covers 'conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion'. By contrast, according to Article 3(2) thereof, that directive does not cover 'difference of treatment based on nationality'.

6 Under Article 6(1) of Directive 2000/43:

'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.'

7 Article 7 of that directive states that:

'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.

…'

8 Article 8(1) of the Directive lays down, in addition, that:

'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.'

9 Article 13(1) of Directive 2000/43 requires Member States to designate a body or bodies for the promotion of equal treatment. Under Article 13(2) of that directive:

'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,

…'

10 Lastly, Article 15 of the Directive confers on Member States responsibility for determining the rules on sanctions applicable and specifies that those sanctions may comprise the payment of compensation to the victim and that they must be 'effective, proportionate and dissuasive'.

National legislation

11 The Law of 25 February 2003 on combating discrimination and amending the Law of 15 February 1993 establishing a Centre for Equal Opportunities and Combating Racism (*Moniteur belge* of 17 March 2003, p. 12844), as amended by the Law of 20 July 2006 on various provisions (*Moniteur belge* of 28 July 2006, p. 36940, 'the Law of 25 February 2003'), seeks to transpose Directive 2000/43 into Belgian law.

12 Article 2 of the Law of 25 February 2003 prohibits any direct or indirect discrimination concerning the conditions of access to employed activity. Article 19 of that law is intended to transpose Article 8 of Directive 2000/43 relating to the burden of proof.

13 The Law of 25 February 2003 also authorises criminal or civil proceedings against discrimination. The court may, pursuant to Article 19 of that Law, order cessation of the act of discrimination (Article 19(1)) and publication of its decision (Article 19(2)) or, pursuant to Article 20 of the Law, it may impose a fine.

14 The Belgian legislature granted Centrum voor gelijkheid van kansen en voor racismebestrijding the possibility of being a party to judicial proceedings where discrimination exists or could exist, without a prior complaint being necessary in that regard.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Centrum voor gelijkheid van kansen en voor racismebestrijding, which is a Belgian body designated, pursuant to Article 13 of Directive 2000/43, to promote equal treatment, applied to the Belgian labour courts for a finding that Feryn, which specialises in the sale and installation of up-and-over and sectional doors, applied a discriminatory recruitment policy.

16 Centrum voor gelijkheid van kansen en voor racismebestrijding is acting on the basis of the public statements of the director of Feryn to the effect that his undertaking was looking to recruit fitters, but that it could not employ 'immigrants' because its customers were reluctant to give them access to their private residences for the period of the works.

17 By order of 26 June 2006, the Voorzitter van de arbeidsrechtbank te Brussel (the President of the Labour Court, Brussels) dismissed Centrum voor gelijkheid van kansen en voor racismebestrijding's application, stating, in particular, that there was no proof nor was there a presumption that a person had applied for a job and had not been employed as a result of his ethnic origin.

18 Against that background, the Arbeidshof te Brussel (Labour Court, Brussels), to which Centrum voor gelijkheid van kansen en voor racismebestrijding had appealed, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is there direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin where an employer, after putting up a conspicuous job vacancy notice, publicly states:

‘I must comply with my customers’ requirements. If you say “I want that particular product or I want it like this and like that”, and I say “I’m not doing it, I’ll send those people”, then you say “I don’t need that door”. Then I’m putting myself out of business. We must meet the customers’ requirements. This isn’t my problem. I didn’t create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!’[?]

(2) Is it sufficient for a finding of direct discrimination in the conditions for access to paid employment to establish that the employer applies directly discriminatory selection criteria?

(3) For the purpose of establishing that there is direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC …, may account be taken of the recruitment of exclusively indigenous fitters by an affiliated company of the employer in assessing whether that employer’s recruitment policy is discriminatory?

(4) What is to be understood by ‘facts from which it may be presumed that there has been direct or indirect discrimination’ within the terms of Article 8(1) of Directive 2004/43? How strict must a national court be in assessing facts which give rise to a presumption of discrimination?

(a) To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute ‘facts from which it may be presumed that there has been direct or indirect discrimination’ within the terms of Article 8(1) of [Directive 2000/43]?

(b) Does an established act of discrimination in April 2005 (public announcement in April 2005) subsequently give rise to a presumption of the continuation of a directly discriminatory recruitment policy? Having regard to the facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist, he publicly stated: ‘I must comply with my customers’ requirements. If you say “I want that particular product or I want it like this and like that”, and I say “I’m not doing it, I’ll send those people”, then you say “I don’t need that door”. Then I’m putting myself out of business. We must meet the customers’ requirements. This isn’t my problem. I didn’t create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!’[?]

(c) Having regard to the facts in the main proceedings, can a joint press release issued by an employer and the national body for combating discrimination, in which acts of discrimination are at least implicitly confirmed by the employer, give rise to such a presumption?

(d) Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants?

(e) Is one fact sufficient in order to raise a presumption of discrimination?

(f) Having regard to the facts in the main proceedings, can a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer?

(5) How strict must the national court be in assessing the evidence in rebuttal which must be produced when a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 has been raised? Can a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 … be rebutted by a simple and unilateral statement by the employer in the press that he does not or does not any longer discriminate and that fitters from ethnic minorities are welcome; and/or by a simple declaration by the employer that his company, excluding the sister company, has filled all vacancies for fitters and/or by the statement that a Tunisian cleaning lady has been taken on and/or, having regard to the facts in the main proceedings, can the presumption be rebutted only by actual recruitment of fitters from ethnic minorities and/or by fulfilling commitments given in the joint press release?

(6) What is to be understood by an 'effective, proportionate and dissuasive' sanction, as provided for in Article 15 of Directive 2000/43 …? Having regard to the facts in the main proceedings, does the abovementioned requirement of Article 15 of Directive 2000/43 permit the national court merely to declare that there has been direct discrimination? Or does it, on the contrary, also require the national court to grant a prohibitory injunction, as provided for in national law? Having regard to the facts in the main proceedings, to what extent is the national court further required to order the publication of the forthcoming judgment as an effective, proportionate and dissuasive sanction?'

The questions referred for a preliminary ruling

19 It should be noted, at the outset, that Article 234 EC does not empower the Court to apply rules of Community law to a particular case, but only to rule on the interpretation of the EC Treaty and of acts adopted by European Community institutions (see, inter alia, Case 100/63 *van der Veen* [1964] ECR 565, 572, and Case C-203/99 *Veedfald* [2001] ECR I-3569, paragraph 31). The Court may, however, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of Community law which may be useful to it in assessing the effects of one or other of its provisions (Case 20/87 *Gauchard* [1987] ECR 4879, paragraph 5, and Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 22).

20 The national court has requested the Court to interpret the provisions of Directive 2000/43 for the purpose, essentially, of assessing the scope of the concept of direct discrimination in the light of the public statements made by an employer in the course of a recruitment procedure (first and second questions), the conditions in which the rule of the reversal of the burden of proof laid down in that directive can be applied (third to fifth questions) and what penalties may be considered appropriate in a case such as that in the main proceedings (sixth question).

The first and second questions

21 With regard to the first and second questions, Ireland and the United Kingdom of Great Britain and Northern Ireland maintain that it is not possible for there to be direct discrimination within the meaning of Directive 2000/43, so that the directive is inapplicable where the alleged discrimination results from public statements made by an employer concerning its recruitment policy but there is no identifiable complainant contending that he has been the victim of that discrimination.

22 It is true that, as those two Member States contend, Article 2(2) of Directive 2000/43 defines direct discrimination as a situation in which one person 'is treated' less favourably than another is, has been or would be treated in a comparable situation on grounds of racial

or ethnic origin. Likewise, Article 7 of that directive requires Member States to ensure that judicial procedures are available to 'all persons who consider themselves wronged by failure to apply the principle of equal treatment to them' and to public interest bodies bringing judicial proceedings 'on behalf or in support of the complainant'.

23 Nevertheless, it cannot be inferred from this that the lack of an identifiable complainant leads to the conclusion that there is no direct discrimination within the meaning of Directive 2000/43. The aim of that directive, as stated in recital 8 of its preamble, is 'to foster conditions for a socially inclusive labour market'. For that purpose, Article 3(1)(a) states that the directive covers, inter alia, selection criteria and recruitment conditions.

24 The objective of fostering conditions for a socially inclusive labour market would be hard to achieve if the scope of Directive 2000/43 were to be limited to only those cases in which an unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer.

25 The fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim.

26 The question of what constitutes direct discrimination within the meaning of Directive 2000/43 must be distinguished from that of the legal procedures provided for in Article 7 of that directive for a finding of failure to comply with the principle of equal treatment and the imposition of sanctions in that regard. Those legal procedures must, in accordance with the provisions of that article, be available to persons who consider that they have suffered discrimination. However, the requirements of Article 7 of Directive 2000/43 are, as stated in Article 6 thereof, only minimum requirements and the Directive does not preclude Member States from introducing or maintaining provisions which are more favourable to the protection of the principle of equal treatment.

27 Consequently, Article 7 of Directive 2000/43 does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the name of a specific complainant or in the absence of an identifiable complainant. It is, however, solely for the national court to assess whether national legislation allows such a possibility.

28 In the light of the foregoing, the answer to the first and second questions must be that the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.

The third to fifth questions

29 The third to fifth questions concern the application of the rule of the reversal of the burden of proof laid down in Article 8(1) of Directive 2000/43 to a situation in which the existence of a discriminatory recruitment policy is alleged by reference to remarks made publicly by an employer concerning its recruitment policy.

30 Article 8 of Directive 2000/43 states in that regard that, where there are facts from which it may be presumed that there has been direct or indirect discrimination, it is for the defendant to prove that there has been no breach of the principle of equal treatment. The precondition of the obligation to adduce evidence in rebuttal which thus arises for the alleged perpetrator of the discrimination is a simple finding that a presumption of discrimination has arisen on the basis of established facts.

31 Statements by which an employer publicly lets it be known that, under its recruitment policy, it will not recruit any employees of a certain ethnic or racial origin may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy.

32 It is, thus, for that employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia, by showing that the actual recruitment practice of the undertaking does not correspond to those statements.

33 It is for the national court to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence which the employer adduces in support of its contentions that it has not breached the principle of equal treatment.

34 Consequently, the answer to the third to fifth questions must be that public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment.

The sixth question

35 The sixth question asks, essentially, what sanctions may be considered to be appropriate for employment discrimination established on the basis of the employer's public statements.

36 Article 15 of Directive 2000/43 confers on Member States responsibility for determining the rules on sanctions for breaches of national provisions adopted pursuant to that directive. Article 15 specifies that those sanctions must be effective, proportionate and dissuasive and that they may comprise the payment of compensation to the victim.

37 Article 15 of Directive 2000/43 thus imposes on Member States the obligation to introduce into their national legal systems measures which are sufficiently effective to achieve the aim of that directive and to ensure that they may be effectively relied upon before the national courts in order that judicial protection will be real and effective. Directive 2000/43 does not, however, prescribe a specific sanction, but leaves Member States free to choose between the different solutions suitable for achieving its objective.

38 In a case such as that referred by the national court, where there is no direct victim of discrimination but a body empowered to do so by law seeks a finding of discrimination and the imposition of a penalty, the sanctions which Article 15 of Directive 2000/43 requires to be laid down in national law must also be effective, proportionate and dissuasive.

39 If it appears appropriate to the situation at issue in the main proceedings, those sanctions may, where necessary, include a finding of discrimination by the court or the competent administrative authority in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of a prohibitory injunction, in accordance with the rules of national law, ordering the employer to cease the discriminatory practice, and, where appropriate, a fine. They may, moreover, take the form of the award of damages to the body bringing the proceedings.

40 The answer to the sixth question must therefore be that Article 15 of Directive 2000/43 requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.

Costs

41 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 (Second Chamber) hereby rules:

1. **The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.**

2. **Public statements by which an employer lets it be known that under its recruitment policy it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. It is then for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment.**

3. **Article 15 of Directive 2000/43 requires that rules on sanctions applicable to breaches of national provisions adopted in order to transpose that directive must be effective, proportionate and dissuasive, even where there is no identifiable victim.**

[Signatures]

---

* Language of the case: Dutch.

JUDGMENT OF THE COURT (Sixth Chamber)

26 June 2001 (1)

(Equal pay for men and women - Conditions of application - Difference in pay - Definition of 'the same work☐ and 'work of equal value☐ - Classification, under a collective agreement, in the same job category - Burden of proof - Objective justification for unequal pay - Effectiveness of a specific employee's work)

In Case C-381/99,

REFERENCE to the Court under Article 234 EC by the Oberlandesgericht Wien (Austria) for a preliminary ruling in the proceedings pending before that court between

Susanna Brunnhofer

and

Bank der österreichischen Postsparkasse AG,

on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, R. Schintgen (Rapporteur), F. Macken and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Ms Brunnhofer, by G. Jöchl, Rechtsanwalt,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Commission of the European Communities, by H. Michard and W. Bogensberger, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 15 March 2001,

gives the following

Judgment

1. By order of 15 June 1999, received at the Court on 8 October 1999, the Oberlandsgericht Wien referred to the Court for a preliminary ruling under Article 234 EC a number of questions on the interpretation of Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the

Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19, 'the Directive☐).

2. The questions were raised in proceedings between Susanna Brunnhofer and the Bank der österreichischen Postsparkasse AG ('the Bank☐) concerning the difference between the remuneration paid by the Bank to Ms Brunnhofer and that paid to one of her male colleagues.

Legal background

3. Article 119 of the Treaty lays down the principle that men and women should receive equal pay for equal work.

4. The second and third paragraphs of Article 119 provide:

'For the purpose of this Article, ☐pay☐ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.☐

5. Under Article 1 of the Directive:

'The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called ☐principle of equal pay☐, means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.☐

6. Article 3 of the Directive provides:

'Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.☐

7. Article 4 of the Directive states:

'Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.☐

The main proceedings and the questions referred to the Court

8. According to the order for reference, Ms Brunnhofer, who was employed by the Bank from 1 July 1993 to 31 July 1997, considers that she has suffered discrimination based on

sex, contrary to the principle of equal pay, on the ground that she received a monthly salary lower than that paid to a male colleague recruited by the Bank on 1 August 1994.

9. The national court found that, although their basic salary was identical, the difference in salary between the two employees arose from the fact that, under his employment contract, Ms Brunnhofer's male colleague received an individual supplement the monthly amount of which was approximately ATS 2 000 higher than the supplement which she received under her contract with the Bank.

10. It is common ground that, when they took up their duties, Ms Brunnhofer and her male colleague were classified in salary group V, which covers employees with training in banking who carry out skilled banking work on their own, as provided for by the collective agreement applicable to banking employees and bankers in Austria ('the collective agreement□).

11. From this circumstance Ms Brunnhofer concludes that she was performing the same work as her male colleague or at any rate work of equal value.

12. It appears from the documents in the case that Ms Brunnhofer was posted to the 'Foreign□ department of the Bank and that her job was to supervise loans. It was expected that after a period of training she would be appointed to a management post in that department. As a result of professional and personal problems which arose before her male colleague was appointed, she did not, however, obtain such an appointment, but was posted to the legal service where, it seems, her work was not considered satisfactory either. She was dismissed on 31 July 1997.

13. Ms Brunnhofer took her case to the Equal Treatment Commission of the Federal Chancellor's Office, which concluded that discrimination within the meaning of the Austrian Law on Equal Treatment, which was intended to transpose the Directive, could not be ruled out in respect of the fixing of her salary.

14. Ms Brunnhofer then brought a legal action before the Arbeits- und Sozialgericht Wien (Austria) asking that the Bank be ordered to pay her more than ATS 160 000 as compensation for the salary discrimination on grounds of sex which she claimed to have suffered.

15. At first instance her action was dismissed by judgment of 16 December 1998. Ms Brunnhofer then appealed to the Oberlandesgericht Wien.

16. The Bank denies that Ms Brunnhofer suffered any discrimination contrary to the principal of equal pay.

17. First, it contends that the total salary of the two employees concerned was not in fact different, since, unlike her male colleague, Ms Brunnhofer was not required regularly to work the full overtime hours allotted to her.

18. Second, it contends that there were objective reasons for the difference in the individual supplement awarded to each of them.

19. According to the Bank, even though the two jobs in question were initially regarded as being of equal value, Ms Brunnhofer's male colleague in fact carried out more important functions in so far as he was responsible for important customers and was authorised to enter into binding commitments on behalf of the Bank. No such authority was given to Ms Brunnhofer, who had less client contact, which explains why she received a lower salary supplement than that given to her male colleague.

20. The quality of the work of the two employees in question was also different. After a promising start, Ms Brunnhofer's work deteriorated, in particular from the beginning of 1994, that is to say at a time when her male colleague had not yet been recruited.

21. Ms Brunnhofer's response is that work effectiveness is not relevant for the purposes of fixing pay on recruitment, since the value of work done can only be assessed as the employment contract is performed.

22. According to the national court, the decision in the case depends essentially on whether, as Ms Brunnhofer claims, it is possible to consider that work is the same or of equal value where, under a collective agreement, the employees concerned are classified in the same job category, or whether, as the Bank contends, a difference in the individual work capacity of two employees, reflected in particular by the poor quality of the work of one of them, which obviously cannot emerge until some time after that person's appointment, is capable of justifying unequal pay.

23. The Oberlandesgericht Wien decided to stay proceedings and refer the following questions to the Court:

'1(a) In assessing whether work is ☐equal work☐ or constitutes ☐the same job☐ within the meaning of Article 119 of the EC Treaty (now Article 141 EC) or is ☐the same work☐ or ☐work to which equal value is attributed☐ within the meaning of Directive 75/117/EEC, is it sufficient, where individual contracts of employment stipulate supplements to pay fixed by collective agreement, to ascertain whether the two workers being compared are classified in the same job, category under the collective agreement?

(b) If the reply to Question 1(a) is in the negative:

In the situation described in Question 1(a), is the same classification under the collective agreement evidence of the same work or work of equal value withinthe meaning of Article 119 (now Article 141) of the Treaty and of Directive 75/117/EEC, with the result that it is for the employer to prove that the work is different?

(c) Can the employer rely on circumstances not taken into account in the collective agreements in order to justify a difference in pay?

(d) If the reply to Question 1(a) or 1(b) is in the affirmative:

Does this also apply if the classification in the job category under the collective agreement is based on a job description couched in very general terms?

2(a) Are Article 119 (now Article 141) of the Treaty and Directive 75/117/EEC based on a definition of ☐worker☐ which is uniform at least in so far as the worker's obligations under the contract of employment depend not only on generally defined standards but also on the individual capacity of the worker himself?

(b) Are Article 119 (now Article 141) of the Treaty and Article 1 of Directive 75/117/EEC to be interpreted as meaning that the fixing of different pay may be objectively justified by circumstances which can be established only *ex post facto*, such as in particular a specific employee's work performance?☐

The questions referred for a preliminary ruling

Preliminary remarks

24. It is clear from the documents in the case that the national court has made a reference to the Court on the interpretation of Article 119 of the Treaty and Article 1 of the Directive in order to assess whether there is discrimination on grounds of sex prohibited by Community law in a case where the woman concerned receives the same basic pay, fixed by a collective agreement, as her male comparator, but from the start of her employment receives a monthly salary supplement, stipulated in her individual employment contract, which proves to be less than that paid to the man, although both employees are classified in the same grade of the same job category under the collective agreement governing their employment.

25. The questions raised by the national court, which can be examined together, essentially concern (i) the concepts of 'the same work□, 'the same job□ and 'work to which equal value is attributed□ within the meaning of Article 119 of the Treaty and Article 1 of the Directive, (ii) the rules of evidence concerning the existence of unequal pay for men and women and of possible objective justification for any difference in treatment and (iii) the question whether certain specific factors, such as the personal capacity or work performance, may be relied on by an employer in order to justify paying an employee,such as the plaintiff in this case, remuneration lower than that paid to her male colleague.

26. Those questions therefore relate both to some of the conditions determining the actual application of the principle of equal pay for men and women and to the various circumstances relied on by the employer in this case to justify the existence of a difference in the amount of the individual salary supplement paid to each of the employees concerned.

27. It should be recalled at the outset that Article 119 of the Treaty lays down the principle that the same work or work to which equal value is attributed must be remunerated in the same way, whether it is performed by a man or a woman (see, to that effect, *inter alia* Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 36).

28. As the Court has already held in Case 43/75 *Defrenne II* [1976] ECR 455, paragraph 12, that principle, which is a particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified, forms part of the foundations of the Community.

29. The Court has also repeatedly held that the Directive is essentially designed to facilitate the practical application of the principle of equal pay laid down in Article 119 of the Treaty and in no way alters the scope or content of that principle as defined in Article 119 (see, in particular, Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 11, and *JämO*, cited above, paragraph 37), so that the terms used in the Treaty article and in the Directive have the same meaning (see, as regards 'pay□, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraph 35, and as regards 'the same work□, Case C-309/97 *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse* [1999] ECR I-2865, paragraph 23).

30. So understood, the fundamental principle laid down in Article 119 of the Treaty and elaborated by the Directive precludes unequal pay as between men and women for the same job or work of equal value, whatever the mechanism which produces such inequality (see *Barber*, cited above, paragraph 32), unless the difference in pay is justified by objective factors unrelated to any discrimination linked to the difference in sex (see, in particular, Case 129/79 *Macarthys* [1980] ECR 1275, paragraph 12, and Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, paragraph 34).

31. In order to help the national court, those various elements must be considered in turn.

Existence of unequal pay between men and women

32. It follows from the case-law of the Court that, since Article 119 of the Treaty has binding effect, the prohibition of discrimination between men and women applies not only to the action of the public authorities but also, as is indeed clear from the wordingof Article 4 of the Directive, to all agreements which are intended to regulate paid labour collectively as well as to contracts between private individuals (see, to that effect, in particular *Defrenne II*, cited above, paragraph 39).

33. It is also settled case-law that the concept of pay in Article 119 of the Treaty and Article 1 of the Directive covers any other consideration, in cash or in kind, present or future, provided that the worker receives it, even indirectly, in respect of his employment from his employer (see, *inter alia*, *Barber*, paragraph 12, and*JämO*, paragraph 39, both cited above).

34.

The monthly salary supplement in question in the present case incontestedly constitutes consideration stipulated in the individual employment contract and paid by the employer to the two employees concerned in respect of their employment with the Bank. That supplement must, therefore, be classified as pay for the purposes of Article 119 of the Treaty and Article 1 of the Directive.

35. As regards the method to be used for comparing the pay of the workers concerned in order to determine whether the principle of equal pay is being complied with, again according to the case-law, genuine transparency permitting an effective review is assured only if that principle applies to each aspect of remuneration granted to men and women, excluding any general overall assessment of all the consideration paid to workers (see *Barber,* paragraphs 34 and 35).

36. That interpretation is indeed borne out by the actual terms of Article 1 of the Directive, according to which the principle of granting men and women equal pay for the same work, as laid down in Article 119 of the Treaty and elaborated by the Directive, means eliminating, for the same work or work to which equal value is attributed, all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

37. In the circumstances, the national court identified quite rightly an inequality between the unequal amount of individual salary supplement paid monthly to the plaintiff and that paid to her male comparator, although it is undisputed that the two employees concerned receive the same basic pay and regardless of the Bank's contention that their overall salary is identical.

38. That finding is not, however, a sufficient basis for concluding that discrimination prohibited by Community law exists.

39. First, since the principle of equal pay as laid down in Article 119 of the Treaty and Article 1 of the Directive presupposes that the men and women to whom it applies are in identical or comparable situations (see, to that effect, Case C-132/92 *Roberts* [1993] ECR I-5579, paragraph 17), it must also be ascertained whether the employees concerned are performing the same work or work to which equal value may be attributed.

40. Second, the differences in treatment prohibited by Article 119 are exclusively those based on the difference in sex of the employees concerned (Case 96/80*Jenkins* [1981] ECR 911, paragraph 10).

Determining whether work is the same or of equal value

41. The national court is asking essentially whether the fact that the female employee claiming discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement governing their employment is sufficient to reach the conclusion that the two employees concerned are performing the same work or work to which equal value is attributed within the meaning of Article 119 of the Treaty and Article 1 of the Directive.

42. In replying to this point raised by the reference, it must be borne in mind that it is clear from the Court's case-law that the terms 'the same work□, 'the same job□ and 'work of equal value□ in Article 119 of the Treaty and Article 1 of the Directive are entirely qualitative in character in that they are exclusively concerned with the nature of the work actually performed (see *Macarthys*, cited above, paragraph 11, and Case 237/85 *Rummler* [1986] ECR 2101, paragraphs 13 and 23).

43. The Court has repeatedly held that, in order to determine whether employees perform the same work or work to which equal value can be attributed, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation (see Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275, paragraphs 32 and 33, and*Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, cited above, paragraph 17).

44.

It follows that the fact that the employees concerned are classified in the same job category under the collective agreement applicable to their employment is not in itself sufficient for concluding that they perform the same work or work of equal value.

45. Such a classification does not exclude the existence of other evidence to support that conclusion.

46. That interpretation is not undermined by the fact, pointed out by the national court in Question 1(d), that the collective agreement defines the job covered by the relevant job category in very general terms.

47. As a matter of evidence, the general indications provided in the collective agreement must in any event be corroborated by precise and concrete factors based on the activities actually performed by the employees concerned.

48. It is therefore necessary to ascertain whether, when a number of factors are taken into account, such as the nature of the activities actually entrusted to each of the employees in question in the case, the training requirements for carrying them out and the working conditions in which the activities are actually carried out, those persons are in fact performing the same work or comparable work.

49. It is for the national court, which alone has jurisdiction to find and assess the facts, to determine whether, in the light of the actual nature of the activities carried out by those concerned, equal value can be attributed to them (*JämO*, cited above, paragraph 48).

50. More particularly, in the present case, the national court must determine whether the plaintiff and the male comparator perform comparable work, even though, as is clear from the order for reference, the male colleague is responsible for dealing with important customers and has authority to enter into binding commitments, whereas Ms Brunnhofer, who supervises loans, has less contact with clients and cannot enter into commitments that directly bind her employer.

The burden of proof

51. By this part of the reference, the national court is asking essentially which party to the main proceedings bears the burden of proving the existence of an inequality in pay between men and women and any circumstances capable of objectively justifying such a difference in treatment.

52. As to that point, it should be observed that it is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination in the matter of pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to having the discrimination removed (see Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 13).

53. However, it is clear from the case-law of the Court that the burden of proof may shift when this is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay (see *Enderby*, cited above, paragraph 14).

54. In particular, where an undertaking applies a system of pay with a mechanism for applying individual supplements to the basic salary, which is wholly lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (Case 109/88 *Danfoss* [1989] ECR 3199, paragraph 16).

55. Under such a system, female employees are unable to compare the different components of their salary with those of the pay of their male colleagues belonging tothe same salary group and can establish differences only in average pay, so that in practice they would be deprived of any possibility of effectively examining whether the principle of

equal pay was being complied with if the employer did not have to indicate how he applied the criteria concerning supplements (see*Danfoss*, cited above, paragraphs 10, 13 and 15).

56. However, there are no such special circumstances in the present case, which concerns the inequality, which is not denied, of a precise component of the overall remuneration granted by the employer to two particular employees of different sex, so that the case-law set out in paragraphs 53 to 55 above is not applicable to this case.

57. In accordance with the normal rules of evidence, it is therefore for the plaintiff in the main proceedings to establish before the national court that the conditions giving rise to a presumption that there is unequal pay prohibited by Article 119 of the Treaty and by the Directive are fulfilled.

58. It is accordingly for the plaintiff to prove by any form of allowable evidence that the pay she receives from the Bank is less than that of her chosen comparator, and that she does the same work or work of equal value, comparable to that performed by him, so that prima facie she is the victim of discrimination which can be explained only by the difference in sex.

59. Contrary to what the national court seems to accept, the employer is not therefore bound to show that the activities of the two employees concerned are different.

60. If the plaintiff in the main proceedings adduced evidence to show that the criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied in this case, a prima facie case of discrimination would exist and it would then be for the employer to prove that there was no breach of the principle of equal pay.

61. To do this, the employer could deny that the conditions for the application of the principle were met, by establishing by any legal means *inter alia* that the activities actually performed by the two employees were not in fact comparable.

62. The employer could also justify the difference in pay by objective factors unrelated to any discrimination based on sex, by proving that there was a difference, unrelated to sex, to explain the payment of a higher monthly supplement to the chosen comparator.

Objective justifications for unequal pay

63. The national court is essentially asking whether a difference between a woman's and a man's pay for the same work or work of equal value is capable of being objectively justified, first, by circumstances not taken into consideration under the collectiveagreement applicable to the employees concerned and, second, by factors which are known only after the employees have taken up their duties and which can be assessed only while the employment contract is being performed, such as a difference in the individual work capacity of the employees concerned or in the effectiveness of an employee's work in relation to that of a colleague.

64. The national court is thereby seeking to determine legal criteria which would enable the existence of an objective justification for unequal treatment prima facie based on sex to be established.

65. In preliminary ruling proceedings, although it is ultimately for the national court, which alone is competent to assess the facts, to establish whether, in the particular case before it, there are objective grounds unrelated to any discrimination based on sex to justify such inequality, the Court of Justice, which is called on to provide answers of use to the national court, may nevertheless provide guidance based on the documents in the file and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment (see *Seymour-Smith and Perez*, cited above, paragraphs 67 and 68).

66. It is appropriate to recall here the case-law according to which a difference in the remuneration paid to women in relation to that paid to men for the same work or work of

equal value must, in principle, be considered contrary to Article 119 of the Treaty and, consequently, to the Directive. It would be otherwise only if the difference in treatment were justified by objective factors unrelated to any discrimination based on sex (see, *inter alia*, *Macarthys*, paragraph 12, and *Hill and Stapleton*, paragraph 34).

67. Furthermore, the grounds put forward by the employer to explain the inequality must correspond to a real need of the undertaking, be appropriate to achieving the objectives pursued and necessary to that end (Case 170/84 *Bilka* [1986] ECR 1607, paragraph 36).

68. As regards the first part of that latter aspect of the reference, as reformulated, concerning possible justifications for unequal treatment, it need merely be stated that it follows from the foregoing that the employer may validly explain the difference in pay, in particular by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, in so far as they constitute objectively justified reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality.

69. It is for the national court to make such an assessment of the facts in each case before it, in the light of all the evidence.

70. With regard to the second part of this aspect of the reference, as reformulated, it must be pointed out that the third paragraph of Article 119 makes a distinction between work paid at piece rates and work paid at time rates.

71. In the first case, that provision states that pay is to be calculated on the basis of the same unit of measurement, without giving further details.

72. In the case of work paid at time rates, it is essential for the employer to be able to take employees' productivity into account and therefore their individual work capacity.

73. In that context, the Court has, moreover, held that, where the unit of measurement is the same for two groups of workers carrying out the same work at piece rates, the principle of equal pay does not prohibit those workers from receiving different pay if that is due to different individual output (see, to that effect, *Royal Copenhagen*, cited above, paragraph 21).

74. However, in the second case, the criterion used in the third paragraph of Article 119 is 'the same job□, a term which is equivalent to 'the same work□ used in the first paragraph of that provision and Article 1 of the Directive.

75. As was pointed out in paragraphs 42, 43 and 48 of this judgment, such a term is defined on the basis of objective criteria, which do not include the essentially subjective and variable factor of each employee's productivity taken in isolation.

76. In so far as the questions clearly concern work paid at time rates, as the national court has, moreover, stated in its order for reference, it follows from the foregoing that circumstances linked to the person of the employee which cannot be determined objectively at the time of that person's appointment but come to light only during the actual performance of the employee's activities, such as personal capacity or the effectiveness or quality of the work actually done by the employee, cannot be relied upon by the employer to justify the fixing, right from the start of the employment relationship, of pay different from that paid to a colleague of the other sex performing identical or comparable work.

77. As the Commission has rightly pointed out in relation to work paid at time rates, an employer cannot therefore pay an unequal salary on the basis of the effectiveness or quality of the work done in the actual performance of the tasks initially conferred except by conferring different duties on the employees concerned, for example by moving the employee whose work has not met expectations to another post. In circumstances such as those described in the previous paragraph, there is nothing to stop individual work capacity from being taken into account and from having an effect on the employee's career development as compared with that of her colleague, and hence on the subsequent posting and pay of the persons concerned, even though they might, at the beginning of

the employment relationship, have been regarded as performing the same work or work of equal value.

78. It should also be pointed out in this connection that, contrary to what the national court appears to accept, it is not possible to treat in the same way all the factors directly concerning the person of the employee and therefore, in particular, to assimilate theprofessional training necessary to perform the activity in question to its concrete results. Although professional training is a valid criterion not only for ascertaining whether or not employees are doing the same work, but also as an objective justification for a difference in pay granted to employees doing comparable work (see, to that effect, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, cited above, paragraph 19), that is because it is a factor which is objectively known at the time when the employee is appointed, whereas work performance can be assessed only subsequently and cannot therefore constitute a proper ground for unequal treatment right from the start of the employment of the employees concerned.

79. In those circumstances, the employer cannot, at the time when the employees concerned are appointed, pay to a specific employee remuneration lower than that paid to a colleague of the other sex and later justify that difference on the ground that the latter's work is superior, or on the ground that the quality of the former's work steadily deteriorated after that employee's recruitment, where it is established that the employees concerned are actually performing the same work or at any rate work of equal value. If that latter condition is met, a justification for unequal treatment based on future assessment of the work of each employee concerned still cannot exclude the existence of considerations based on the different sex of the employees concerned. As is already clear from paragraphs 30 and 66 of this judgment, the difference in pay between a woman and a man occupying the same job can be justified only by objective factors unrelated to any discrimination linked to the difference in sex.

80. In the light of all the foregoing considerations, the reply to be given to the questions referred must be that the principle of equal pay for men and women laid down in Article 119 of the Treaty and elaborated by the Directive must be interpreted as follows:

- a monthly salary supplement to which the employees concerned are entitled under their individual employment contracts, paid by the employer in respect of their employment, constitutes pay within the scope of Article 119 of the Treaty and the Directive; equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees but also in the light of each aspect of pay taken in isolation;

- the fact that a female employee who claims to be the victim of discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement governing their employment is not in itself sufficient for concluding that the two employees concerned are performing the same work or work to which equal value is attributed within the meaning of Article 119 of the Treaty and Article 1 of the Directive, since this fact is only one indication amongst others that this criterion is met;

- as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in factperforming the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay;

- a difference in pay is capable of being justified by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, provided that they constitute objective reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality;

- in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of different sex for the same job or work of equal value

cannot be justified by factors which become known only after the employees concerned take up their duties and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the effectiveness of the work of a specific employee compared with that of a colleague.

Costs

81. The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Oberlandesgericht Wien by order of 15 June 1999, hereby rules:

The principle of equal pay for men and women laid down in Article 119 of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC) and elaborated by Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women must be interpreted as follows:

- a monthly salary supplement to which the employees concerned are entitled under their individual employment contracts, paid by the employer in respect of their employment, constitutes pay within the scope of Article 119of the Treaty and the Directive; equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees but also in the light of each aspect of pay taken in isolation;

- the fact that a female employee who claims to be the victim of discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement governing their employment is not in itself sufficient for concluding that the two employees concerned are performing the same work or work to which equal value is attributed within the meaning of Article 119 of the Treaty and Article 1 of the Directive, since this fact is only one indication amongst others that this criterion is met;

- as a general rule, it is for employees who consider themselves to be the victims of discrimination to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value, comparable to that performed by the chosen comparator; the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay;

- a difference in pay is capable of being justified by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, provided that they constitute objective reasons unrelated to any discrimination based on sex and in conformity with the principle of proportionality;

- in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of different sex for the same job or work of equal value cannot be justified by factors which become known only after the

employees concerned take up their duties and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the effectiveness of the work of a specific employee compared with that of a colleague.

Gulmann
Skouris
Schintgen

Macken

Cunha Rodrigues

Delivered in open court in Luxembourg on 26 June 2001.

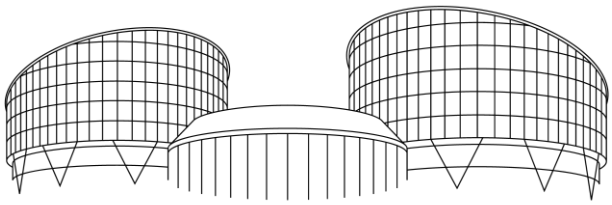
R. Grass

C. Gulmann

Registrar

President of the Sixth Chamber

1: Language of the case: German.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF HORVÁTH AND KISS v. HUNGARY

(Application no. 11146/11)

JUDGMENT

STRASBOURG

29 January 2013

FINAL

29/04/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Horváth and Kiss v. Hungary,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Danutė Jočienė,
Peer Lorenzen,
András Sajó,
Işıl Karakaş,
Nebojša Vučinić,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 18 December 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 11146/11) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Hungarian nationals, Mr István Horváth and Mr András Kiss ("the applicants"), on 11 February 2011.

2. The applicants were represented by Mrs L. Farkas, a lawyer practising in Budapest, and the European Roma Rights Centre, a non-governmental organisation with its seat in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3. The applicants alleged under Article 2 of Protocol No. 1 read in conjunction with Article 14 of the Convention that their education in a remedial school had amounted to direct and/or indirect discrimination in the enjoyment of their right to education, on the basis of their Roma origin, in that their schooling assessments had been paper-based and culturally biased, their parents could not exercise their participatory rights, they had been placed in schools designed for the mentally disabled whose curriculum had been limited, and they had been stigmatised in consequence.

4. On 4 January 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1994 and 1992 respectively and live in Nyíregyháza.

A. General background

6. The applicants are two young Roma men, who were diagnosed as having mental disabilities. As a result of these diagnoses, the applicants were educated at the Göllesz Viktor Remedial Primary and Vocational School, a remedial school ("special educational programme" or "special" school) in the city of Nyíregyháza, created for children with mental disabilities.

7. The proportion of Roma students at the Göllesz Viktor Remedial Primary and Vocational School was 40 to 50% in the last ten years. Statistical data indicate that in 2007 Roma represented 8.7% of the total number of pupils attending primary school in Nyíregyháza. In 1993, the last year when ethnic data were officially collected in public education in Hungary, at least 42% of the children in special educational programme were of Roma origin according to official estimates, though they represented only 8.22% of the total student body.

8. According to statistical data in the Statistical Yearbook of Education, in 2007/2008 only 0.4–0.6% of students with special needs had the opportunity to participate in integrated mainstream secondary education providing the Baccalaureate. Although one of the second applicant's classmates was admitted to a secondary vocational school offering the Baccalaureate, neither of the applicants was enrolled in a Baccalaureate programme, which limited their access to higher education and employment. The first applicant was unable to follow a course to become a dance teacher, the career of his father; instead, he received special vocational training to become a baker. The second applicant continued his studies in a mainstream secondary vocational school which did not offer the Baccalaureate, and was unable to pursue his ambition to become a car mechanic.

B. Societal context

9. Scholarly literature suggests that the systemic misdiagnosis of Roma children as mentally disabled has been a tool to segregate Roma children from non-Roma children in the Hungarian public school system since at least the 1970s.

10. The national Gypsy research in 1971 made it clear that a major obstacle to the education of Gypsy children was the existence of remedial (special) schools. In 1974/1975, 11.7% of Gypsy children attended special schools and classes. Due to the steady increase in Gypsy enrolment, by 1985/1986 their proportion had reached 17.5%, whereas only 2% of majority Hungarian students studied in special schools and classes. Eight grades finished in special education amounted to six grades in a normal school. Between 1972 and 1975, almost 50% of the lower grade special school students in Budapest were re-tested. The most significant result of the Budapest review was that if the borderline between sound and disabled mental abilities were set at IQ 70, the figure recommended by the World Health Organisation (WHO), then only 49.3% of students participating in special education qualified as mentally disabled, whereas 50.7% qualified as normal, of whom 12% had average intellect and 38.7% were borderline cases, that is, on the brink of mental retardation. However, only 7% were qualified as having average mental abilities through a complex evaluation. The complex evaluation qualified children whose test results suggested otherwise as intellectually disabled. In order to come to this conclusion, the category of familial intellectual disability was introduced, a notion distinct from pathological mental disability.

11. According to the Hungarian authorities, in 2004, 5.3% of primary school children were mentally disabled in Hungary, whereas this ratio stood at 2.5% in the European Union. In the last decade the rate of mentally disabled children has been continuously increasing in Hungary, especially in the ‘mild mental disability’ and ‘other disability’ categories. Children with disadvantaged background, especially Roma ones, are significantly over-represented amongst children with a disability.

12. The shortcomings of the diagnostic system were acknowledged by State authorities when in 2003 the Ministry of Education launched a programme entitled “Out of the Back Bench” with the stated aim of reviewing children and, after re-diagnosis, channelling those back to mainstream school who had been misdiagnosed. Through the programme, 2,100 children were reassessed and 11% of the re-diagnosed children were channelled back to normal school. In Szabolcs-Szatmár-Bereg County, where the applicants are from, this rate was 16%.

13. Part of the reason for the fact that so many children were considered disabled was that the definition of special educational needs in Act no. LXXIX of 1993 on Public Education (“the PEA”) and the definition of mental disability prior to 1 September 2003 (see paragraph 63 below) went beyond mental disability and included educational challenge, dyslexia and behavioural problems.

14. In 2007, the National Expert and Rehabilitation Committee (NERC) explained that an IQ between 70 and 85 represented a borderline intellect. A child in this range of IQ could have serious and persistent learning

impairment. The expert evaluating each case had to assess what factors tilted the balance towards mental disability or sound mental ability. For example, weak abilities of abstraction or associative learning could indicate mental disability even above IQ 70. "Borderline intellect" was not on its own considered as mental retardation or a cause for placement in special school.

15. In 2004 the Minister of Education requested the expert panels to stop transferring children with scores above IQ 70 to special schools. That year, a new protocol and new standardised proceedings were adopted, calling for the disadvantaged situation of the child to be taken into account. If a child spoke the language of an ethnic minority, for instance, he or she could not be examined using verbal tests in Hungarian. Still, inequalities persisted. The greatest difference between Roma and non-Roma children occurred in a performance test, the so-called "Mosaic Test". One explanation for this is that Roma children have less experience with toys and games where units from bits or pictures from pieces (e.g. toy cubes with different pictures on each side, or puzzles, etc.) had to be assembled.

C. Mr Horváth's assessments

16. Mr Horváth started elementary education in the Göllesz Viktor Remedial Primary and Vocational School on the basis of the recommendation of the Expert and Rehabilitation Panel of Szabolcs-Szatmár-Bereg County ("the Expert Panel"). His examination was requested on 19 April 2001 by the nursery he was attending at that time. The nursery claimed that his mental and social abilities were lower than normal for his age, which showed in his sense of logic, drafting skills and communication. He spent very little time in the nursery, as he was sick most of the time. This, although a common cause for bad performance in tests, was not taken into account when his results were assessed.

17. The examination requested by the nursery was performed on 17 May 2001. In addition to the observation of his behaviour, his abilities (verbal, counting, cognitive, attention/concentration, visuo-motor coordination) and his performance, the following IQ tests were done: "Budapest Binet Test" – IQ 64; "Coloured Raven Test" – IQ 83; "Goodenough 'draw-a-person' Test" – DQ 67. The Expert Panel did not elaborate in its opinion on the causes of the disparate results.

18. In its opinion, the Expert Panel diagnosed Mr Horváth with "mild mental disability", of which the origin was declared unknown. The diagnosis stated that Mr Horváth was "two and a half years behind normal", together with an immature central nervous system. Therefore, he was channelled to remedial school. As opposed to the WHO value of IQ 70, expert panels in Hungary applied, according to the Ministry of National Resources, IQ 86 as a border value between sound intellectual ability and mild mental disability.

19. Mr Horváth's parents had been told by the Expert Panel even before the examination took place that he was going to be placed in a remedial school and they had been asked to sign the expert opinion before the examination took place.

20. On 3 December 2002 the Expert Panel re-examined Mr Horváth. It found that there was no development in his abilities, and reported that he was still suffering from mild mental disability.

21. On 28 April 2005 the Expert Panel again examined Mr Horváth. According to this examination, his "Raven Test" result was IQ 61. Therefore the Expert Panel declared that his status had not changed and upheld its previous opinion.

22. On 20 March 2007 another examination took place. This time, Mr Horváth's "Raven Test" value was IQ 71. The Expert Panel noted that he had better knowledge than this test score reflected, had good results at school in 2006 and 2007, was integrated in his school system and able to study individually, had no impediment in speech and only needed some reassurance. In addition, it noted that he was active in classes, hard-working and complied with all the requirements of the curriculum. Noting that Mr Horváth studied in a remedial school, the Expert Panel again diagnosed him with mild mental disability and special educational needs. Therefore it upheld his placement in remedial school.

23. Mr Horváth's parents were not invited to participate in the diagnostic assessments. His father signed only the opinion of 17 May 2001. It is unclear if the parents were provided with information about the procedure and their respective rights, including a right to appeal, or if a copy of the opinion was given to them. His father accompanied Mr Horváth to the first examination but was not allowed to attend the examination itself. The parents were told the result but no explanation about the consequences was given.

24. On 26 September and 2 October 2008 Mr Horváth was re-examined by the NERC as ordered by the first instance court (see paragraph 38 below). This opinion stated that the applicant had "mild mental disability" although the causes of the disability could not be established.

D. Mr Kiss's assessments

25. After spending seven months in nursery, Mr Kiss started elementary education in September 1999 in a mainstream school, Primary School No. 13 located in a Roma settlement of Nyíregyháza. In its decision of 4 January 1999, the local pedagogical advisory service concluded that he had learning difficulties "deriving from his disadvantaged social and cultural background" and advised him to be educated under a special programme but in a mainstream school. On 14 December 1999 the school requested an expert diagnosis based on his results in the first quarter of the

school year, claiming that he had poor results, was often tired, his attention was volatile and his vocabulary poor. His IQ then measured 73.

26. On 15 May 2000 the Expert Panel diagnosed Mr Kiss with "mild mental disability". According to the "Budapest Binet Test", his IQ was 63, and he scored IQ 83 in the "Raven Test". Relying on the results, the Expert Panel arranged for Mr Kiss to be placed at a school for children with mild mental disabilities. As rehabilitation, the Expert Panel proposed that his concentration and analytical-synthetical ability should be developed. The Panel's opinion did not contain any explanation for the discrepancies between Mr Kiss's IQ results in the various tests.

27. Mr Kiss's parents objected to the placement of their child in the remedial school and insisted that he should be educated in a mainstream school, but in vain. They were not informed of their right to appeal against the Panel's decision. Mr Kiss was then placed in Göllesz Viktor Remedial Primary and Vocational School.

28. During his studies, Mr Kiss won numerous competitions, including a poetry reading contest and sports competitions, and he was an A student until 7th grade. However, his teacher told him that he could not continue his studies to become a car mechanic as he intended to, because as a remedial school pupil, he could only choose between training courses offered by a special vocational school.

29. The Expert Panel subsequently re-assessed Mr Kiss twice, on 14 December 2002 and 27 April 2005. On the latter occasion the Expert Panel noted that, despite the fact that he had achieved good results at school, his analytical thinking was underdeveloped. His IQ based on the "Raven Test" scored 71, yet the Expert Panel stated that he needed to be educated further at the remedial school.

30. During the court procedure in the case (see below), the first-instance court ordered that Mr Kiss be examined by the NERC. According to the expert opinion of 20 November 2008, his mental capacity was normal, he was not mentally disabled and his SQ (social quotient) score was 90, which excluded mental disability. However, he had significant deficiencies with regard to acquired knowledge and had a learning impairment. As with the first applicant, the NERC found that the Expert Panel's decision should have noted that socio-cultural factors had played a significant role in the shaping of their status from an early age, but in fact these factors and Mr Kiss's disadvantaged situation were not taken into account.

The NERC concluded that both applicants were provided with education adequate to their abilities.

E. Review of the applicants' intellectual ability by independent experts

31. In August 2005 both applicants participated in a summer camp where the testing of 61 children with 'special educational needs' took place. The testing was carried out by independent experts.

32. Both applicants were assessed with various tests. With regard to Mr Horváth, the experts noted that his "Raven Test" (IQ 83) was under the average, but did not correspond to the "mentally disabled" score; therefore, he was not mentally disabled. His "Bender B Test" referred to immature nervous system potentially causing behavioural problems and problems in studying but he was not considered mentally disabled or unfit for an integrated mainstream class.

33. Mr Kiss's "Raven Test" score was IQ 90, his "MAVGYI-R Test" score was IQ 79, and his verbal intelligence was 91. According to the assessment, he suffered from immaturity of the nervous system and dyslexia. The experts noted that he was sound of mind and could be educated in a school with a normal curriculum. They suggested immediate intervention by the authorities in order to place him into a mainstream school and to provide him with appropriate education. The experts also suggested a thorough pedagogical examination and the development of a subsequent individual learning plan with pedagogical and psychological help. They noted that he had to catch up with his studies in order to reduce the deficiencies he had as a result of studying under a lower curriculum.

34. The experts noted that the diagnostic methods applied should be reviewed, and that Roma children could have performed better in the tests if those had not been designed for children belonging to the ethnic majority. They stressed that the "Raven Test" measured intelligence only in a narrow margin and therefore provided less data with regard to intelligence. The experts further recommended that the "MAVGYI-R" child intelligence test should be reviewed and updated as it was outmoded and because oral tests were culturally biased and poorly compatible with the present lifestyle and knowledge of children. The experts also noted that the intelligence tests had a close correlation with school qualification; therefore education in a remedial class might significantly influence the results of an intelligence test of a 13/14-year-old child.

The NERC found the independent experts' conclusions open to doubt.

F. First-instance court proceedings

35. On 13 November 2006 the applicants filed a claim for damages with the Szabolcs-Szatmár-Bereg County Regional Court, requesting the court to establish a violation of the principle of equal treatment amounting to a violation of their personality rights under section 76 of the Civil Code and section 77(3) of the PEA. The action was directed against the Expert Panel, the Szabolcs-Szatmár-Bereg County Council and the Göllesz Viktor Remedial Primary and Vocational School.

36. The applicants claimed that the Expert Panel had discriminated against them and misdiagnosed them as being "mildly mentally disabled" on the basis of their ethnicity, social and economic background, and had subsequently ordered them to be educated in a special school, although they

had normal abilities. They asserted that the expert panels were free to choose the tests applied by them, and it was well-known among experts that some tests were culturally biased and led to misdiagnosis of disadvantaged children, especially Roma ones. This systemic error originated in the flawed diagnostic system itself, which did not take into account the social or cultural background of Roma children, was as such culturally biased, and therefore led to the misdiagnosis of Roma children. They claimed that it was the responsibility of the experts who were required by the law to be experienced in the field of mental disabilities and thus obliged to know the symptoms of such disabilities to ensure that only children with real mental disability were educated in special/disabled/special educational needs classes. In addition, and in violation of the respective rules of procedure, the applicants' parents had not been informed of the Panel's procedure or its consequences or of their rights to participate in the proceedings and to appeal against the decisions in question, so their constitutional right to a remedy was violated.

37. The applicants further asserted that the County Council had failed effectively to control the Expert Panel. They also claimed that the teachers working at the Remedial School should have noticed that they were of normal abilities.

38. The Regional Court ordered the applicants to be examined by the NERC.

39. On 27 May 2009 the Regional Court found that the aggregate of the respondents' handlings of the applicants' education had amounted to a violation of their rights to equal treatment and education and therefore ordered them, jointly and severally, to pay 1,000,000 Hungarian forints (HUF) in damages to each applicant.

The court explained that it was called on to investigate whether the respondents had complied with the Constitution and the PEA, that is, ensured the applicants' civil rights without any discrimination, promoted the realisation of equality before the law with positive measures aiming to eliminate their inequalities of opportunity, and provided them with education in accordance with their abilities. It reasoned that – while the statutory definition of "special needs" had been amended several times in the relevant period – the relevant regulations clearly stipulated that the expert panels should individualise each case, decide on possible special needs in each case according to the needs and circumstances of the individual child, identify the reasons underlying any special needs, and establish specific support services which a child needed according to the extent of disability.

40. The court held that this kind of individualisation was lacking with regard to the applicants' diagnoses and that the Expert Panel had failed to identify those specific professional services that would help the applicants in their education. It had failed to establish during the applicants'

examination and re-examination the reasons for which they were in need of special education, and whether they needed that as a result of their behaviour or of organic or non-organic reasons.

41. The court emphasised that the principle of equal treatment required that the Expert Panel decide whether children reaching school age might study in schools with a standard curriculum or in remedial schools with a special one. At the same time, the court noted that, in the present case, the operation of the Expert Panel was stalled due to ongoing restructuring and the low number of professional and other staff. Therefore, the Expert Panel could not perform its duty of continuous control examinations.

42. Moreover, in the court's view, the County Council had failed to ensure effective control over the Expert Panel and therefore failed to note that the Panel had not informed the parents appropriately. In addition, the County Council had not ensured that the expert decisions were individualised according to the law.

Therefore, the respondents had violated the applicants' right to equal treatment.

G. Appeal procedure

43. The Expert Panel did not appeal and so the above decision became final and enforceable with regard to it.

On appeal by the Remedial School and the County Council, on 5 November 2009 the Debrecen Court of Appeal reversed the first-instance judgment and dismissed the applicants' claims against those respondents.

44. The Court of Appeal accepted the Remedial School's defence, namely that it had done no more than enrol the applicants according to the Expert Panel's decision. It held that it was for the County Council to ensure effective control over the lawful operation of the Remedial School and the Expert Panel. An omission in this regard might establish the County Council's liability, in particular because the parents' participatory rights had not been respected.

45. The Court of Appeal further noted that, in order to prevent the misdiagnosis and consequent segregation of Roma children into remedial schools, there was a need, unfulfilled as yet, for the development of a new diagnostic testing system which should take into account the cultural, linguistic and social background of children. However, it held that the lack of appropriate diagnostic tools and the subsequent placement of the applicants into remedial schools did not have any connection to their ethnic origin, and therefore found no discrimination against the applicants, concluding that their personality rights had not been violated. In its view, the applicants had not suffered any damage as a result of the unlawful conduct of the respondents, since, according to the court-appointed experts' opinion, they had been educated in accordance with their mental abilities. That opinion effectively confirmed the Expert Panel's decisions.

The Court of Appeal's judgment further contains the following passage:

> "Examining the – not at all comprehensive – amendments [of the PEA and the decrees on its implementation which occurred after 1 January 2007], it can be established on the one hand that those amendments were predominantly and evidently occasioned by the progress of related science, the researches and the results of surveys, and on the other hand that the following of legislative developments in this period was almost an impossible task for those applying the law."

H. Review proceedings

46. The applicants subsequently submitted a petition for review to the Supreme Court. They argued that there was no national professional standard established with regard to the diagnostic system in Hungary. The well-known systemic errors of the diagnostic system, together with the disregard of the socially, culturally and linguistically disadvantaged background, had resulted in a disproportionately high number of Roma children diagnosed as having "mild mental disability".

47. The applicants requested the Supreme Court to establish, as an analogy with the case of *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, ECHR 2007-IV), the misdiagnosis of Roma children, that is, that the channelling of Roma children with normal mental abilities into remedial schools constituted discrimination. Such misdiagnosis represented direct – or alternatively indirect – discrimination, based on the ethnic, social and economic background of the applicants.

48. The applicants further claimed that the Court of Appeal had wrongly concluded that there was no connection between the lack of appropriate diagnostic tools and the ethnic origin of the applicants. The fact that the tests themselves had no indication of ethnicity did not preclude that they forced a disproportionately high number of Roma children into a disadvantaged position in comparison with majority children. This practice amounted to a violation of section 9 (indirect discrimination) of Act no. CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities ("the ETA"). In addition, the fact that the experts had disregarded the specific social, cultural and language components when assessing the test results had led to direct discrimination in breach of section 8 of the ETA.

49. The applicants also asserted that the respondents had not acted with due diligence in the circumstances, when – aware of the systemic error of the diagnostic system – they had failed to act according to international standards. In addition, Mr Kiss had been placed in a remedial school despite the explicit objection of the parents.

50. The Supreme Court reviewed the second-instance judgment and found it partly unfounded. It stated as follows:

> "Considering the relevant provisions of the [ETA] and the [PEA] ... the Supreme Court has to decide whether the respondents discriminated against the plaintiffs on the

> basis of their ethnic, social, economic and cultural background, which resulted in the deprivation of their rights to be educated in accordance with their abilities and therefore their rights to equal treatment, and subsequently whether their personality rights have been violated."

51. The Supreme Court upheld the second-instance judgment with regard to the finding that the conduct of the Remedial School and the County Council had not violated the applicants' right to equal treatment, either in terms of direct or indirect discrimination.

52. The Supreme Court further noted:

> "The systemic errors of the diagnostic system leading to misdiagnosis – regardless of its impact on the applicants – could not establish the respondents' liability ... The creation of an appropriate professional protocol which considers the special disadvantaged situation of Roma children and alleviates the systemic errors of the diagnostic system is the duty of the State."

53. The Supreme Court noted, however, that:

> "[T]he failure of the State to create such a professional protocol and [an eventual] violation of the applicants' human rights as a result of these systemic errors exceed the competence of the Supreme Court ... the applicants may seek to have a violation of their human rights established before the European Court of Human Rights. Therefore the Supreme Court has not decided on the merit of this issue."

54. The Supreme Court further examined whether the respondents' liability could be established under the general rules of tort liability regardless of the fact that it had not established a violation of the applicants' personality rights. It found no such liability in respect of the Remedial School. However, it observed that the Expert Panel's handling of the parental rights had violated the relevant law (Ministerial Decree no. 14/1994. (VI.24.) MKM). The County Council was found liable for this on account of its failure to supervise the legality, or to organise the supervision of the legality, of the functioning of the Expert Panel, as well as to put an end to the unlawful practice. The prejudice to the applicants was caused by their deprivation of the right to a remedy provided for by law and thereby of the theoretical chance of obtaining a more favourable assessment of their learning abilities.

The Supreme Court consequently upheld the first-instance judgment with regard to the payment of HUF 1,000,000 in damages to each applicant by the Expert Panel, out of which sum the County Council was obliged to pay HUF 300,000, on account of its deficient control.

This decision was served on 11 August 2010.

II. RELEVANT DOMESTIC LAW

A. Elements of domestic law submitted by the Government

55. The work of the expert and rehabilitation committees examining learning abilities was, at the material time, regulated by Ministerial Decree no. 14/1994. (VI.24.) MKM. This Decree dealt with procedural issues, regulated the operation of expert committees, secured the complexity of the expert and rehabilitation committee examinations, and required that the committees' recommendations be based on a complex assessment of the results of medical, pedagogical and psychological examinations. As to the methods of examination to be used, a protocol was outlined in a manual entitled "Transfer Examinations" ("the Manual"), the publication of which was commissioned by the Ministry of Education in the 1980s.

56. The Manual states with emphasis that performance disorders may have two causes: the lack of knowledge or the lack of ability. It specifies the diagnostic signs indicating that the lack of knowledge is not caused by ability disorder as follows: where the lack of knowledge is explained by previous poor developmental conditions and poor socio-cultural environment; where the task can be simplified so as to suit the child's level of knowledge and at that level no performance disorder can be observed; where during the examination the manner of making use by the child of the help provided by the examining teacher and the child's capability to be oriented and taught indicate that his abilities are developable; and where the child's social maturity, general knowledge and performance in life situations indicate that his abilities are intact.

57. Consequently, in examining a child's task-solving performance, the interdependence of four factors shall always be examined, namely previous educational effects, the child's scope of knowledge, the child's abilities and his age-related maturity.

58. The Manual further contains the following guidelines:

> "Where a child from a socio-culturally retarded environment is being examined, tests free of cultural elements should be used. Certain tasks of a given test may be transformed in order to adjust them – at the same level of difficulty – to the child's scope of knowledge...
>
> When a socially disadvantaged child is being examined, special attention must be paid to his capability to learn in the examination situation..."

59. The Manual also draws experts' attention to the desirable procedures to be followed in examining a child of Roma ethnicity as follows:

> "The fact that a child does not know the language of school instruction or that his command of language does not attain the level of mother tongue would, in itself, constitute a serious disadvantage even if the child had no school integration problems resulting from social and/or cultural problems. Therefore, the special education or psychological examination of children coming from a disadvantageous social situation

and underdeveloped linguistic environment should be carried out with special care. From a delay in speech development no conclusions concerning the child's mental maturity should be drawn. In such cases the child's practical intelligence should be assessed, or his cognitive abilities should be examined through non-verbal tasks."

60. This protocol was reviewed and updated between 2004 and 2008 and a new Manual was published. In 2010 a new Ministerial Decree (no. 4/2010. (I.19.) OKM) was issued for the regulation of the work of the pedagogical expert services. This Decree prescribes a uniform procedural order for expert and rehabilitation committees, and specifies the professional requirements to be met in carrying out the examinations, based on which expert opinions are drafted; moreover, in addition to the remedies formerly introduced, it provides for the involvement of an independent equal opportunity expert, if appropriate.

B. Elements of domestic law submitted by the applicants

61. Before the ETA entered into force in 2004, discrimination based on ethnic origin had been prohibited by the Constitution, the Civil Code and the PEA. On the enactment of the ETA, the PEA was amended to provide that the requirement of equal treatment shall apply to all participants in public education and permeate all segments and procedures of the same.

62. Relevant provisions of the PEA are as follows:

Section 4

"(7) Those co-operating in the organisation, control and operation of public education and in the performance of the tasks of public education shall take account of the children's interest, which is placed above everything else, when making decisions and taking measures.

The children's interests which are placed above everything else are the following in particular: ...

b) that they should be given every kind of assistance to evolve their abilities and talents, to develop their personalities and to update their knowledge continually as prescribed by this Act;..."

Section 10

"(3) Children and pupils have the following rights:

a) they shall receive education and teaching according to their abilities, interest and faculties, continue their studies according to their abilities and participate in primary art education in order that their talent should be recognised and developed; ...

f) they shall receive particular care – special nurture or care with the purpose of rehabilitation – according to their conditions and personal endowments, they shall appeal to the institution of pedagogical assistance service, irrespective of their age; ..."

63. The PEA further gives the definition of special educational needs ("SEN").

Between 1 September 1996 and 1 September 2003, it provided as follows:

Section 121

"(18) (later 20): [The term of] other disability [concerns] those children/pupils who, on the basis of the opinion of the expert and rehabilitation committee:

a) struggle with pervasive development disorder (for example, autism), or

b) struggle with disorders in school performance ... because of other psychic disorders ... as a consequence of which are lastingly impeded in development and learning (for example, dyslexia ...); ..."

64. By 1 September 2003 the PEA was amended; and the term SEN was introduced instead of 'other disability':

Section 121

"(29) [C]hildren/pupils with [SEN] are those who, on the basis of the opinion of the expert and rehabilitation committee:

a) suffer from physical, sensory, mental, speech deficiency or autism, or multiple disabilities in case of the joint occurrence thereof, or

b) are lastingly and substantially impeded in development and learning because of psychic disorders (for example, dyslexia ...); ..."

65. As of 1 September 2007, section 121 of the PEA reads as relevant:

"(29) [C]hildren/pupils with special educational needs are those who, on the basis of the opinion of the expert and rehabilitation committee:

a) suffer from physical, sensory, mental, speech deficiency or autism, or multiple disabilities in case of the joint occurrence thereof, and struggle with lasting and serious disorders in the cognitive functions or behavioural development, attributable to organic causes, or

b) struggle with long-term and serious disorders in the cognitive functions or behavioural development, not attributable to organic causes."

66. As demonstrated above, as of 1996, the PEA differentiated between two categories of disability, namely the category of mentally disabled children and the one of those who suffered from adaptive, learning or behavioural difficulties.

As of 2003, the term SEN was introduced and the category of mentally disabled children was defined as SEN(a) whereas the one of those who suffered from adaptive, learning or behavioural difficulties was defined as SEN(b).

In 2007, the law redefined these categories and since then has differentiated between the two categories according to the origin of special needs: organic disabilities correspond to SEN(a) whereas special needs with non-organic causes correspond to SEN(b). If the disability is attributable to organic causes, the child is declared by the rehabilitation committee of experts as having mild mental disability and will be educated in a

specialised institution with specialised teachers. If the special needs do not originate in organic causes then the child can be educated in an integrated way, that is, in normal mainstream schools but with the support of special education teachers. Nevertheless, the PEA also allowed 'SEN(b) children' to be educated in special schools or classes, under a special curriculum; in order to change this practice, a subsequent amendment was introduced to the effect that only those mentally disabled children should be placed in segregated special schools whose disability derived from organic causes.

However, in 2008, a new amendment reinstalled the previous provision of educating SEN children, again allowing children who were not mentally disabled and had no organic disability to be educated in segregated special schools.

67. As of 1 September 2007 the PEA introduced a provision for pupils suffering from adaptive, learning or behavioural difficulties, who can be educated in an integrated way:

Section 30

"(7) If a child/pupil struggles with adaptive, learning or behavioural difficulties ... or the chronic and serious derangement of cognitive functions or of development of behaviour ascribable to organic reasons, he or she is entitled to developmental education. ...

(8) The question whether a child/pupil struggles with adaptive, learning or behavioural difficulties or has special educational needs shall be decided by the rehabilitation committee of experts at the request of the educational counselling service."

68. As of 2003, the PEA also regulates the necessary conditions for educating children with special educational needs:

Section 121

"(28) The necessary conditions for the education and teaching of children with special educational needs are as follows: employment of conductive therapists and therapeutic teachers according to the separate kindergarten education or school education and teaching of children/pupils and the type and severity of the special educational need; application of a special curriculum, textbooks or any other special aids necessary for education and teaching; engagement of therapeutic teachers with qualifications in a special field necessary for private tuition, integrated kindergarten education, school education and teaching, developmental preparation and activities specified by the competent committee of experts; a special curriculum, textbooks and special therapeutic and technical tools necessary for the activities; provision of the professional services specified by the rehabilitation committee of experts for children students; ..."

69. Under the PEA, the term "special curriculum" means that 'SEN children' may be exempt from certain subjects fully or partially, according to the opinion of the expert and rehabilitation committee or the pedagogical advisory committee.

70. Lastly, the PEA also defines the different categories of secondary education and provides that, in order to educate children with special educational needs, secondary schools shall operate as special vocational school. Such schools shall educate those pupils who, as a result of their disabilities, cannot be educated in mainstream school.

C. National Social Inclusion Strategy (Extreme Poverty, Child Poverty, the Roma) (2011–2020)

71. This document, published by the Ministry of Public Administration and Justice (State Secretariat for Social Inclusion) in December 2011, contains the following passages:

"II.2. Providing an inclusive school environment, reinforcing the ability of education to compensate for social disadvantages

The development of an inclusive school environment that supports integrated education and provides education that breaks the inheritance of segregation and disadvantages as well as the development of services assisting inclusion play a primary role in the reduction of the educational failures of disadvantaged children, including Roma children.

As emphasised in the national strategy "Making Things Better for Our Children" (2007), « in an educational system creating opportunities, children, regardless of whether they come from poor, under-educated families, live in segregated living conditions, are disabled, migrants or blessed with outstanding talent, must receive education suited to their abilities and talents throughout their lifetime, without their education being influenced or affected by prejudices, stereotypes, biased expectations or discrimination. Therefore, this must be the most important priority of Hungary's educational policy. »

In the interest of reducing the extent of educational exclusion, we must reduce the selectivity of the educational system. Institutions must have effective tools against discrimination and need major methodological support for promoting the integration of pupils encumbered with socio-cultural disadvantages; this is also the way to reduce the out-migration of non-Roma pupils from certain schools. The development and application of an inclusive school model is a fundamental criterion concerning the regulation, management and coordination of public education that is also key in methodological developments as well as in the renewal of teacher training and the determination of the content of cooperation between institutions.

In the interest of ensuring that, likewise, children should not be unnecessarily declared disabled, we must provide for the enforcement of procedures determined in the relevant rule of law and professional criteria concerning the examinations serving as the basis for the subsequent expert opinion by providing professional assistance on an ongoing basis and with independent and effective inspections. In the spirit of prevention and in the interest of ensuring the timely and professional development of children, we must create standard procedures, professional contents and requirements also in the areas of early childhood development, educational consulting and speech therapy. The range of tests, examination methods and means used in the course of the testing and examination of children must be continuously extended. We must pay particular attention to avoiding declaring children disabled unnecessarily in the case

of disadvantaged children transferred into long-term foster care and the Roma and must ensure that the tests, methods and procedures employed for the determination of the child's actual abilities should be able to separate any deficiencies that may arise from environmental disadvantages."

III. RELEVANT INTERNATIONAL TEXTS

A. Council of Europe sources

72. Recommendation no. R(2000)4 of the Committee of Ministers to member States on the education of Roma/Gypsy children in Europe (adopted by the Committee of Ministers on 3 February 2000 at the 696th meeting of the Ministers' Deputies) provides as follows:

"The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Noting that the problems faced by Roma/Gypsies in the field of schooling are largely the result of long-standing educational policies of the past, which led either to assimilation or to segregation of Roma/Gypsy ...

Bearing in mind that policies aimed at addressing the problems faced by Roma/Gypsies in the field of education should be comprehensive, based on an acknowledgement that the issue of schooling for Roma/Gypsy children is linked with a wide range of other factors and pre-conditions, namely the economic, social and cultural aspects, and the fight against racism and discrimination;

Bearing in mind that educational policies in favour of Roma/Gypsy children should be backed up by an active adult education and vocational education policy; ...

Recommends that in implementing their education policies the governments of the member States:

– be guided by the principles set out in the appendix to this Recommendation;

– bring this Recommendation to the attention of the relevant public bodies in their respective countries through the appropriate national channels."

The relevant sections of the Appendix to Recommendation No. R(2000)4 read as follows:

"Guiding principles of an education policy for Roma/Gypsy children in Europe

I. Structures

5. Particular attention should also be paid to the need to ensure better communication with parents, where necessary using mediators from the Roma/Gypsy community which could then lead to specific career possibilities. Special information and advice should be given to parents about the necessity of education and about the support mechanisms that municipalities can offer families. There has to be mutual understanding between parents and schools. The parents' exclusion and lack of knowledge and education (even illiteracy) also prevent children from benefiting from the education system.

6. Appropriate support structures should be set up in order to enable Roma/Gypsy children to benefit, in particular through positive action, from equal opportunities at school.

7. The member States are invited to provide the necessary means to implement the above-mentioned policies and arrangements in order to close the gap between Roma/Gypsy pupils and majority pupils.

II. Curriculum and teaching material

8. Educational policies in favour of Roma/Gypsy children should be implemented in the framework of broader intercultural policies, taking into account the particular features of the Romani culture and the disadvantaged position of many Roma/Gypsies in the member States.

9. The curriculum, on the whole, and the teaching material should therefore be designed so as to take into account the cultural identity of Roma/Gypsy children. Romani history and culture should be introduced in the teaching material in order to reflect the cultural identity of Roma/Gypsy children. The participation of representatives of the Roma/Gypsy community should be encouraged in the development of teaching material on the history, culture or language of the Roma/Gypsies.

10. However, the member States should ensure that this does not lead to the establishment of separate curricula, which might lead to the setting up of separate classes."

73. The Opinion on Hungary of the Advisory Committee on the Framework Convention for the Protection of National Minorities, adopted on 22 September 2000 (CM(2000)165)), contains the following passage:

"41. The Advisory Committee is deeply concerned about the well documented cases of improper treatment of Roma children in the field of education, notably through putting them in "special schools", which are reserved ostensibly for mentally disabled children. The Advisory Committee stresses that placing children in such special schools should take place only when it is absolutely necessary on the basis of consistent, objective and comprehensive tests, which avoid the pitfalls of culturally biased testing. It considers it a positive step that the existence of and the need to address this unacceptable phenomenon has been recognised by the Ministry of Education. The Advisory Committee considers that the current situation is not compatible with Article 12(3) of the Framework Convention and must be remedied."

74. The Follow-up Report on Hungary (2002-2005) of the Council of Europe Commissioner for Human Rights (29 March 2006) (CommDH(2006)11) contains the following passages:

"29. The Ministry of Education estimates that 95% of children of school age are registered school attenders. Alongside the normal schooling programme, there is special educational provision for children regarded as requiring special attention on account of handicap. While the maximum size of ordinary classes is 25 children, the special classes have a maximum of 13 so as to ensure quality instruction. The per-pupil grant which central government makes to local authorities is doubled for children in the special classes.

30. Around 20% of Roma children continue to be assigned to special classes as against only 2% of Hungarian children. It should be noted that dyslexia is regarded as

a serious difficulty requiring placement in a special class and that social marginality has sometimes also been treated as a handicap. As a result, whereas the proportion of handicapped children in Europe is 2.5%, it is 5.5% in Hungary on account of inappropriate or abusive placements of this kind.

31. A protection mechanism has recently been introduced which requires parental consent for a child to be placed in a special class. In addition, the child must be tested without delay to assess its abilities. During the visit it was explained to the delegation that the files of 2,000 children regarded as handicapped had been thoroughly checked to make sure that placement in a special class was strictly necessary and to put right any abusive placements which authorities had made for financial or segregation reasons. Of the 2,000 children concerned, 10% had been returned to ordinary schooling after the check – evidence that close supervision of placements must continue."

75. The Report on Hungary of the European Commission against Racism and Intolerance (ECRI) (fourth monitoring cycle), adopted on 20 June 2008 and published on 24 February 2009, contains the following passages:

"81. [Of] the three levels of disabilities into which children in special schools may fall ("very serious" (requiring residential care), "medium-severe" or "mild" disability), the vast majority of children assessed as having a "mild disability" could, in the view of many NGOs, be integrated relatively easily in the ordinary school system: many children are misdiagnosed due to a failure to take due account of cultural differences or of the impact of socio-economic disadvantage on the child's development, and others suffer from only very minor learning disabilities that do not warrant the child's removal from the mainstream system. ECRI repeatedly heard that investments in teacher training should primarily be directed towards ensuring that teachers in the mainstream school system are equipped to deal with diverse, integrated classes, rather than towards perpetuating a system from which children, once streamed into it, are unlikely to break out, and which overwhelmingly results in low levels of educational achievement and a high risk of unemployment. Some actors have suggested that – bearing in mind that the best way of ensuring that children do not wrongly become trapped in special schools is to ensure that they are never sent down that track in the first place – the category of children with mild disabilities should simply be deleted from the Education Act and all children with mild disabilities integrated in the mainstream school system.

82. ECRI notes that the efforts made to date to combat the disproportionate representation of Roma children in special schools for children with mental disabilities, though they have had some positive effects, cannot be said to have had a major impact in practice so far. It stresses that, in parallel to assisting wrongly diagnosed children already in the special school system to return to the mainstream system, putting an end to this form of segregation also implies ensuring that children are not wrongly streamed into special schools."

B. Other international texts

76. For other relevant international texts, see *D.H. and Others v. the Czech Republic* [GC], cited above, §§ 81 to 107; and *Oršuš and Others v. Croatia* [GC], no. 15766/03, §§ 87 to 97, ECHR 2010.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 1 READ IN CONJUNCTION WITH ARTICLE 14 OF THE CONVENTION

77. The applicants argued that their education in a remedial school represented ethnic discrimination in the enjoyment of their right to education, in breach of Article 2 of Protocol No. 1 read in conjunction with Article 14 of the Convention.

Article 2 of Protocol No. 1 provides:

> "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

Article 14 of the Convention provides:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

78. The Government contested that argument.

A. Admissibility

1. The parties' submissions

a. Victim status

i. The Government

79. The Government argued that the applicants could no longer claim to be victims of a violation of their rights within the meaning of Article 34 of the Convention given that the Regional Court had found in respect of the Expert Panel that the applicants' right to equal treatment and education had been violated by the Expert Panel's failure to individualise their diagnoses or to specify the cause and nature of their special educational needs. Each of the applicants had been awarded HUF 1,000,000 as non-pecuniary damages. Moreover, the Supreme Court had found that the County Council was liable for its failure to supervise the legality of the functioning of the Expert Panel which had conducted a gravely unlawful practice by failing to observe the legal guarantees concerning the parents' rights to be present, be informed, consent or seek a remedy. The prejudice suffered on account of the applicants' deprivation of the right to a remedy provided for by law and

thereby of the theoretical chance of obtaining a more favourable assessment of their learning abilities had been compensated by non-pecuniary damages.

ii. The applicants

80. The applicants contested the Government's assertion that these judgments fully and effectively remedied the violation of their rights. The damages provided in regard to the omissions of the County Council and the Expert Panel did not respond to their claim of structural direct/indirect discrimination, i.e. the flawed system of diagnosis in Hungary, or to their claim of misdiagnosis and inadequate education. It was also established by the Regional Court that the damage caused derived from the convergence of the actions of each of the respondents. Because of the appellate process, it was only with regard to the Expert Panel that the judgment had become final. However, the applicants asserted that a final judgment in respect to an authority last in line of culpability, i.e. the Expert Panel, could not effectively remedy the violation of their rights to equal treatment in education. Given that respondents' actions had been inseparable, the Expert Panel alone could not have changed the structure under which the applicants had been misdiagnosed. Therefore, they continued to be victims of a violation of their rights under the Convention.

b. Exhaustion of domestic remedies

i. The Government

81. Concerning the applicants' claim that the assessment of their learning abilities had not been made with culturally unbiased tests which amounted to a general claim of a systemic error, the Government submitted that in this respect the applicants had failed to exhaust domestic remedies in accordance with Article 35 § 1 of the Convention. Such claims should have been raised by the applicants in proceedings instituted against the ministry responsible for education. The availability of this remedy was undisputable and there was record of successful such actions. Moreover, as to the issue of segregation, the Government submitted that this issue had not been raised before the competent domestic authorities; in particular, the question of the County Council's liability for the eventual discriminatory effect of its education policy had been not addressed by the applicants in the domestic proceedings although the local authorities were better placed to determine the adequacy of an education policy to the needs of the children concerned. It was true that the applicants had initially filed an action against the County Council on account of its alleged failure to provide them with an education adequate to their abilities, however, they had withdrawn that action on 26 February 2007 and 9 March 2007, respectively.

ii. The applicants

82. The applicants contested the Government's position, claiming that they had submitted their claim before the domestic courts against respondents who were – each to a different extent as part of a system – all responsible for their misdiagnoses. They claimed that the ministry responsible for education oversaw the whole education sector, while at the local level it was the county councils which maintained, supervised and controlled the expert panels assessing children. In Hungary, certain State duties were transferred to local public authorities due to decentralisation of the public administration.

c. Six-month time-limit

i. The Government

83. The Government were of the opinion that the application was also inadmissible for the applicants' failure to observe the six-month time-limit laid down in Article 35 § 1 of the Convention. On the issue of whether the applicants' education was channelled into special education on the basis of assessments made with culturally biased or unbiased tests and methods, the Regional Court's judgment of 27 May 2009 had been the final domestic decision. This judgment became final in regard to the Expert Panel on 2 July 2009. The applicants, however, had not submitted their application until 11 February 2011, that is, more than six months later.

ii. The applicants

84. In order to find redress for the violation of their rights, the applicants stressed that they had needed to exhaust all effective domestic remedies available to them against all respondents who bore joint liability for the alleged breaches. Therefore the six-month time-limit ran from the receipt of the Supreme Court judgment on 11 August 2010. Indeed, the Government did not claim that the review by the Supreme Court had not been an effective remedy.

2. The Court's assessment

85. The Court finds that the above objections are interrelated and must be examined together. In so far as the applicants' claim of discrimination and/or misdiagnosis is concerned, the Court observes that the Supreme Court did not sustain the applicants' claim of discrimination and breach of equal treatment. In particular, it confirmed the position of the lower courts regarding the respondents' joint liability, finding that, in the adjudication of the claims against the appealing parties, it was appropriate to evaluate the conduct of the School and the County Council in relation to the unlawful acts of the Expert Panel, as established by the Regional Court, even if the

latter's judgment had become final in the absence of appeal in regard to the Expert Panel. In view of this finding of joint liability, the Court will consider the alleged violations as deriving from the joint acts of the School, the County Council and the Expert Panel. However, the applicants obtained redress only in regard to the Expert Panel's handling (see paragraphs 43 to 54 above), and none in regard to their claims of discrimination. In these circumstances, the Court is satisfied that the applicants have retained their victim status for the purposes of Article 34 of the Convention.

86. Moreover, the Court observes that the applicants pursued claims of discrimination and unequal treatment before all domestic judicial instances, including the Supreme Court, which however held in essence (see paragraph 53 above) that the applicants' claim of systemic error amounting to a violation of their Convention rights could not, in the circumstances, be redressed by means of the national law. The Court is therefore satisfied that – in respect of the alleged discrimination in the enjoyment of their right to education – the applicants have taken all the requisite steps to exhaust domestic remedies that can be reasonably expected in the circumstances.

87. Concerning the applicants' claim about the unsuitability of the test battery applied in their case, the Court notes that the applicants could have brought an action against the education authorities under this head. However, they did not do so. This aspect of the case cannot therefore be examined on the merits for non-exhaustion of domestic remedies (see also *Horváth and Vadászi v. Hungary* (dec.), no. 2351/06, 9 November 2010).

88. It follows from the above considerations that, to the extent that the applicants have exhausted domestic remedies, the six-month time-limit ran from the service of the Supreme Court's judgment on 11 August 2010 and has thus been respected.

89. Furthermore, the Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible, apart from the applicants' claim about the unsuitability of the test battery applied in their cases (see paragraph 87 above), which must be rejected for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4.

B. Merits

1. The parties' arguments

a. The applicants

90. According to the applicants, the improper shunting of Roma children into special schools constituted indirect discrimination, and was impermissible under Article 2 of Protocol No. 1. Under domestic law, indirect discrimination occurred where an apparently neutral provision,

criterion or practice would put persons of a specific racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice was objectively justified by a legitimate aim and the means of achieving that aim were appropriate and necessary.

91. The applicants submitted that Roma were uniquely burdened by the current system; no other protected group had been shown to have suffered wrongful placement in special schools based on the diagnostic system. Social deprivation was in great part linked to the concept of familial disability. This notion had been formulated during the first big wave of re-diagnosis of Roma children transferred to special schools in the 1970s. According to contemporary research, familial disability could not amount to any type or form of mental disability, as it was in essence based on the social deprivation and the non-mainstream, minority cultural background of Roma families and children. The definition of mental disability as comprising social deprivation and/or having a minority culture amounted to bias and prejudice.

92. In addition, the tests used for placement had been culturally biased and knowledge-based, putting Roma children at a particular disadvantage. None of the applicants had been observed in their home, and their ethnicity had not been taken into account when assessing the results. Consequently, their socio-cultural disadvantaged background resulting from their ethnicity had not been taken into consideration.

93. The applicants further faulted the examination process for its not being sufficiently individualised. After the first assessment, based on which the applicants had been transferred to a special school, the applicants had in fact not been re-examined. The "review" had been paper-based, their diagnoses had never been individualised, and their parents' rights had not been respected. These failures had been established by the domestic courts. Indeed, it had been a violation to assign them to special schools when their tests had indicated IQ scores higher than WTO standards for mental disability. For the applicants, the issue was why the Government had allowed expert panels across the country and in Nyíregyháza in particular to diagnose mild mental disability contrary to WHO standards. Given that the WHO standards had been applicable at the time, the development of science and the changing terminology could not serve as a reasonable justification for the misdiagnoses of the applicants and the deprivation of their right to access adequate education. Until 2007, special schools had not only educated mentally disabled children, but also educated children with special education needs, including educational challenge and poor socio-economic background. Due to an amendment in 2007, the PEA had prescribed that all children who had been sent to special schools because of "psychological disorders" or "learning difficulties" had to be re-tested in order to establish whether the disorder was the result of organic reasons; if not, those children had to be transferred back to normal schools.

b. The Government

94. The Government denied that the applicants had been treated less favourably than non-Roma children in a comparable situation. Moreover, inasmuch as their treatment in education had been different from that of non-Roma (and other Roma) children of the same age, it had had an objective and reasonable justification. Moreover, they had not been treated differently from non-Roma children with similar socio-cultural disadvantages.

95. The Government were of the opinion that tests and standards tailored to the Roma population would have no sensible meaning from the point of view of assessing a child's ability to cope with the mainstream education system – which was the purpose of the assessment of learning abilities of children and of the psychometric tests applied in the process. They referred to NERC's expert opinion of 28 June 2007, which stated that the culture-bias of the "Budapest Binet Test" was less apparent in younger ages (three to six years of age) because it measured primarily basic practical knowledge. When this test was applied, its cultural bias could be compensated by a pedagogical examination aimed at exploring practical knowledge. Moreover, this one had not been the only test applied; and the applicants had been tested with a complex method. The diagnoses that the applicants needed special education had not been based on a single test; they had not even been exclusively based on the results of various tests obtained in a single examination session.

96. Moreover, the results of standardising the recently developed "WISC-IV Child Intelligence Test" showed that there were no ethnically determined differences between the test scores of Roma and non-Roma children. Therefore, in light of foreign experience gained in this field, it had been decided in the standardisation process not to lay down separate norms specifically applicable to Roma children but to use other means to ensure the fair assessment of all children in the course of the application of standardised tests. Relying on expert opinions, the Government claimed that socio-cultural background had been decisive for the mental development of the child, and when the actual level of a child's mental development (IQ) had been measured, the result had necessarily been influenced by the same socio-cultural effects that had shaped the child's mental development. In sum, the above results of the standardisation proved that IQ tests did not measure any difference between Roma and non-Roma culture or any cultural differences between Roma and non-Roma children. What they did measure was the effect of cultural deprivation or insufficient cultural stimuli in early childhood on the mental development of children, irrespective of their ethnic origin. Disproportionate representation of Roma children in special education was explained by their disproportionate representation in the group deprived of the beneficial effects of modernisation on the mental development of children. These factors concerned areas of social

development which fell outside the scope of the right to education or any of the rights enshrined in the Convention.

97. The Government were further of the opinion that the testing (or assessment) of the applicants' abilities had been sufficiently individualised even if their diagnoses had not been so, as it had been established and redressed by the Regional Court's final judgment against the Expert Panel.

98. Moreover, the Government agreed that the ensuing possibility of errors of assessment resulting from eventual personal biases or professional mistakes being committed must be counterbalanced by appropriate safeguards. Such procedural safeguards, including the parents' rights to be present, be informed, consent or seek remedy, were provided for by Hungarian law. The fact that these safeguards had not been respected in the applicants' case was not disputed: it had been established by the Supreme Court which had found that the Expert Panel had conducted a gravely unlawful practice in this respect and that the County Council had also been liable for this on account of its failure to supervise the legality of the functioning of the Expert Panel, as well as to put an end to the unlawful practice.

99. The assessment by the Expert Panel had not been carried out for medical purposes but with a view to determining whether the applicants could successfully be educated in a mainstream school. Therefore, contrary to the applicants' opinion, it could not be regarded as misdiagnosis if a diagnosis of learning disability, in terms of special education, did not coincide with a medical diagnosis of mild mental retardation as defined by the WHO.

100. Therefore, it had not been unreasonable for the Supreme Court to examine the applicants' diagnoses, contrary to the medical approach proposed by them, from the point of view of their right to an education adequate to their abilities and to find that, from this aspect, the Expert Panel's original diagnoses establishing that the applicants had needed education under a special curriculum had been confirmed by the forensic experts' opinion, even in the second applicant's case.

2. The Court's assessment

a. General principles

101. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article.

Discrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment. The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (see *D.H. and Others*, cited above, §§ 175-176).

102. The Court has further established that, as a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority. They therefore require special protection. Their vulnerable position means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (see *Oršuš and Others*, cited above, §§ 147-148).

103. Furthermore, the Court reiterates that the word "respect" in Article 2 of Protocol No. 1 means more than "acknowledge" or "take into account"; in addition to a primarily negative undertaking, it implies some positive obligation on the part of the State (see *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 37, Series A no. 48). Nevertheless, the requirements of the notion of "respect", which appears also in Article 8 of the Convention, vary considerably from case to case, given the diversity of the practices followed and the situations obtaining in the Contracting States. As a result, the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see *Lautsi and Others v. Italy* [GC], no. 30814/06, § 61, ECHR–2011 (extracts); *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 135, ECHR 2005-XI; *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, pp. 30-31, § 3, Series A no. 6).

104. In the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, structural deficiencies call for the implementation of positive measures in order, *inter alia*, to assist the applicants with any difficulties they encountered in following the school curriculum. These obligations are particularly stringent where there is an actual history of direct discrimination. Therefore, some additional steps are needed in order to address these problems, such as active and structured involvement on the part of the relevant social services (see *Oršuš and Others*, cited above, § 177).

The Court would note in this context Recommendation no. R(2000)4 of the Committee of Ministers (see paragraph 72 above) according to which appropriate support structures should be set up in order to enable Roma/Gypsy children to benefit, in particular through positive action, from equal opportunities at school.

105. Furthermore, the Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group. Such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent (see, amongst other authorities, *D.H. and Others*, cited above, § 184).

A general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who, as for instance in the present case, are identifiable on the basis of an ethnic criterion, may be considered discriminatory notwithstanding that it is not specifically aimed at that group, unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate (see *Oršuš and Others*, cited above, § 150). Furthermore, discrimination potentially contrary to the Convention may result from a *de facto* situation (see *Zarb Adami v. Malta*, no. 17209/02, § 76, ECHR 2006-VIII).

106. Where it has been shown that legislation produces such indirect discriminatory effect, the Court would add that, as with cases concerning employment or the provision of services (see, *mutatis mutandis*, *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII), it is not necessary, in cases in the educational sphere, to prove any discriminatory intent on the part of the relevant authorities (see *D.H. and Others*, cited above, § 194).

107. When it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence (see *D.H. and Others*, cited above, § 188).

108. Where an applicant alleging indirect discrimination establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden of proof shifts to the respondent State. The latter must show that the difference in treatment is not discriminatory (see, *mutatis mutandis*, *Nachova and Others*, loc. cit.). Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (see, *mutatis mutandis*, *Nachova and Others*, cited above, § 147), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.

b. Application of those principles to the present case

109. The Court notes that the applicants in the present case made complaints under Article 2 of Protocol No. 1 read in conjunction with Article 14 of the Convention, claiming that the fact that they had been assigned to a remedial school for children with special educational needs during their primary education violated their right to receive an education and their right to be free from discrimination. In their submission, all that has to be established is that, without objective and reasonable justification, they were assigned to a school where, because of the limited curriculum, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination (compare with the above-mentioned *D.H. and Others* judgment, § 183).

110. The Court notes that Roma children have been overrepresented among the pupils at the Göllesz Viktor Remedial Primary and Vocational School (see paragraph 7 above) and that Roma appear to have been overrepresented in the past in remedial schools due to the systematic misdiagnosis of mental disability (see paragraph 10 above). The underlying figures not having been disputed by the Government – who have not produced any alternative statistical evidence – the Court considers that these figures reveal a dominant trend. It must thus be observed that a general policy or measure exerted a disproportionately prejudicial effect on the Roma, a particularly vulnerable group. For the Court, this disproportionate effect is noticeable even if the policy or the testing in question may have similar effect on other socially disadvantaged groups as well. The Court cannot accept the applicants' argument that the different treatment as such resulted from a *de facto* situation that affected only the Roma. However, it is uncontested – and the Court sees no reason to hold otherwise – that the different, and potentially disadvantageous, treatment applied much more often in the case of Roma than for others. The Government could not offer a reasonable justification of such disparity, except that they referred, in general terms, to the high occurrence of disadvantageous social background among the Roma (see paragraph 96 above).

111. Although the policy and the testing in question have not been argued to aim specifically at that group, for the Court there is consequently a *prima facie* case of indirect discrimination. It thus falls on the Government to prove that in the case of applicants the difference in treatment had no disproportionately prejudicial effects due to a general policy or measure that is couched in neutral terms, and that therefore the difference in treatment was not discriminatory.

112. The Court reiterates that a difference in treatment is discriminatory if "it has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised (see, among many other authorities, *Oršuš and Others*, cited above,

§ 196; *Larkos v. Cyprus* [GC], no. 29515/95, § 29, ECHR 1999-I; *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 51, ECHR 2006-VI). The Court stresses that where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.

113. The Court notes the Government's submissions (see paragraph 94 above) according to which the impugned treatment is neutral (that is, based on objective criteria) and results in the different treatment of different people, and moreover the education programme in its existing form is beneficial to pupils with different abilities. The Court accepts that the Government's position to retain the system of special schools/classes has been motivated by the desire to find a solution for children with special educational needs. However, it shares the disquiet of the other Council of Europe institutions who have expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation which the system causes (see paragraphs 73 to 75 above) – even if in the present case the applicants were not placed in ethnically segregated classes.

114. The Court notes that the Hungarian authorities took a number of measures to avoid misdiagnoses in the placement of children. Nevertheless, the Council of Europe Commissioner for Human Rights found in 2006 that 20% of Roma children continued to be assigned to special classes, as compared with only 2% of majority children (see paragraph 74 above). Moreover, the ECRI Report published in 2009 (see paragraph 75 above) indicated a high number of misplaced Roma pupils. For the Court, these facts raise serious concerns about the adequacy of these measures at the material time.

115. The Court notes that the misplacement of Roma children in special schools has a long history across Europe.

Regarding the Czech Republic, the Advisory Committee on the Framework Convention for the Protection of National Minorities pointed out that children who were not mentally handicapped were frequently and quasi-automatically placed in Czech remedial schools "[owing] to real or perceived language and cultural differences between Roma and the majority" (see *D.H. and Others*, cited above, § 68).

In Hungary, the concept of "familial disability" (see paragraphs 10 and 91 above) resulted in comparable practices. The ECRI Report published in 2009 notes that the vast majority of children with mild learning disabilities could easily be integrated into mainstream schools; and many are misdiagnosed because of socio-economic disadvantage or cultural differences. These children are unlikely to break out of this system of inferior education, resulting in their lower educational achievement and poorer prospects of employment. The Report also noted that efforts to combat the high proportion of Roma children in special schools – both by

assisting wrongly diagnosed children and preventing misdiagnosis in the first place – have not yet had a major impact (see paragraph 75 above).

116. In such circumstances – and in light of the recognised bias in past placement procedures (see paragraph 115 above) – the Court considers that the State has specific positive obligations to avoid the perpetuation of past discrimination or discriminative practices disguised in allegedly neutral tests.

117. While in the present case the Court is not called on to examine the alleged structural problems of biased testing, the related complaint being inadmissible (see paragraph 87 above), it is nevertheless incumbent on the State to demonstrate that the tests and their application were capable of determining fairly and objectively the school aptitude and mental capacity of the applicants.

118. The Court observes that the Hungarian authorities set the borderline value of mental disability at IQ 86, significantly higher than the WHO guideline of IQ 70 (see paragraph 18 above). The Expert Panel found disparate measurements of Mr Horváth's IQ between IQ 61 and 83. Mr Kiss had an IQ of 63 according to the "Budapest Binet Test" and an IQ of 83 according to the "Raven Test". However, when taking the latter test at a summer camp (see paragraph 31 above), Mr Horváth scored IQ 83 and Mr Kiss IQ 90.

The Court cannot take a position as to the acceptability of IQ scores as the sole indicators of school aptitude but finds it troubling that the national authorities significantly departed from the WHO standards.

119. The Court observes, further, that the tests used to assess the applicants' learning abilities or difficulties have given rise to controversy and continue to be the subject of scientific debate and research. The Court is aware that it is not its role to judge the validity of such tests, or to identify the state-of-the-art, least culturally biased test of educational aptitude. It is only called on to ascertain whether good faith efforts were made to achieve non-discriminatory testing. Nevertheless, various factors in the instant case lead the Court to conclude that the results of the tests carried out in regard to applicants did not provide the necessary safeguards against misdiagnosis that would follow from the positive obligations incumbent on the State in a situation where there is a history of discrimination against ethnic minority children.

120. In the first place, the Court notes that it was common ground between the parties that all the children who were examined sat the same tests, irrespective of their ethnic origin.

The Government acknowledged that at least part of the test battery applied (namely, the "Budapest Binet Test") was culturally biased (see paragraph 95 above).

Moreover, certain tests used in the case of the applicants were found to be obsolete by independent experts (see paragraph 34 above).

121. In these circumstances, the Court considers that, at the very least, there is a danger that the tests were culturally biased. For the Court, the issue is therefore to ascertain to what extent special safeguards were applied that would have allowed the authorities to take into consideration, in the placement and regular biannual review process, the particularities and special characteristics of the Roma applicants who sat them, in view of the high risk of discriminatory misdiagnosis and misplacement.

122. The Court relies in this regard on the facts established by the Regional Court which were not contradicted on appeal (see paragraphs 39 to 42 above). This court found that the Expert Panel had failed to individualise the applicants' diagnoses or to specify the cause and nature of their special educational needs and therefore violated the applicants' rights to equal opportunity. Moreover, the social services administering the placement had been subject to constant reorganisation. In this regard, the court had found that the conditions necessary for the functioning of the Expert Panel had not been provided. Consequently, the Expert Panel and the County Council could not provide the necessary guarantees against misplacement which was historically more likely to affect Roma. Moreover, after a careful analysis of the applicable law, the Court of Appeal and the Supreme Court concluded that, as of 2003, children with special educational needs had included students with psychological developmental troubles (learning disabilities). It was not clear whether the applicants had mental (or learning) disabilities that could not have been taken into consideration within the normal education system by providing additional opportunities to catch up with the normal curriculum. Those courts found that, because of the changes in legislation, related to changing concepts on integrated education, there was lack of legal certainty from 1 January until 1 September 2007 (see paragraph 45 *in fine* above)

123. In the face of these findings, it is difficult for the Court to conceive that there was adequate protection in place safeguarding the applicants' proper placement. Therefore, the tests in question, irrespective of their allegedly biased nature, cannot be considered to serve as sufficient justification for the impugned treatment.

124. As regards the question of parental consent, the Court accepts the Government's submission that in this regard the violation of the applicants' rights to education was recognised and adequate remedies were provided in the domestic procedure (see paragraph 79 above). However, in the case of Mr Kiss, the absence of parental participation and the parents' express objection to the placement can be seen as having contributed to the discrimination.

125. The Court notes that the identification of the appropriate educational programme for the mentally disabled and students with a learning disability, especially in the case of Roma children, as well as the choice between a single school for everyone, highly specialised structures

and unified structures with specialised sections is not an easy one. It entails a difficult balancing exercise between the competing interests. The Court notes in the Hungarian context that the 2003 programme (see paragraph 12 above) and the 2011 National Inclusion Strategy (see paragraph 71 above) advocate an integrated approach in this respect.

As to the setting and planning of the curriculum, this mainly involves questions of expediency on which it is not for the Court to rule (see *Valsamis v. Greece*, 18 December 1996, § 28, *Reports of Judgments and Decisions* 1996-VI).

126. Nevertheless, whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation (see *Buckley v. the United Kingdom*, 25 September 1996, § 76, *Reports* 1996–IV, and *Connors v. the United Kingdom*, no. 66746/01, § 83, 27 May 2004).

127. The facts of the instant case indicate that the schooling arrangements for Roma applicants with allegedly mild mental disability or learning disability were not attended by adequate safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class (see, *mutatis mutandis*, *Buckley*, cited above, § 76, and *Connors*, cited above, § 84). Furthermore, as a result of the arrangements, the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a consequence, they received an education which did not offer the necessary guarantees stemming from the positive obligations of the State to undo a history of racial segregation in special schools. The education provided might have compounded their difficulties and compromised their subsequent personal development instead of helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population.

In that connection, the Court notes with interest that the new legislation intends to move out students with learning disabilities from special schools and provides for children with special educational needs, including socially disadvantaged children, to be educated in ordinary schools enabling the diminution of the statistical overrepresentation of Roma in the special school population. This integration process requires the use of state-of-the-art testing.

However, in the present case the Court is not called on to examine the adequacy of education testing as such in Hungary.

128. Since it has been established that the relevant legislation, as applied in practice at the material time, had a disproportionately prejudicial effect

on the Roma community, and that the State, in a situation of *prima facie* discrimination, failed to prove that it has provided the guarantees needed to avoid the misdiagnosis and misplacement of the Roma applicants, the Court considers that the applicants necessarily suffered from the discriminatory treatment. In this connection – and with regard to the vulnerability of persons with mental disabilities as such, as well as their past history of discrimination and prejudice – the Court also recalls its considerations pronounced in the case of *Alajos Kiss v. Hungary* (no. 38832/06, 20 May 2010):

> "[I]f a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question....[T]he treatment as a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny." (paragraphs 42 and 44).

129. Consequently, there has been a violation in the instant case of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 in respect of each of the applicants.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

130. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

131. The applicants made no damages claims.

B. Costs and expenses

132. The applicants claimed, jointly, 6,000 euros (EUR) for the costs and expenses incurred before the Court. This claim corresponds to 100 hours of legal work billable by their lawyer at an hourly rate of EUR 60.

133. The Government contested this claim.

134. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award

the sum of EUR 4,500 jointly to the applicants, who were represented by a lawyer and a non-governmental organisation, covering costs under all heads.

C. Default interest

135. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the alleged unsuitability of the test battery applied in the applicants' case inadmissible and the remainder of the application admissible;

2. *Holds* that there has been a violation of Article 2 of Protocol No. 1 read in conjunction with Article 14 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicants, jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,500 (four thousand five hundred euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

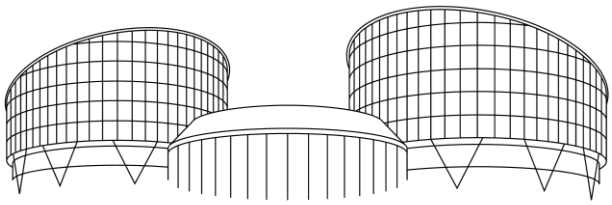
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 29 January 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF Z.H. v. HUNGARY

(Application no. 28973/11)

JUDGMENT

STRASBOURG

8 November 2012

FINAL

08/02/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Z.H. v. Hungary,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Ineta Ziemele, *President,*
Danutė Jočienė,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Paulo Pinto de Albuquerque,
Helen Keller, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 9 October 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 28973/11) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr Z.H. ("the applicant"), on 19 November 2011.

2. The applicant, who had been granted legal aid, was represented by Mr D. Karsai, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Public Administration and Justice.

3. The applicant alleged, in particular, that on account of his disabilities, he could not benefit from proper information about the reasons for his arrest, in breach of Article 5 § 2, and his subsequent incarceration amounted to inhuman and degrading treatment, an infringement of Article 3 of the Convention.

4. On 13 February 2012 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On 7 June 2012 the Mental Disability Advocacy Center (MDAC), a non-governmental organisation with its seat in Budapest, was granted leave to intervene in the proceedings as third party (Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1987 and lives in the village of A. in eastern Hungary.

7. The applicant is innately deaf and dumb and has medium-grade intellectual disability. He is illiterate.

8. According to the bill of indictment preferred in the case, on 10 April 2011 the applicant – a multiple recidivist offender with the most recent conviction dating from 2 November 2009 – mugged a passer-by in Gyüre. He was then halted for an identity check by officers of the Vásárosnamény Police Department. He attempted to escape but was apprehended while still in possession of the stolen item. He was committed to the police station.

9. Since the applicant was perceived to use a sort of sign language, a sign-language interpreter was appointed for him at once. Later in the day he was interrogated as a suspect of robbery. No lawyer was present.

10. The Government submitted that the applicant had understood the charges brought against him but made no complaint about it and admitted the commission of the offence by signing the minutes of the interrogation. The applicant denied this, arguing that the sign language used by him and the one used by the interpreter were different and thus no comprehension had been possible between them.

The applicant's signature on the minutes in question consists of his scribbled nickname, hardly legible.

11. Between 10 April and 4 July 2011 the applicant was detained on remand on the charge of mugging at Szabolcs-Szatmár-Bereg County Prison.

12. The applicant maintained that the conditions of detention were inapt to his condition and that he had been molested, sexually and otherwise, by the other inmates. The Government argued that special measures had been put in place to address the applicant's situation (in particular, the prison governor issued an instruction to that effect on 23 May 2011) – an assertion of which the efficacy has been disputed by the applicant (for details, see paragraphs 25 and 26 below).

13. On 4 July 2011 the applicant was released from detention and placed under house arrest. The Vásárosnamény District Court, having noted that he did not know any sign language and was able to communicate only with his mother, was of the view that the time spent by the applicant in detention had be to be reduced to a minimum.

14. Meanwhile, on 20 June 2011 the applicant was indicted for robbery. His mental condition was noted by the prosecution. A public defence counsel and a sign-language interpreter were appointed for him.

15. While detained, the applicant was examined by a forensic psychiatrist. On 30 June 2011 the expert gave the opinion that the applicant's faculties were to a large extent reduced and that he should be placed under partial guardianship. This was done by the Vásárosnamény District Court on 27 September 2011. The court noted that the applicant's IQ was 39, he was deaf and dumb, he had medium-grade intellectual disability, he could not count and did not know sign language; the only person with whom he could communicate was his mother.

16. The criminal proceedings conducted against the applicant are still pending.

17. The applicant submitted the testimonies of a Mr F. and a Mr R. who were present when Mr Karsai met with the applicant on 6 May 2012 to discuss his representation before the Court. According to these testimonies, the applicant communicated using a peculiar sign-language-like method, essentially only intelligible to his mother, which appeared to be completely different from the standard sign language.

II. RELEVANT DOMESTIC LAW

18. Act no. XIX of 1998 on the Code of Criminal Procedure provides as follows:

Section 129

"(2) A defendant's pre-trial detention may be ordered in proceedings conducted for a criminal offence punishable by imprisonment and only if:

a) the defendant has escaped or absconded from the reach of the court, the prosecutor or the investigating authority or attempted to do so, or if other proceedings for an intentional criminal offence punishable by imprisonment has been instituted against him during the procedure,

b) due to the risk of his escape or absconding or for other reasons it can reasonably be assumed that his attendance at the procedural acts cannot be ensured otherwise,

c) it can reasonably be assumed that if left at large he would frustrate, obstruct or jeopardise the taking of evidence, especially by influencing or intimidating the witnesses, or by destroying, falsifying or concealing physical evidence or documents,

d) it can reasonably be assumed that if left at large he would accomplish the attempted or prepared criminal offence, or would commit another criminal offence punishable by imprisonment."

III. RELEVANT INTERNATIONAL TEXTS

19. The United Nations Convention on the Rights of Persons with Disabilities[1] contains the following provisions:

Article 2 - Definitions

"For the purposes of the present Convention:

...

"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; ..."

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."

Article 14 - Liberty and security of the person

"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."

20. The Interim Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted on 28 July 2008 by the Office of the United Nations High Commissioner for Human Rights to the 63rd session of the General Assembly of the UN (A/63/175), contains the following passages:

"The Special Rapporteur draws the attention of the General Assembly to the situation of persons with disabilities, who are frequently subjected to neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence. He is concerned that such practices, perpetrated in public institutions, as well as in the private sphere, remain invisible and are not recognized as torture or other cruel, inhuman or degrading treatment or punishment." [summary]

"Persons with disabilities are often segregated from society in institutions, including prisons, social care centres, orphanages and mental health institutions. They are deprived of their liberty for long periods of time including what may amount to a lifelong experience, either against their will or without their free and informed consent. Inside these institutions, persons with disabilities are frequently subjected to unspeakable indignities, neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence. The lack of reasonable accommodation in

[1] Ratified by Hungary on 20 July 2007.

detention facilities may increase the risk of exposure to neglect, violence, abuse, torture and ill-treatment." [paragraph 38]

"Persons with disabilities often find themselves in ... situations [of powerlessness], for instance when they are deprived of their liberty in prisons or other places ... In a given context, the particular disability of an individual may render him or her more likely to be in a dependant situation and make him or her an easier target of abuse ..." [paragraph 50]

"States have the further obligation to ensure that treatment or conditions in detention do not directly or indirectly discriminate against persons with disabilities. If such discriminatory treatment inflicts severe pain or suffering, it may constitute torture or other form of ill-treatment. ..." [paragraph 53]

"The Special Rapporteur notes that under article 14, paragraph 2, of the [Convention on the Rights of Persons with Disabilities], States have the obligation to ensure that persons deprived of their liberty are entitled to 'provision of reasonable accommodation'. This implies an obligation to make appropriate modifications in the procedures and physical facilities of detention centres ... to ensure that persons with disabilities enjoy the same rights and fundamental freedoms as others, when such adjustments do not impose disproportionate or undue burden. The denial or lack of reasonable accommodation for persons with disabilities may create detention ... conditions that amount to ill-treatment and torture." [paragraph 54]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

21. The applicant complained that his detention amounted to inhuman and degrading treatment, in breach of Article 3, on account of the fact that he was mentally disabled, deaf and dumb.

Article 3 reads as follows:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

22. The Government contested that argument.

A. Admissibility

23. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

(a) The Government

24. The Government submitted that the applicant had given no indication to the prison authorities of any assault against him or of the alleged inappropriateness of the detention conditions. They noted that the governor of Szabolcs-Szatmár-Bereg County Prison had issued a special instruction addressing the treatment of the applicant.

25. In the Government's view, during his detention the applicant could express himself and communicate with the prison personnel despite the fact that he did not use a hearing aid and is illiterate. They also submitted that special arrangements had been made to accommodate his needs: he had been placed in a cell shared with a relative, located in an "open" section of the prison, next to the service place of the unit warden so that he could immediately indicate his problems. Furthermore, to facilitate communication with the applicant, the prison warden was regularly in contact with the applicant's mother and a sign-language interpreter was made available during the prison admission procedure, the visits and on the occasions when the applicant received official documents. Fellow inmates assisted the applicant in writing letters and the warden paid special attention to the forwarding of his letters, to prevent any abuse.

(b) The applicant

26. The applicant submitted that his detention gave rise to a violation of Article 3 of the Convention as it was inapt to his conditions. He further claimed that he had been mobbed and sexually assaulted by other inmates. He explained that, due to his intellectual impairment and general inability to communicate, he was not in a position to complain of any assault or give indication of the inappropriateness of his circumstances, and that it was unreasonable to expect him to do so. He also noted that the visits of his mother, limited to two occasions per month, were not sufficient to address his problems and his communication needs occurring in detention. With regard to the governor's special instruction, the applicant asserted that it was unsuitable to deal with the situation of a deaf and dumb, intellectually disabled and illiterate person.

(c) The third party

27. The Mental Disability Advocacy Center submitted that persons with disabilities were particularly vulnerable to torture and ill-treatment, including sexual abuse, in prison and other detention settings. Making reference *inter alia* to the relevant provisions of the UN Convention on the Rights of Persons with Disabilities (see paragraph 19 above), they argued

that the prevention of ill-treatment of detainees with disabilities must include the provision of "reasonable accommodations" on an individualised basis.

2. The Court's assessment

(a) General principles

28. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. In considering whether treatment is "degrading" within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see among many other authorities *Price v. the United Kingdom*, no. 33394/96, § 24, ECHR 2001-VII; *Peers v. Greece*, no. 28524/95, §§ 67-68 and 74, ECHR 2001–III; and *Engel v. Hungary*, no. 46857/06, § 26, 20 May 2010).

29. Moreover, where the authorities decide to detain a person with disabilities, they should demonstrate special care in guaranteeing such conditions as correspond to the person's individual needs resulting from his disability (see mutatis mutandis *Jasinskis v. Latvia*, no. 45744/08, § 59, 21 December 2010; *Price v. the United Kingdom*, op.cit., § 30). States have an obligation to take particular measures which provide effective protection of vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). Any interference with the rights of persons belonging to particularly vulnerable groups – such as those with mental disorders – is required to be subject to strict scrutiny, and only very weighty reasons could justify any restriction (see *Alajos Kiss v. Hungary*, no. 38832/06, § 42, 20 May 2010).

(b) Application of those principles to the present case

30. In the instant application, the Court observes that Mr Z.H. – deaf and dumb, suffering from intellectual disability, illiterate and unable to avail himself of the official sign language – was detained at Szabolcs-Szatmár-Bereg County Prison for a period lasting almost three months (see paragraph 11 above). It notes the Government's submission according to which special measures, incarnated by an instruction issued by the prison governor, were put in place to address his situation, as of 23 May 2011 (see paragraph 12 above). However, it is unclear to what extent these

measures concerned the phase of the applicant's detention occurring prior to this date, that is, between 10 April and 23 May 2011.

31. In any case, the Court is not convinced that even the aggregate of the measures referred to by the Government – namely, the applicant's incarceration together with a relative in a cell close to the warden's office, the involvement of other inmates and the applicant's mother in handling the situation and the facilitation of his correspondence (see paragraph 25 above) – was sufficient to remove the applicant's treatment from the scope of Article 3.

Given that the applicant undoubtedly belongs to a particularly vulnerable group (see paragraphs 20 and 29 *in fine* above) and that as such he should have benefited from reasonable steps on the side of the authorities to prevent situations likely to result in inhuman and degrading treatment, the Court considers that it was incumbent on the Government to prove that the authorities took the requisite measures. This redistribution of the burden of proof is analogous to the manner in which the Court examines situations where an individual is taken into police custody in good health but is found to be injured at the time of release, so that it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue arises under Article 3 of the Convention (see among many other authorities *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V).

32. In the present circumstances, however, the Court notes that the Government have failed to meet this burden of proof in a satisfactory manner, especially in respect of the initial period of the detention.

The Court considers in particular that the inevitable feeling of isolation and helplessness flowing from the applicant's disabilities, coupled with the presumable lack of comprehension of his own situation and of that of the prison order¸ must have caused the applicant to experience anguish and inferiority attaining the threshold of inhuman and degrading treatment, especially in the face of the fact that he had been severed from the only person (his mother) with whom he could effectively communicate. Moreover, while the applicant's allegations about being molested by other inmates have not been supported by evidence, the Court would add that had this been the case, the applicant would have faced significant difficulties in bringing such incidents to the wardens' attention, which may have resulted in fear and the feeling of being exposed to abuse.

The Court also observes that the District Court eventually released the applicant for quite similar considerations.

33. In sum, the Court cannot but conclude that – despite the authorities laudable but belated efforts to address his situation – the applicant's incarceration without the requisite measures taken within a reasonable time must have resulted in a situation amounting to inhuman and degrading

treatment, in breach of Article 3 of the Convention, on account of his multiple disabilities.

There has accordingly been a breach of that provision.

II. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

34. The applicant also submitted that, due to his condition, the procedure followed by the authorities on his arrest fell short of the requirements of Article 5 § 2 of the Convention, which provides as follows:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

35. The Government contested that argument.

A. Admissibility

36. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

(a) The Government

37. The Government submitted that the applicant's pre-trial detention had been in conformity with the requirements of Article 5 § 2 of the Convention. They argued that all the guarantees envisaged by the Convention had been applied, including the requisite consideration dedicated to the applicant's disability and special conditions.

38. As to the question whether the applicant had been informed, in a language which he had understood, of the reasons for his arrest, the Government noted that the applicant had been interrogated in the presence of a sign-language interpreter and, in their opinion, he had understood the charge against him. They also stressed that he had made no complaint about the procedure and had signed the minutes of the interrogation.

(b) The applicant

39. The applicant submitted that, when arrested, he had not been informed, in a language which he had understood, of the reasons for his arrest and the charges against him. Relying essentially on the decisions of the Vásárosnamény District Court dated 4 July and 27 September 2011 (see paragraphs 13 and 15 above), the applicant contested the Government's

submission that he understood the official sign language. In support of this argument, he further submitted two witness testimonies stating that he used a special method of communication different from the official sign language (see paragraph 17 above). He stressed that he was only able to communicate with his mother using a special type of sign-language. He explained that his signature on the minutes of the interrogation could not be considered valid, given that he was deaf, dumb and illiterate. He argued that, taking into consideration his intellectual disability, he should have been assisted by a lawyer or a person authorised to act on his behalf, so that he could understand the grounds for his arrest.

(c) The third party

40. The Mental Disability Advocacy Center submitted that, when interpreting the guarantees enshrined in Article 5 § 2 of the Convention, the provisions of the UN Convention on the Rights of Persons with Disabilities should be taken into account. They argued that this instrument required States to provide reasonable accommodations to persons with disabilities in order to ensure their effective access to justice. They explained that, in the present case, reasonable accommodation would have required the presence of a person who could have effectively communicated with the applicant and assisted him during the interrogation.

2. The Court's assessment

(a) General principles

41. The Court reiterates that paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2, any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features (see *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 40, Series A no. 182).

Article 5 § 2 neither requires that the necessary information be given in a particular form, nor that it consists of a complete list of the charges held against the arrested person (see *X. v. Germany*, no. 8098/77, Commission decision of 13 December 1978, Decisions and Reports 16, p. 111). However, in the Court's view, if the condition of a person with intellectual disability is not given due consideration in this process, it cannot be said that he was provided with the requisite information enabling him to make effective and intelligent use of the right ensured by Article 5 § 4 to

challenge the lawfulness of detention unless a lawyer or another authorised person was informed in his stead (see *X. v. the United Kingdom*, no. 6998/75, Commission's report of 16 July 1980, § 111, Series B no. 41).

(b) Application of those principles to the present case

42. The applicant was interrogated at the Vásárosnamény police station in the sole presence of a sign-language interpreter. As already noted above (see paragraph 30 above), the applicant is deaf and dumb, illiterate and has an intellectual disability. Moreover, he cannot communicate by means of the official sign language, an interpreter of which was present. In these circumstances, the Court is not persuaded that he can be considered to have obtained the information required to enable him to challenge his detention – and this notwithstanding the fact that the signature of his nickname figures on the minutes of the interrogation.

43. The Court further finds it regrettable that the authorities did not make any truly "reasonable steps" (cf. *Z and Others*, loc.cit.) – a notion quite akin to that of "reasonable accommodation" in Articles 2, 13 and 14 of the UN Convention on the Rights of Persons with Disabilities (see paragraph 19 above) – to address the applicant's condition, in particular by procuring for him assistance by a lawyer or another suitable person. For the Court, the police officers interrogating him must have realised that no meaningful communication was possible in the situation and they should have sought assistance in the first place from the applicant's mother (who could have at least informed the officers about the magnitude of the applicant's communication problems) – rather than simply making the applicant sign the minutes of the interrogation.

44. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 2 of the Convention.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

45. The applicant also complained under Article 5 § 1 that his detention had been unjustified and, under Articles 6 and 13, that the criminal proceedings conducted against him had been unfair.

The Court notes that the applicant, a multiple recidivist, was detained on remand on suspicion of mugging and considers that this measure as such cannot be regarded as unjustified deprivation of liberty, in breach of Article 5 § 1 (c), quite apart from the previous findings in the context of Articles 3 and 5 § 2 (see paragraphs 33 and 44 above). This complaint is therefore manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected, pursuant to Article 35 § 4 of the Convention.

Moreover, the criminal proceedings against the applicant are still pending and consequently, the complaints concerning their fairness are

premature. This complaint must thus be rejected, pursuant to Article 35 §§ 1 and 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

47. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

48. The Government contested this claim.

49. The Court considers that the applicant must have suffered some non-pecuniary damage and awards him, on the basis of equity, EUR 16,000 under this head.

B. Costs and expenses

50. The applicant also claimed EUR 9,000 for the costs and expenses incurred before the Court. This sum corresponds to 35 hours of legal work billable by his lawyer at an hourly rate of EUR 200 plus VAT and includes 110 euros of clerical costs.

51. The Government contested this claim.

52. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 covering costs under all heads, from which amount EUR 850 – the sum which has been awarded to the applicant under the Council of Europe's legal-aid scheme – must be deducted.

C. Default interest

53. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints concerning Articles 3 and 5 § 2 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 3 of the Convention;

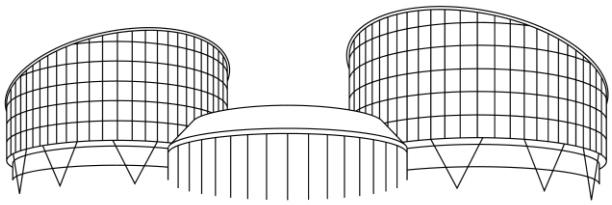
3. *Holds* that there has been a violation of Article 5 § 2 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 16,000 (sixteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,150 (two thousand one hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Ineta Ziemele
Registrar	President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KĘDZIOR v. POLAND

(Application no. 45026/07)

JUDGMENT

STRASBOURG

16 October 2012

FINAL

16/01/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kędzior v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

David Thór Björgvinsson, *President,*
Lech Garlicki,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 25 September 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 45026/07) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Polish national, Mr Stanisław Kędzior ("the applicant"), on 4 October 2007.

2. The applicant was represented by Mr A. Bodnar and Mrs M. Zima, lawyers from the Helsinki Foundation for Human Rights (Warsaw, Poland). The Polish Government ("the Government") were represented by their Agent, Mr J. Wołąsiewicz of the Ministry of Foreign Affairs.

3. The applicant complained, in particular, about his placement in a social care home and his inability to obtain release from the home, in breach of Article 5 §§ 1 and 4 of the Convention.

4. On 7 May 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1956 and lives in Sośnica.

6. The applicant has been undergoing psychiatric treatment since the age of sixteen. He was hospitalised on several occasions in psychiatric hospitals in Lubliniec and Żurawica.

7. The applicant lived in Nowy Lubliniec with his mother and handicapped sister. At the end of 2000 the applicant's brother, who did not live with them, applied to the court submitting that the applicant had been aggressive, had been refusing to take his medication and had been abusing alcohol.

8. On 22 December 2000 the applicant was partly deprived of his legal capacity by a court because of his mental disorder, as he had been diagnosed with schizophrenia.

9. On 28 August 2001 the Lubaczów District Court appointed his brother, Mr Zbigniew Kędzior, as his guardian (*kurator*). Subsequently, the guardian applied to the court to have the order varied and to have the applicant declared totally incapacitated.

10. In the course of the proceedings, on 22 December 2001, an expert psychiatric opinion was prepared which confirmed that the applicant was suffering from schizophrenia and that he had a tendency to abuse alcohol.

11. On 27 December 2001 the Krosno Regional Court changed its previous decision and decided to declare the applicant totally incapacitated as his mental condition had deteriorated. The applicant's brother remained his guardian (*opiekun prawny*).

12. On an unspecified date the applicant's guardian requested the Ruda Różaniecka Social Care Home (*Dom Pomocy Społecznej*) to admit the applicant.

13. On 8 February 2002 the Lubaczów District Family Centre (*Powiatowe Centrum Pomocy Rodzinie*) decided to place the applicant in the social care home, as requested by his guardian. In terms of domestic law the admission was voluntary and did not require approval by a court.

14. Between 31 October 2001 and 11 February 2002 the applicant was in a psychiatric hospital in Jaroslaw.

15. On 11 February 2002 the applicant was admitted to the Ruda Różaniecka Social Care Home, where he remained for ten years.

16. The applicant complained to the Lubaczów District Court that he had been placed in the care home against his will and without any medical necessity. On 12 April 2002 the president of the court informed him that the placement had been in accordance with the law.

17. On 27 December 2004 the District Family Centre informed the applicant that his guardian was authorised to place him in the care home.

18. On 9 February 2006 the Przemysl Regional Court rejected the applicant's request for proceedings to be initiated to have his legal capacity fully restored. The court considered that the applicant, being legally incapacitated, did not have the authority to lodge such a request, and that his guardian did not support the request.

19. On 23 February 2006 the president of the Lubaczów District Court explained to the applicant again that due to his total incapacitaty he had not been a party to the proceedings relating to his placement in the care home.

20. On 17 March 2006 the president of the Przemysl Regional Court informed the applicant in a letter that there were no grounds to institute proceedings to restore the applicant's legal capacity of the court's own motion.

21. On 5 June 2006 and 15 February 2007 the District Family Centre again replied to the applicant's letters informing him that only his guardian could approve his release from the care home.

22. On 21 September 2006 the Przemysl Regional Court again rejected a request by the applicant to have his legal capacity restored, given his lack of legal standing to initiate such proceedings.

23. On 17 January 2007 the president of the Lubaczów District Court informed the applicant that any variation of his incapacitation order was governed by Article 559 of the Code of Civil Procedure (CCP). The president further clarified that proceedings to vary the incapacitation order could be instituted by a court of its own motion. In addition, the applicant himself, although lacking legal capacity, could apply to the court for such proceedings to be instituted. According to the president, the latter possibility was based on the interpretation of the law as provided in a commentary to the CCP.

24. The applicant again asked the Przemyśl Regional Court to quash the legal incapacitation order. On 8 February 2007 the court rejected the request as inadmissible in law.

25. On 1 March 2007 the president of the Przemysl Regional Court explained to the applicant, in a letter of response to the applicant's query, that only his legal guardian could institute proceedings to have his legal incapacity revoked. Alternatively, the applicant could request the court to institute such proceedings of its own motion, but for that to succeed new medical evidence needed to be provided.

26. On 11 May and 7 August 2007 the Przemysl Regional Court rejected further requests by the applicant for his legal capacity to be restored, on the ground that the applicant had no legal standing to institute such proceedings.

27. On 17 September 2007 the same court rejected a further appeal by the applicant against the decision of 7 August 2007. The court noted that following the Constitutional Court's judgment of 7 March 2007 the domestic law had been amended, and it was now possible for a person lacking legal capacity to institute proceedings to have the incapacitation order set aside. However, the amendments to the CCP had been introduced by the law of 9 May 2007, which would enter into force only on 7 October 2007. Thus, the applicant's request had not been examined.

28. On 13 July 2007 the Jarosław District Prosecutor informed the applicant that his complaints, in particular against Dr F., who had prepared an expert opinion in 2001 in the proceedings concerning his incapacitation, were manifestly ill-founded.

29. On several occasions in 2008 the applicant attempted to institute proceedings to have his incapacitation quashed; however, all his requests were refused for failure to comply with various procedural requirements, including failure to pay court fees in the amount of 40 Polish zlotys (PLN, approx. 10 euros (EUR)). The applicant appealed against all the decisions and submitted new requests for the incapacitation order to be lifted.

30. It appears that a later request was successful, as on 9 March 2009 the Przemysl Regional Court instituted proceedings to have the applicant's legal capacity restored (file no. Ns 23/09). The court decided to have an expert opinion prepared and for the applicant to be heard by a judge in the presence of a psychologist and a psychiatrist.

31. On 20 March 2009 a judge, with a panel of experts, heard the applicant during a twenty-five-minute-long interview.

32. On 7 April 2009 the experts submitted their opinion to the court on the basis of that interview with the applicant. The applicant submitted to the experts that he had been placed in the social care home against his will by his brother seven years previously. In the home he had been independent, had not been drinking alcohol and had been taking his medication. In the past four years he had been given long leaves of absence to visit his home, and had travelled alone. He would like to make his own decisions and to vote in elections and not to be obliged to ask his brother for everything. He also mentioned that if his capacity were restored he would prefer to stay in the social care home and to continue visiting his family home on leaves of absence.

33. The experts concluded that the applicant was suffering from schizophrenia, although for several years he had not experienced psychotic symptoms or displayed aggressive behaviour. However, without a rigorous therapeutic regime the applicant's state of health could worsen. According to the experts the applicant did not consider himself to be a person with a mental disorder, and showed a lack of critical judgment regarding his state of health and his actions. On the basis of the file and the interview with the applicant the experts concluded that his primary intention in applying for restoration of his legal capacity was to leave the social care home. In this context they noted that during the interview the applicant had spontaneously declared that he would prefer to stay in the social care home even if his capacity were restored. Nevertheless, judging from his consistent and extensive correspondence with the courts so far, the experts considered that his sole intention remained "to live freely in the family home and not in the social care institution". The experts concluded that the applicant's mental state had improved but not to the extent that would allow him to function independently.

34. On 8 April 2009 the experts informed the court that they considered it unnecessary to notify the applicant of any court decisions or applications to court, given his state of health.

35. On 9 April 2009 the Przemysl Regional Court decided to stop sending the applicant any notifications of court decisions and appointed a court officer as a guardian to represent his interests in legal proceedings. The applicant submitted that he had never met this guardian.

36. On 9 April 2009 the Przemysl Regional Court dismissed a request by the applicant to have his legal capacity restored. The decision contains no reasons, as it appears that the applicant's guardian had not asked for them. Nor did she lodge an appeal against the decision.

37. On 16 January 2012, at the request of the applicant's guardian, he was transferred to the Sośnica Social Care Home.

II. RELEVANT DOMESTIC LAW AND PRACTICE

38. Article 559 of the Code of Civil Procedure ("the CCP") provides as follows:

> "1. A court may quash legal incapacitation if the reasons for which it was ordered cease to exist; the quashing may take place of the court's own motion.
>
> 2. Where the mental state of an incapacitated person improves, a court may change the total incapacitation to partial; where his or her mental state deteriorates, partial incapacitation may be changed to total."

39. On 7 March 2007 the Constitutional Court gave judgment in case no. K 28/05. The judgment was published and entered into force on 17 March 2007. The court decided that Article 559 of the CCP was unconstitutional in so far as it deprived an incapacitated person of the right to lodge a request to have a legal incapacitation order quashed or varied. As regards the consequences of the judgment, the Constitutional Court considered that the most appropriate means of enforcement would be for the legislature to introduce an amendment to the Code. In that connection it welcomed a bill under examination by Parliament which included a relevant amendment. However, it emphasised that the judgments of the Constitutional Court should be enforced not only by the legislature but also by the ordinary courts. In the present case that would mean changing the unconstitutional practice of courts examining cases concerning incapacitation, and allowing proceedings to be brought by individuals deprived of legal capacity. The Constitutional Court stated:

> "From the date of publication of the judgment in the Official Journal the presumption of the constitutionality of Article 559, taken together with Article 545 §§ 1 and 2 of the CCP, in so far as it prevented an incapacitated person from instituting proceedings to quash or vary an incapacitation order, is no longer applicable. The Constitutional Court wishes to emphasise that that is so in consequence of the judgment of the Constitutional Court itself, whether or not legislative changes are eventually introduced. It should therefore be considered that the finding by the Constitutional Court of the unconstitutionality of limiting an incapacitated person's procedural rights allows the courts to interpret the Code of Civil Procedure in accordance with the Constitution. In the context of this judgment

> the opinion expressed by the Supreme Court's resolution of 2004, to the effect that amelioration of the procedural position of incapacitated persons could not be achieved through interpretation of the existing regulations as that would amount to overstepping the boundaries of judicial power, is no longer applicable. Judges, when carrying out their duties, are subject not only to statute but also to the Constitution, which is the highest law in the Republic of Poland and may – and in cases of conflict with existing statutes confirmed by the Constitutional Court shall – be directly applicable."

40. The Law of 9 May 2007, which entered into force on 7 October 2007, amended the CCP. A new paragraph was added; Article 559 § 3 provides as follows:

> "An application to have a legal incapacitation order quashed or varied may also be lodged by the incapacitated person."

41. According to the 1994 Psychiatric Protection Act (*ustawa o ochronie zdrowa psychicznego*) the admission to a psychiatric hospital of a person who has a mental disorder or is mentally disabled and is unable to express his or her consent must be approved by a civil court (section 22 (2)). A court can also decide on the admission of a person who has a mental disorder but who does not consent to treatment in the hospital. A guardian can express consent to admit an adult who is totally incapacitated, but the latter must agree too, unless he is unable to express agreement. In any event, and in particular in the event of disagreement between the patient and the guardian, the question of admission is decided or confirmed by a court (section 22). Admission to the hospital is preceded by a psychiatric examination.

42. Admission to a social care home is governed by section 38 et seq. of the Act. It provides that a person who, on account of mental disorder or mental disability, is unable to take care of himself or herself and cannot be taken care of by somebody else, and does not need hospital treatment, may be placed in a social care home with his or her consent or the consent of his or her guardian. Only if the person concerned or his or her guardian does not consent to the placement must the decision be taken by a court.

43. According to the Ordinance of the Minister of Justice of 22 February 1995, a regional court must supervise the legality of the admission and continuing residence of individuals confined to psychiatric hospitals and social care homes (section 1). However, an obligation to carry out periodic reviews, every six months, of the need for continuing residence applies only to those admitted to psychiatric hospitals (section 2 (3)).

44. The regulations on the functioning of social care homes were also governed by the 1990 Social Assistance Act (*Ustawa o pomocy społecznej*), replaced by the Act of 2004. According to the relevant regulations, the costs of the person's stay in a social care home must not exceed 70% of his or her income or pension. Both Acts provided that placement of a totally incapacitated person in a social care home may only be done with his or her guardian's consent.

45. The relevant international instruments and conclusions on the comparative law are set out in the judgment of *Stanev v. Bulgaria* [GC], no. 36760/06, §§ 72, 73 and 88-95, ECHR 2012.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

46. The applicant complained that his placement in the social care home had constituted an unlawful deprivation of liberty in breach of Article 5 § 1 of the Convention, which reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (e) the lawful detention of persons ... of unsound mind..."

47. The Government contested that argument in general terms.

A. Submissions by the parties

1. The applicant

48. The applicant maintained that his placement in the social care home was in breach of Article 5 § 1 of the Convention. As regards the objective aspect of deprivation of liberty, the applicant submitted that his situation in the Ruda Różaniecka Home had been similar to the conditions examined by the Court in the case of *D.D. v. Lithuania* (no. 13469/06, 14 February 2012). In particular, the applicant could not leave the home freely. Only his guardian could apply to the home's management for a leave of absence for the applicant. The length of the leave of absence was limited and could only be extended exceptionally. In the event of an unauthorised absence the police would be informed. Therefore, the applicant had been entirely under the control of the staff of the social home.

49. From the subjective point of view the applicant's stay in the home should be considered a deprivation of liberty, as he had never consented to be placed in the home and was never asked for his view in that connection. In numerous letters he sent to various authorities and courts over the last ten years the applicant clearly expressed his wish to leave the social care home. On numerous occasions the applicant emphasised that his placement had been illegal and that he wished to return to his family home. The applicant also submitted that he was in conflict with his brother, who had been his guardian since 2001, and that he had not seen him since 2005.

50. The applicant's representative expressed doubts as to whether his placement in the home had been in accordance with domestic law. He submitted that the applicant's brother had submitted a request for the applicant to be placed in the home on 1 December 2001, before he had been officially appointed his brother's guardian, once his brother had become a totally incapacitated person, on 30 January 2002. The applicant's brother did not discuss the matter with the applicant, nor did he apply to a court for approval of his action.

In any event, the applicant's representative considered that his detention had also been illegal in the light of the *Winterwerp* criteria (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33). The applicant did not contest the fact that he had a mental illness; however, he considered that placing him in a home against his will had not been the only way to protect his interests and well-being.

2. The Government

51. The Government did not contest the applicant's submissions as regards the applicant's situation in the social care home and the regulations regarding leave of absence. They submitted in general that given the applicant's state of health the social care home had been the best choice for him in order to protect his well-being. The Government also stated that after several years in the Ruda Różaniecka Home the applicant had been granted long leaves of absence so that he could spend a considerable amount of time with his family.

The Government considered that prior to his placement in the social care home on 11 February 2002 the applicant had been examined by a psychiatrist on 22 December 2001 in the context of the incapacitation proceedings.

52. The Government referred in general to the case of *H.M. v Switzerland* (no. 39187/98, ECHR 2002-II) and considered that the circumstances of that case were similar to the present one. They submitted that in 2009, in the course of the proceedings aimed at changing the incapacitation order, the applicant stated that he had no intention to leave the social care home (see paragraph 32 above).

3. The third party

53. The third party, the Mental Disability Advocacy Centre (MDAC) submitted their comments regarding the situation of individuals deprived of legal capacity. They considered that even total incapacitation should not automatically deprive a person of the right to independent living. An assessment of a person's mental state does not necessarily determine that person's functional capacity. According to the World Health Organisation one in four people in the world will have a mental health problem at some

point in their lives. The MDAC considered that if a person with a disability retained the functional capacity to consent to a treatment any involuntary measure in respect of such person should be considered to be in breach of the Convention.

The MDAC underlined that in many countries, including Poland, mental health services were heavily institutionalised and lacked any alternative in a form of community-based, modern and humane mental health and social care services.

B. Admissibility

1. General principles

54. The Court reiterates that in order to determine whether there has been a deprivation of liberty, the starting point must be the particular situation of the individual concerned. Account must be taken of a whole range of factors arising in a particular case, such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39, and *Ashingdane v. the United Kingdom*, 28 May 1985, § 41, Series A no. 93).

55. The Court further observes that the notion of deprivation of liberty within the meaning of Article 5 § 1 does not only comprise the objective element of a person's confinement in a particular restricted space for a length of time which is more than negligible. A person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement in question (see *Storck v. Germany*, no. 61603/00, § 74, ECHR 2005-V).

56. The Court notes its case-law to the effect that a person could be considered to have been "detained" for the purposes of Article 5 § 1 even during a period when he or she was in an open ward with regular unescorted access to unsecured hospital grounds and the possibility of unescorted leave outside the hospital (see *H.L. v. the United Kingdom*, no. 45508/99, § 92, ECHR 2004-IX).

The Court also had the opportunity to examine placements in social care homes of mentally incapacitated individuals, and to find that it amounted to deprivation of liberty within the meaning of Article 5 § 1 of the Convention (see *Stanev*, cited above, § 132 and *D.D. v. Lithuania*, cited above, § 152).

2. Application of these principles in the present case

57. As concerns the circumstances of the present case, the Court considers that the key factor in determining whether Article 5 § 1 applies to the applicant's situation is whether the care home's management has exercised complete and effective control over his treatment, care, residence and movement from February 2002, when he was admitted to that

institution, to the present day (see paragraph 44 above and *D.D. v. Lithuania*, cited above, § 149). The applicant was not free to leave the institution without the management's permission. Nor could the applicant himself request leave of absence from the home, as such requests had to be made by the applicant's official guardian. Accordingly, and as in the *Stanev* case, although the applicant was able to undertake certain journeys and to spend time with his family the factors mentioned above lead the Court to consider that the applicant was under constant supervision and was not free to leave the home without permission whenever he wished (see *Stanev*, cited above, § 128). Moreover the Court notes that it would appear that the applicant's extended visits to his family were only authorised during the last few years of his stay in the Ruda Różaniecka Home.

Finally, the management of the care home controlled the remaining 30% of the applicant's disability pension. The Court observes in this respect that the facts of the applicant's situation at the home were largely undisputed.

58. The Court next turns to the "subjective" element, which was partly disputed between the parties. The Court reiterates that the fact that the applicant lacked *de jure* legal capacity to decide matters for himself does not necessarily mean that he was *de facto* unable to understand his situation (see *Shtukaturov v. Russia*, no. 44009/05, § 108, ECHR 2008). Whilst accepting that in certain circumstances, due to the severity of his or her incapacity, an individual may be wholly incapable of expressing consent or objection to being confined in an institution for the mentally handicapped or another secure environment, the Court finds that this was not the applicant's case. The documents presented to the Court indicate that the applicant subjectively perceived his compulsory admission to the Ruda Różaniecka Home as a deprivation of liberty. On a number of occasions the applicant requested the courts to start proceedings to quash his legal incapacitation order, submitting that this would allow him to leave the home. For many years he has been consistently complaining about his placement in the care home, to the courts, the prosecutor and the District Family Centre. Also, in his correspondence with the Court between 2007 and 2012 the applicant consistently asked for help to leave the social care home where he had been placed and was being kept against his will. The Court takes note of the Government's argument relating to the applicant's own declaration made when interviewed by the experts on 7 April 2009 (see paragraphs 32 and 52 above). However, the Court would rely on the assessment of this statement made by the experts themselves who disregarded it as being in clear contradiction to the applicant's real intentions, consistently expressed so far (see paragraph 33 above).

In sum, even though the applicant had been deprived of his legal capacity, he was still able to express an opinion on his situation, and in the

present circumstances the Court finds that the applicant had never agreed to being placed in the social care home.

59. Lastly, the Court notes that although the applicant's admission was requested by the applicant's guardian, a private individual, it was implemented by a State-run institution – the care home. Therefore, the responsibility of the authorities for the situation complained of was engaged (see *Shtukaturov*, cited above, § 110, and *D.D. v. Lithuania*, cited above, § 151).

60. In the light of the foregoing the Court concludes that the applicant was "deprived of his liberty" within the meaning of Article 5 § 1 of the Convention from February 2002 and remains so to this day.

61. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

62. The Court accepts that the applicant's detention was "lawful", if this term is construed narrowly, in the sense of formal compatibility of the detention with the procedural and material requirements of the domestic law. It appears that the only condition for the applicant's detention was the consent of his official guardian, his brother, who was also the person who had sought the applicant's placement in the care home (see *Shtukaturov*, cited above, § 112).

63. However, the Court reiterates that the notion of "lawfulness" in the context of Article 5 § 1 (e) has also a broader meaning. "The notion underlying the term ['procedure prescribed by law'] is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary" (see *Winterwerp*, cited above, § 45). In other words, the detention cannot be considered "lawful" within the meaning of Article 5 § 1 if the domestic procedure does not provide sufficient guarantees against arbitrariness.

64. In its above-mentioned *Winterwerp* judgment, the Court set out three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 § 1 (e): except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, the existence of a true mental disorder must be established by a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder.

65. Turning to the present case, the Court notes that it was submitted on behalf of the applicant that his deprivation of liberty had been arbitrary, because he had not been reliably shown to be of unsound mind at the time of his confinement. The Government submitted that the applicant was examined by a psychiatrist about one month before being placed in the home.

66. The Court reiterates that the mental condition of a person must have been established at the time he is deprived of liberty (see *O.H. v. Germany*, no. 4646/08, § 78, 24 November 2011). In the present case a psychiatrist examined the applicant on 22 December 2001 in the course of the incapacitation proceedings, while the decision to place him in the care home was taken one month and seventeen days later, on 8 February 2002.

67. Taking into account the relative brevity of this period, the Court accepts that the authorities could be considered as having based their decision on a recent medical assessment confirming the applicant's mental illness when placing him in the home (compare and contrast; *Stukatorov*, cited above, § 115 where the period amounted to ten months, and *Stanev*, cited above, § 156 where it had been over two years).

68. Nevertheless, the Court considers that the other two requirements of Article 5 § 1 (e) were not satisfied fully in the present case. As regards the need to justify the placement by the severity of the disorder, it notes that the purpose of the 2001 medical report was not to examine whether the applicant's state of health required him to be placed in a home for people with mental disorders, but solely to determine the issue of his legal protection.

69. The Court also notes deficiencies in the assessment of whether the disorders warranting the applicant's confinement still persisted. There is no appearance that the applicant was under the supervision of a psychiatrist and that there had been any periodic psychiatric examinations (see paragraph 43 above). Indeed, no provision was made for such an assessment under the relevant legislation, and the next psychiatric examination of the applicant took place almost eight years later, in April 2009, in the context of proceedings for quashing of the legal incapacitation order (see paragraph 32 above).

70. In view of the above considerations, the Court finds that the regulatory framework for placing in social care homes persons, like the applicant, who have been totally deprived of their legal capacity, did not provide the necessary safeguards at the material time. The Court will revert further to this matter in the context of the applicant's complaint under Article 5 § 4 of the Convention.

71. Having regard to the foregoing, and in particular to the total lack of continued assessment of the applicant's disorder, the Court observes that the applicant's placement in the home was not ordered "in accordance with a procedure prescribed by law" and that his deprivation of liberty was not justified by sub-paragraph (e) of Article 5 § 1.

Furthermore, the Government have not indicated any of the other grounds listed in sub-paragraphs (a) to (f) which might have justified the deprivation of liberty in issue in the present case.

There has therefore been a violation of Article 5 § 1.

II. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

72. The applicant complained that he had not had at his disposal any effective procedure by which he could challenge the necessity for his continued stay in the social care home and obtain his release.

The applicant submitted that he had been admitted to the care home at his guardian's request and without his agreement. The lawfulness of his admission to the home, considered voluntary since it was made by his guardian, had not been reviewed by a court, either upon his admission or at any other time. The domestic law did not impose an obligation to have periodic reviews of the continuing need for him to remain in the social care home. In fact, he was not examined by a psychiatrist during his ten-year stay in the Ruda Różaniecka Home, except once, in 2009 in the course of the proceedings for quashing the legal incapacitation order. Being deprived of his legal capacity, the applicant was prevented from independently pursuing any judicial legal remedy to challenge his continued stay in the social care home.

Article 5 § 4, relied on by the applicant, provides as follows:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

73. The Government did not comment on the admissibility and merits of this complaint.

A. Admissibility

74. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. General principles

75. Among the principles emerging from the Court's case-law on Article 5 § 4 concerning "persons of unsound mind" are the following:

(a) a person detained for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial

character, to bring proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention;

(b) Article 5 § 4 requires the procedure followed to have a judicial character and to afford the individual concerned guarantees appropriate to the kind of deprivation of liberty in question; in order to determine whether proceedings provide adequate guarantees, regard must be had to the particular nature of the circumstances in which they take place;

(c) the judicial proceedings referred to in Article 5 § 4 need not always be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A; see also *Stanev*, cited above, § 171).

76. This is so in cases where the original detention was initially authorised by a judicial authority (see *X v. the United Kingdom*, 5 November 1981, § 52, Series A no. 46), and it is all the more true in the circumstances where the applicant's placement in the care home has been instigated by a private individual, namely the applicant's guardian, and decided upon by the municipal and social care authorities without any involvement by the courts (see *D.D. v. Lithuania*, cited above, § 164).

2. Application of these principles in the present case

77. The Court accepts that the forms of judicial review may vary from one domain to another and may depend on the type of deprivation of liberty at issue. It is not within the province of the Court to inquire into what would be the best or most appropriate system of judicial review in this sphere (see *D.D. v. Lithuania*, cited above, § 165). However, in the present case the courts were not involved in deciding on the applicant's placement in the care home at any moment or in any form. It appears that, in situations such as the applicant's, Polish law does not provide for automatic judicial review of the lawfulness of admitting a person to, and keeping him in, an institution such as a social care home (see paragraphs 41 and 59 above). In addition, a review cannot be initiated by the person concerned if that person has been deprived of his legal capacity. In sum, the applicant was prevented from independently pursuing any legal remedy of a judicial nature to challenge his continued involuntary institutionalisation. This again confirms a lack of an effective regulatory framework in this area (see paragraph 70 above).

78. Moreover, the Court notes that the Government did not make any submissions in respect of this complaint, and did not indicate any procedure that could have given rise to a judicial review of the lawfulness of his placement as required by Article 5 § 4.

79. In the light of the above, the Court holds that there has been a violation of Article 5 § 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

80. The applicant submitted that he had been prevented from directly applying to a court for restoration of his legal capacity, in spite of the Constitutional Court's judgment finding that the relevant provisions had been unconstitutional. The applicant's representative submitted that the judgment of the Constitutional Court of 7 March 2007 had been directly applicable and had created a right for totally incapacitated individuals, such as the applicant, to directly lodge a request for an incapacitation order to be lifted. Nevertheless, all his requests lodged before the entry into force of the new law amending the Code of Civil Procedure had been refused, in disregard of the Constitutional Court's judgment. This constituted a breach of the applicant's right of access to court.

The applicant relied on Article 6 § 1 of the Convention, the relevant parts of which read:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

81. The Government did not comment on the admissibility and merits of this complaint.

A. Admissibility

82. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. General principles

83. The Court reiterates that Article 6 § 1 secures to everyone the right to have any claim relating to his or her civil rights and obligations brought before a court or tribunal (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). This "right to court", of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his or her civil rights is unlawful and complains that no possibility has been afforded to submit that claim to a court meeting the requirements of Article 6 § 1 (see, *inter alia*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X, and *Salontaji--Drobnjak v. Serbia*, no. 36500/05, § 132, 13 October 2009).

84. The right of access to court by its very nature calls for regulation by the State and may be subject to limitations. Nevertheless, the limitations applied must not restrict the access allowed the individual in such a way or to such an extent that the very essence of that right is impaired. A limitation will violate the Convention if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, *Kreuz v. Poland*, no. 28249/95, §§ 52-57, ECHR 2001-VI, and *Liakopoulou v. Greece*, no. 20627/04, §§ 19-25, 24 May 2006).

85. The Court has already held, in respect of partially incapacitated individuals, that given the trends emerging in national legislation and the relevant international instruments, Article 6 § 1 of the Convention must be interpreted as guaranteeing a person, in principle, direct access to a court to seek restoration of his or her legal capacity (see *Stanev*, cited above, § 245). In the latter judgment the Court observed that eighteen of the twenty national legal systems studied in 2011 provided for direct access to the courts for any partially incapacitated individuals wishing to have their status reviewed. In seventeen States such access was open even to those declared fully incapable (see *Stanev*, §§ 95 and 243). This indicates that there is now a trend at European level towards granting legally incapacitated individuals direct access to the courts to seek restoration of their capacity.

2. Application of these principles in the present case

86. The Court observes at the outset that in the present case none of the parties disputed the applicability of Article 6 to the proceedings for restoration of legal capacity. The applicant, who has been totally deprived of legal capacity, complained that between March and October 2007 he was prevented from directly applying to a court to have his capacity restored in spite of the Constitutional Court's judgment. The Court has had occasion to clarify that proceedings for restoration of legal capacity are directly decisive for the determination of "civil rights and obligations" (see *Matter v. Slovakia*, no. 31534/96, § 51, 5 July 1999). Article 6 § 1 of the Convention is therefore applicable in the instant case.

87. It remains to be determined whether the applicant's access to court was restricted, and if so whether the restriction pursued a legitimate aim and was proportionate to it.

88. Turning to the facts of the instant case, the Court firstly observes that it is not called here to decide whether under the Convention the right of partially incapacitated persons to have a direct access to court, established in the *Stanev* judgment, should be extended to persons totally incapacitated. The question under consideration arose because the Polish Constitutional Court declared unconstitutional the domestic provision that barred persons deprived of their legal capacity from directly instituting proceedings to have

a legal incapacitation order varied. The Constitutional Court's judgment of 7 March 2007 entered into force ten days later.

The Constitutional Court explicitly addressed the lower courts, reiterating that as a consequence of its own judgment the domestic law should be interpreted as allowing incapacitated individuals access to court. That should be so with or without the relevant amendment to the CCP introduced by the legislator.

In spite of this clear indication, the applicant's requests to have his legal capacity restored were rejected on 11 May, 7 August, and 17 September 2007 as not provided by law (see paragraphs 26 and 27 above). On the last occasion the District Court referred to the Constitutional Court's judgment, but gave no explanation as to why it had not applied it. The Court notes that the Government also failed to provide any explanation in this respect.

89. The Court reiterates that the right to ask a court to review a declaration of incapacity is one of the most important rights for the person concerned, since such a procedure, once initiated, will be decisive for the exercise of all the rights and freedoms affected by the declaration of incapacity, not least in relation to any restrictions that may be placed on the person's liberty (see *Shtukaturov*, cited above, § 71, and *Stanev*, cited above, § 241).

90. The Court considers that the Constitutional Court's judgment, which explicitly urged lower courts not to limit the procedural rights of incapacitated individuals, was legally binding notwithstanding the unfinished legislative process and the domestic court's reluctance to apply directly that judgment. In these circumstances, the applicant was deprived of a clear, practical and effective opportunity to have access to court in respect of his request to restore his legal capacity. All in all, the system was therefore not sufficiently coherent and clear (see *De Geouffre de la Pradelle v. France*, 16 December 1992, § 34, Series A no. 253-B). Also, under those circumstances, refusing the applicant's requests for the incapacitation order to be changed on at least three occasions between March and October 2007 cannot be seen as justified enforcement of a legitimate procedural limitation on the applicant's right of access to court (see *Angel Angelov v. Bulgaria*, no. 51343/99, § 38, 15 February 2007).

The Court takes note that subsequently the relevant provision of the CCP was amended and in 2009 the applicant was finally able to initiate proceedings aimed at varying his incapacitation order (see paragraphs 30 and 40 above). However, this positive development cannot alter the above conclusion, which relates to the period prior to entry into force of the above-mentioned amendment.

91. The Court therefore concludes that there has been a violation of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

92. The applicant further complained under Article 8 of the Convention in that placing him in the social care home for an indefinite period of time constituted an interference with his right to respect for his private and family life. The Government did not comment on the applicant's complaint.

93. The Court notes that his complaint is linked to the ones examined above and must therefore likewise be declared admissible.

94. However, having regard to the reasons which led the Court to find a violation of Articles 5 §§ 1 and 4 of the Convention (see paragraphs 70 and 78 above), the Court finds that no separate issue arises under Article 8 of the Convention, and this complaint does not require a separate examination (see *Stanev*, cited above, § 252).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

95. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

96. The applicant claimed EUR 10,000 in respect of non-pecuniary damage.

97. The Government contested this claim as excessive.

98. The Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

99. The applicant, who was represented by lawyers from the Helsinki Foundation for Human Rights, did not make any claim for costs and expenses.

C. Default interest rate

100. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention;

4. *Holds* that there has been a violation of Article 6 § 1 of the Convention;

5. *Holds* that there is no need to examine separately the complaint under Article 8 of the Convention;

6. *Holds*

(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable on the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 16 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

David Thór Björgvinsson
President

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF SHTUKATUROV v. RUSSIA

(Application no. 44009/05)

JUDGMENT

STRASBOURG

27 March 2008

FINAL

27/06/2008

In the case of Shtukaturov v. Russia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President*,
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Dean Spielmann,
Giorgio Malinverni,
George Nicolaou, *judges*,
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 6 March 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 44009/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Pavel Vladimirovich Shtukaturov ("the applicant"), on 10 December 2005.

2. The applicant, who was granted legal aid, was represented by Mr D. Bartenev, a lawyer practising in St Petersburg. The Russian Government ("the Government") were represented by Mr P. Laptev, the former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged that, by depriving him of his legal capacity without his participation and knowledge, the domestic courts had breached his rights under Articles 6 and 8 of the Convention. He further alleged that his detention in a psychiatric hospital infringed Articles 3 and 5 of the Convention.

4. On 9 March 2006 the Court decided that an interim measure should be indicated to the Government under Rule 39 of the Rules of Court. The Government was requested to allow the applicant to meet his lawyer in hospital in order to discuss the present case before the Court.

5. On 23 May 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1982 and lives in St Petersburg.

7. Since 2002 the applicant has suffered from a mental disorder. On several occasions he was placed in Hospital no. 6 in St Petersburg for in-patient psychiatric treatment. In 2003 he obtained the status of a disabled person. The applicant lived with his mother; he did not work and received a disability pension.

8. In May 2003 the applicant's grandmother died. The applicant inherited a flat from her in St Petersburg and a house with a plot of land in the Leningrad region.

9. On 27 July 2004 the applicant was placed in Hospital no. 6 for in-patient treatment.

A. Incapacitation proceedings

10. On 3 August 2004 the applicant's mother lodged an application with the Vasileostrovskiy District Court of St Petersburg, seeking to deprive the applicant of legal capacity. She claimed that her son was inert and passive, that he rarely left the house, that he spent his days sitting on a couch, and that sometimes he behaved aggressively. She indicated that her son had recently inherited property from his grandmother; however, he had not taken the necessary steps to register his property rights. This indicated that he was incapable of leading an independent social life and thus needed a guardian. It appears that the applicant was not formally notified about the proceedings that had been brought in respect of him.

11. On 10 August 2004 the judge invited the applicant and his mother to court to discuss the case. However, there is no evidence that the invitation ever reached the applicant. The court also requested the applicant's medical records from Hospital no. 6.

12. On 12 October 2004 the judge of the Vasileostrovskiy District Court of St Petersburg commissioned a psychiatric expert examination of the applicant's mental health. The examination was assigned to the doctors of Hospital no. 6, where the applicant had been undergoing treatment. The judge formulated two questions to the doctors: firstly, whether the applicant suffered from any mental illness; and, secondly, whether he was able to understand his actions and control them.

13. On 12 November 2004 an expert team from Hospital no. 6 examined the applicant and his medical records. The report prepared by the expert team may be summarised as follows. After graduating from college, the applicant worked for a short time as an interpreter. However, some time later he became aggressive, unsympathetic and secluded, and prone to

empty philosophising. He abandoned his job, started attending religious meetings and visiting Buddhist shrines, lost most of his friends, neglected his personal hygiene and became very negative towards his relatives. He suffered from anorexia and was hospitalised because of this.

14. In August 2002 he was placed in a psychiatric hospital for the first time with a diagnosis of "simple schizophrenia". In April 2003 he was discharged from hospital; however, later that same month he was admitted again because of his aggressive behaviour towards his mother. In the following months he was placed in hospital two further times. In April 2004 he was discharged. However, he "continued to live in an antisocial way". He did not work, loitered in the flat, prohibited his mother from preparing him food or from leaving the flat or moving around, and threatened her. She was so afraid of the applicant that she once spent a night at friends of hers and had to complain to the police about her son.

15. The final part of the report concerned the applicant's mental condition at the time of his examination. The doctors noted that the applicant's social maladjustment and autism had worsened. They noted, *inter alia*, that "the applicant did not understand why he had been subjected to a [forensic] psychiatric examination". The doctors further stated that the applicant's "intellectual and mnemonic abilities were without any impairment". However, his behaviour was characterised by several typical features of schizophrenia, such as "formality of contacts, structural thought disorder ..., lack of judgment, emotional emasculation, coldness, reduced energy potential". The expert team concluded that the applicant was suffering from "simple schizophrenia with a manifest emotional and volitional defect" and that he could not understand his actions or control them.

16. On 28 December 2004 Judge A. of the Vasileostrovskiy District Court held a hearing on the merits of the case. The applicant was neither notified nor present at that hearing. The applicant's mother was notified but did not appear. She informed the court that she maintained her initial request and asked the court to examine the case in her absence. The case was examined in the presence of the district prosecutor. A representative of Hospital no. 6 was also present. The representative of the hospital, described in the judgment as "an interested party", asked the court to declare the applicant incapable. It appears that the prosecutor did not make any remarks on the substance of the case. The hearing lasted ten minutes. As a result, the judge declared the applicant legally incapable, referring to the experts' findings.

17. Since no appeal was lodged against the judgment of 28 December 2004 within the ten-day time-limit provided by law, the judgment became final on 11 January 2005.

18. On 14 January 2005 the applicant's mother received a copy of the full text of the judgment of 28 December 2004. Subsequently, on an

unspecified date, she was appointed the applicant's guardian and was authorised by law to act on his behalf in all matters.

19. According to the applicant, he was not sent a copy of the judgment and only became aware of its existence by chance in November 2005, when he found a copy of the judgment among his mother's papers at home.

B. The first meeting with the lawyer

20. On 2 November 2005 the applicant contacted Mr Bartenev, a lawyer with the Mental Disability Advocacy Centre ("the lawyer"), and explained the situation. The applicant and the lawyer met for two hours and discussed the case. According to the lawyer, who holds a degree in medicine from the Petrozavodsk State University, during the meeting the applicant was in an adequate state of mind and fully able to understand complex legal issues and give relevant instructions. On the same day the lawyer helped the applicant draft a request to restore the time-limits for lodging an appeal against the judgment of 28 December 2004.

C. Confinement in the psychiatric hospital in 2005

21. On 4 November 2005 the applicant was placed in Hospital no. 6. Admission to hospital was requested by the applicant's mother, as his guardian; in terms of domestic law it was therefore voluntary and did not require approval by a court (see paragraph 56 below). The applicant claimed, however, that he had been confined to hospital against his will.

22. On 9, 10, 12 and 15 November 2005 the lawyer attempted to meet his client in hospital. The applicant, in turn, requested the hospital administration to allow him to see his lawyer in private. However, Dr Sh., the Director of the hospital, refused permission. He referred to the applicant's mental condition and the fact that the applicant was legally incapable and therefore could only act through his guardian.

23. On 18 November 2005 the lawyer had a telephone conversation with the applicant. Following that conversation the applicant signed a form authorising the lawyer to lodge an application with the European Court of Human Rights in connection with the events described above. That form was then transmitted to the lawyer through a relative of another patient in Hospital no. 6.

24. The lawyer reiterated his request for a meeting. He specified that he was representing the applicant before the European Court and enclosed a copy of the power of attorney. However, the hospital administration refused permission on the ground that the applicant did not have legal capacity. The applicant's guardian also refused to take any action on the applicant's behalf.

25. From December 2005 the applicant was prohibited from having any contact with the outside world; he was not allowed to keep any writing equipment or use a telephone. The applicant's lawyer produced a written statement by Mr S., another former patient in Hospital no. 6. Mr S. met the applicant in January 2006 while Mr S. was in the hospital in connection with attempted suicide. Mr S. and the applicant shared the same room. In the words of Mr S., the applicant was someone friendly and quiet. However, he was treated with strong medicines, such as Haloperidol and Chlorpromazine. The hospital staff prevented him from meeting his lawyer or his friends. He was not allowed to write letters; his diary was confiscated. According to the applicant, he once attempted to escape from the hospital, only to be captured by the staff members who secured him to his bunk bed.

D. Applications for release

26. On 1 December 2005 the lawyer complained to the guardianship office of Municipal District no. 11 of St Petersburg about the actions of the applicant's official guardian, namely his mother. He claimed that the applicant had been placed in the hospital against his will and without medical necessity. The lawyer also complained that the hospital administration was preventing him from meeting the applicant.

27. On 2 December 2005 the applicant himself wrote a letter in similar terms to the district prosecutor. He indicated, in particular, that he was prevented from meeting his lawyer, that his hospitalisation had not been voluntary, and that his mother had placed him in the hospital in order to appropriate his flat.

28. On 7 December 2005 the applicant wrote a letter to the Chief Doctor of Hospital no. 6, asking for his immediate discharge. He claimed that he needed some specialist dental assistance which could not be provided within the psychiatric hospital. In the following weeks, the applicant and his lawyer wrote several letters to the guardianship authority, district prosecutor, public health authority, and so on, calling for the applicant's immediate discharge from the psychiatric hospital.

29. On 14 December 2005 the district prosecutor advised the lawyer that the applicant had been placed in the hospital at the request of his official guardian, and that all questions related to his eventual release should be decided by her.

30. On 16 January 2006 the guardianship office informed the lawyer that the actions of the applicant's guardian had been lawful. According to the guardianship office, on 12 January 2006 the applicant was examined by a dentist. As follows from this letter, the representatives of the guardianship office did not meet the applicant and relied solely on information obtained from the hospital and from his guardian – the applicant's mother.

E. Request under Rule 39 of the Rules of Court

31. In a letter of 10 December 2005, the lawyer requested the Court to indicate to the Government interim measures under Rule 39 of the Rules of Court. In particular, he requested the Court to oblige the Russian authorities to grant him access to the applicant with a view to assisting him in the proceedings and preparing his application to the European Court.

32. On 15 December 2005 the President of the Chamber decided not to take any decision under Rule 39 until more information was received. The parties were invited to produce additional information and comments regarding the subject matter of the case.

33. Based on the information received from the parties, on 6 March 2006 the President of the Chamber decided to indicate to the Government, under Rule 39 of the Rules of Court, interim measures desirable in the interests of the proper conduct of the proceedings before the Court. These measures were as follows: the Government was directed to organise, by appropriate means, a meeting between the applicant and his lawyer. That meeting could take place in the presence of the personnel of the hospital where the applicant was detained, but outside their hearing. The lawyer was to be provided with the necessary time and facilities to consult with the applicant and help him in preparing the application before the European Court. The Government was also requested not to prevent the lawyer from having such a meeting with his client at regular intervals in future. The lawyer, in turn, was obliged to be cooperative and comply with reasonable requirements of hospital regulations.

34. However, the applicant's lawyer was not given access to the applicant. The Chief Doctor of Hospital no. 6 informed the lawyer that he did not regard the Court's decision on interim measures as binding. Furthermore, the applicant's mother objected to the meeting between the applicant and the lawyer.

35. The applicant's lawyer challenged that refusal before the St Petersburg Smolninskiy District Court, referring to the interim measure indicated by the European Court of Human Rights. On 28 March 2006 the court upheld his claim, declaring the ban on meetings between the applicant and his lawyer as unlawful.

36. On 30 March 2006 the former Representative of the Russian Federation at the European Court of Human Rights, Mr P. Laptev, wrote a letter to the President of the Vasileostrovskiy District Court of St Petersburg, informing him of the interim measures applied by the Court in the present case.

37. On 6 April 2006 the Vasileostrovskiy District Court examined, on the applicant's motion, the Court's request under Rule 39 of the Rules of Court and held that the lawyer should be allowed to meet the applicant.

38. The hospital and the applicant's mother appealed against that decision. On 26 April 2006 the St Petersburg City Court examined their appeal and quashed the lower court's judgment of 6 April 2006. The City Court held, in particular, that the District Court had no competence to examine the request lodged by the Representative of the Russian Federation. The City Court further noted that the applicant's official guardian – his mother – had not applied to the court with any requests of this kind. The City Court finally held as follows:

> "... The applicant's complaint [to the European Court] was lodged against the Russian Federation ... The request by the European Court was addressed to the authorities of the Russian Federation. The Russian Federation as a special subject of international relations enjoys immunity from foreign jurisdiction; it is not bound by coercive measures applied by foreign courts and cannot be subjected to such measures ... without its consent. The [domestic] courts have no right to undertake on behalf of the Russian Federation an obligation to comply with the preliminary measures ... This can be decided by the executive ... by way of an administrative decision."

39. On 16 May 2006 the St Petersburg City Court examined the appeal against the judgment of 28 March 2006 lodged by the Chief Doctor of Hospital no. 6. The City Court held that "under Rule 34 of the Rules of Court, the authority of an advocate [representing the applicant before the European Court] should be formalised in accordance with the legislation of the home country". The City Court further held that under Russian law the lawyer could not act on behalf of the client in the absence of an agreement between them. However, no such agreement had been concluded between Mr Bartenev (the lawyer) and the applicant's mother – the person who had the right to act on behalf of the applicant in all legal transactions. As a result, the City Court concluded that the lawyer had no authority to act on behalf of the applicant, and his complaint should be dismissed. The judgment of 28 March 2006 by the Smolninskiy District Court was thus reversed.

40. On the same day the applicant was discharged from hospital and met with his lawyer.

F. Appeals against the judgment of 28 December 2004

41. On 20 November 2005 the applicant's lawyer brought an appeal against the decision of 28 December 2004. He also requested the court to extend the time-limit for lodging the appeal, claiming that the applicant had not been aware of the proceedings in which he had been declared incapable. The appeal was lodged through the registry of the Vasileostrovskiy District Court.

42. On 22 December 2005 Judge A. of the Vasileostrovskiy District Court returned the appeal to the applicant's lawyer without examination.

She indicated that the applicant had no legal capacity to act and, therefore, could only lodge an appeal or any other request through his guardian.

43. On 23 May 2006, after the applicant's discharge from the psychiatric hospital, the applicant's lawyer appealed against the decision of 22 December 2005. By a ruling of 5 July 2006, the St Petersburg City Court upheld the decision of 22 December 2005. The City Court held that the Code of Civil Procedure did not allow for the lodging of applications for restoration of procedural terms by legally incapable persons.

44. In the following months the applicant's lawyer introduced two appeals for supervisory review, but to no avail.

45. According to the applicant's lawyer, in 2007 the applicant was admitted to Hospital no. 6 again, at the request of his mother.

II. RELEVANT DOMESTIC LAW

A. Legal capacity

46. Under Article 21 of the Civil Code of the Russian Federation of 1994, any individual aged 18 or over has, as a rule, full legal capacity (*дееспособность*), which is defined as "the ability to acquire and enjoy civil rights, create and fulfil civil obligations by his own acts". Under Article 22 of the Civil Code legal capacity can be limited, but only on the grounds defined by law and within a procedure prescribed by law.

47. Under Article 29 of the Civil Code, a person who cannot understand or control his or her actions as a result of a mental illness may be declared legally incapable by the court and placed in the care of a guardian (*опека*). All legal transactions on behalf of the incapacitated person are concluded by his guardian. The incapacitated person can be declared fully capable if the grounds on which he or she was declared incapable cease to exist.

48. Article 30 of the Civil Code provides for partial limitation of legal capacity. If a person's addiction to alcohol or drugs is creating serious financial difficulties for his family, he can be declared partially incapable. That means that he is unable to conclude large-scale transactions. He can, however, dispose of his salary or pension and make small transactions, under the control of his guardian.

49. Article 135 § 1 of the Code of Civil Procedure of 2002 establishes that a civil claim lodged by a legally incapable person should be returned to him without examination.

50. Article 281 of the same Code establishes the procedure for declaring a person incapable. A request for incapacitation of a mentally ill person can be brought before a first-instance court by a family member of the person concerned. On receipt of the request, the judge must commission a forensic psychiatric examination of the person concerned.

51. Article 284 of the Code provides that the incapacitation request should be examined in the presence of the person concerned, the plaintiff, the prosecutor and a representative of the guardianship office (*орган опеки и попечительства*). The person whose legal capacity is being examined by the court is to be summoned to the court hearing, unless his state of health prohibits him from attending it.

52. Article 289 of the Code provides that full legal capacity can be restored by the court at the request of the guardian, a close relative, the guardianship office or the psychiatric hospital, but not of the person declared incapable himself.

B. Confinement to a psychiatric hospital

53. The Psychiatric Assistance Act of 2 July 1992, as amended ("the Act"), provides that any recourse to psychiatric aid should be voluntary. However, a person declared fully incapable may be subjected to psychiatric treatment at the request or with the consent of his official guardian (section 4 of the Act).

54. Section 5(3) of the Act provides that the rights and freedoms of persons with mental illnesses cannot be limited solely on the ground of their diagnosis, or the fact that they have been subjected to treatment in a psychiatric hospital.

55. Under section 5 of the Act, a patient in a psychiatric hospital can have a legal representative. However, pursuant to point 2 of section 7, the interests of a person declared fully incapable are represented by his official guardian.

56. Section 28(3) and (4) of the Act ("Grounds for hospitalisation") provides that a person declared incapable can be subjected to hospitalisation in a psychiatric hospital at the request of his guardian. This hospitalisation is regarded as voluntary and does not require approval by the court, as opposed to non-voluntary hospitalisation (sections 39 and 33 of the Act).

57. Section 37(2) of the Act establishes the list of rights of a patient in a psychiatric hospital. In particular, the patient has the right to communicate with his lawyer without censorship. However, under section 37(3) the doctor may limit the applicant's rights to correspond with other persons, have telephone conversations and meet visitors.

58. Section 47 of the Act provides that doctors' actions can be appealed against before the court.

III. RELEVANT INTERNATIONAL DOCUMENTS

59. On 23 February 1999 the Committee of Ministers of the Council of Europe adopted Recommendation No. R (99) 4 on principles concerning the legal protection of incapable adults. The relevant provisions read as follows.

Principle 2 – Flexibility in legal response

"1. The measures of protection and other legal arrangements available for the protection of the personal and economic interests of incapable adults should be sufficient, in scope or flexibility, to enable a suitable legal response to be made to different degrees of incapacity and various situations.

...

4. The range of measures of protection should include, in appropriate cases, those which do not restrict the legal capacity of the person concerned.

..."

Principle 3 – Maximum preservation of capacity

"1. The legislative framework should, so far as possible, recognise that different degrees of incapacity may exist and that incapacity may vary from time to time. Accordingly, a measure of protection should not result automatically in a complete removal of legal capacity. However, a restriction of legal capacity should be possible where it is shown to be necessary for the protection of the person concerned.

2. In particular, a measure of protection should not automatically deprive the person concerned of the right to vote, or to make a will, or to consent or refuse consent to any intervention in the health field, or to make other decisions of a personal character at any time when his or her capacity permits him or her to do so.

..."

Principle 6 – Proportionality

"1. Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

2. The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention."

Principle 13 – Right to be heard in person

"The person concerned should have the right to be heard in person in any proceedings which could affect his or her legal capacity."

Principle 14 – Duration, review and appeal

"1. Measures of protection should, whenever possible and appropriate, be of limited duration. Consideration should be given to the institution of periodical reviews.

...

3. There should be adequate rights of appeal."

THE LAW

60. The Court notes that the applicant submitted several complaints under different Convention provisions. Those complaints relate to his incapacitation, placement in a psychiatric hospital, inability to obtain a review of his status, inability to meet with his lawyer, interference with his correspondence, involuntary medical treatment, and so on. The Court will examine these complaints in chronological sequence. Thus, the Court will start with the complaints related to the incapacitation proceedings – the episode which gave rise to all the subsequent events – and then examine the applicant's hospitalisation and the complaints stemming from it.

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION AS REGARDS THE INCAPACITATION PROCEEDINGS

61. The applicant complained that he had been deprived of his legal capacity as a result of proceedings which had not been "fair" within the meaning of Article 6 of the Convention. The relevant parts of Article 6 § 1 provide as follows:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The parties' submissions

62. The Government contended that the proceedings before the Vasileostrovskiy District Court had been fair. Under Russian law, a request to declare a person legally incapable may be lodged by a close relative of the person suffering from a mental disorder. In the present case it was Ms Shtukaturova, the applicant's mother, who had filed such a request. The court ordered a psychiatric examination of the applicant. Having examined the applicant, the doctors concluded that he was unable to understand or control his actions. Given the applicant's medical condition, the court decided not to summon him to the hearing. However, in compliance with Article 284 of the Code of Civil Procedure, a prosecutor and a representative of the psychiatric hospital were present at the hearing. Therefore, the applicant's procedural rights were not breached.

63. The applicant maintained that the proceedings before the first-instance court had been unfair. The judge had not explained why she changed her mind and considered that the applicant's personal presence had not been necessary (see paragraphs 11 et seq. above). The court had decided on the applicant's incapacity without hearing or seeing him, or obtaining any submissions from him. The court based its decision on the written medical report, which the applicant had not seen and had had no opportunity to challenge. The prosecutor who participated in the hearing on

28 December 2004 also supported the application, without having seen the applicant prior to the hearing. The Vasileostrovskiy District Court also failed to question the applicant's mother, who had lodged the application for incapacity. In sum, the court failed to take even minimal measures in order to ensure an objective assessment of the applicant's mental condition. Further, the applicant maintained that he was unable to challenge the judgment of 28 December 2004 because, under Russian law, he lacked standing to lodge an appeal.

B. Admissibility

64. The parties did not dispute the applicability of Article 6, under its "civil" head, to the proceedings in issue, and the Court does not see any reason to hold otherwise (see *Winterwerp v. the Netherlands*, 24 October 1979, § 73, Series A no. 33).

65. The Court notes that the applicant's complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

C. Merits

1. General principles

66. In most of the previous cases before the Court involving "persons of unsound mind", the domestic proceedings concerned their detention and were thus examined under Article 5 of the Convention. However, the Court has consistently held that the "procedural" guarantees under Article 5 §§ 1 and 4 are broadly similar to those under Article 6 § 1 of the Convention (see, for instance, *Winterwerp*, cited above, § 60; *Sanchez-Reisse v. Switzerland*, 21 October 1986, Series A no. 107; *Kampanis v. Greece*, 13 July 1995, Series A no. 318-B; and *Ilijkov v. Bulgaria*, no. 33977/96, § 103, 26 July 2001). Therefore, in deciding whether the incapacitation proceedings in the present case were "fair", the Court will have regard, *mutatis mutandis*, to its case-law under Article 5 § 1 (e) and Article 5 § 4 of the Convention.

67. The Court observes that in deciding whether an individual should be detained as a "person of unsound mind", the national authorities are to be recognised as having a certain margin of appreciation. It is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities (see *Luberti v. Italy*, 23 February 1984, § 27, Series A no. 75).

68. In the context of Article 6 § 1 of the Convention, the Court assumes that in cases involving a mentally ill person the domestic courts should also enjoy a certain margin of appreciation. Thus, for example, they can make the relevant procedural arrangements in order to secure the proper administration of justice, protection of the health of the person concerned, and so on. However, such measures should not affect the very essence of the applicant's right to a fair trial as guaranteed by Article 6 of the Convention. In assessing whether or not a particular measure, such as exclusion of the applicant from a hearing, was necessary, the Court will take into account all relevant factors (such as the nature and complexity of the issue before the domestic courts, what was at stake for the applicant, whether his appearance in person represented any threat to others or to himself, and so on).

2. Application to the present case

69. It is not disputed that the applicant was unaware of the request for incapacitation made by his mother. Nothing suggests that the court notified the applicant *proprio motu* about the proceedings (see paragraph 10 above). Further, as follows from the report of 12 November 2004 (see paragraph 13 above), the applicant did not realise that he was being subjected to a forensic psychiatric examination. The Court concludes that the applicant was unable to participate in the proceedings before the Vasileostrovskiy District Court in any form. It remains to be ascertained whether, in the circumstances, this was compatible with Article 6 of the Convention.

70. The Government argued that the decisions taken by the national judge had been lawful in domestic terms. However, the crux of the complaint is not the domestic legality but the "fairness" of the proceedings from the standpoint of the Convention and the Court's case-law.

71. In a number of previous cases (concerning compulsory confinement in hospital) the Court confirmed that a person of unsound mind must be allowed to be heard either in person or, where necessary, through some form of representation – see, for example, *Winterwerp*, cited above, § 60. In *Winterwerp*, the applicant's freedom was at stake. However, in the present case the outcome of the proceedings was at least equally important for the applicant: his personal autonomy in almost all areas of his life was in issue, including the eventual limitation of his liberty.

72. Further, the Court notes that the applicant played a double role in the proceedings: he was an interested party, and, at the same time, the main object of the court's examination. His participation was therefore necessary not only to enable him to present his own case, but also to allow the judge to form her personal opinion about the applicant's mental capacity (see, *mutatis mutandis*, *Kovalev v. Russia*, no. 78145/01, §§ 35-37, 10 May 2007).

73. The applicant was indeed an individual with a history of psychiatric problems. From the materials of the case, however, it appears that despite

his mental illness he had been a relatively autonomous person. In such circumstances it was indispensable for the judge to have at least a brief visual contact with the applicant, and preferably to question him. The Court concludes that the decision of the judge to decide the case on the basis of documentary evidence, without seeing or hearing the applicant, was unreasonable and in breach of the principle of adversarial proceedings enshrined in Article 6 § 1 (see *Mantovanelli v. France*, 18 March 1997, § 35, *Reports of Judgments and Decisions* 1997-II).

74. The Court has examined the Government's argument that a representative of the hospital and the district prosecutor attended the hearing on the merits. However, in the Court's opinion, their presence did not make the proceedings truly adversarial. The representative of the hospital acted on behalf of an institution which had prepared the report and was referred to in the judgment as an "interested party". The Government did not explain the role of the prosecutor in the proceedings. In any event, from the record of the hearing it appears that both the prosecutor and the hospital representative remained passive during the hearing, which, moreover, lasted only ten minutes.

75. Finally, the Court observes that it must always assess the proceedings as a whole, including the decision of the appellate court (see *C.G. v. the United Kingdom*, no. 43373/98, § 35, 19 December 2001). The Court notes that in the present case the applicant's appeal was disallowed without examination on the ground that the applicant had no legal capacity to act before the courts (see paragraph 41 above). Regardless of whether or not the rejection of his appeal without examination was acceptable under the Convention, the Court merely notes that the proceedings ended with the first-instance court judgment of 28 December 2004.

76. The Court concludes that in the circumstances of the present case the proceedings before the Vasileostrovskiy District Court were not fair. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AS REGARDS THE INCAPACITATION OF THE APPLICANT

77. The applicant complained that, by depriving him of his legal capacity, the authorities had breached Article 8 of the Convention. Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The Government

78. The Government admitted that the judgment depriving the applicant of his legal capacity entailed a number of limitations in the area of private life. However, they claimed that the applicant's rights under Article 8 had not been breached. Their submissions can be summarised as follows. Firstly, the measure adopted by the court was aimed at the protection of the interests and health of other persons. Further, the decision was taken in conformity with the substantive law, namely on the basis of Article 29 of the Civil Code of the Russian Federation.

2. The applicant

79. The applicant insisted in his initial complaint that Article 8 had been breached in his case. He maintained that Article 29 of the Civil Code, which had served as a basis for depriving him of legal capacity, was not formulated with sufficient precision. The law permitted the deprivation of an individual's legal capacity if that person "could not understand the meaning of his actions or control them". However, the law did not explain what kind of "actions" the applicant should understand or control, or how complex these actions should be. In other words, there was no legal test to establish the severity of the reduction in cognitive capacity which called for full deprivation of legal capacity. The law was clearly deficient in this respect; it failed to protect mentally ill people from arbitrary interference with their right to private life. Therefore, the interference with his private life had not been lawful.

80. The applicant further argued that the interference did not pursue a legitimate aim. The authorities did not seek to protect national security, public safety or the economic well-being of the country, or to prevent disorder or crime. As to the protection of the health and morals of others, there was no indication that the applicant represented a threat to the rights of third parties. Finally, with regard to the applicant himself, the Government did not suggest that the incapacitation had had a therapeutic effect on the applicant. Nor was there any evidence that the authorities had sought to deprive the applicant of his capacity because he would otherwise have carried out actions which would result in a deterioration of his health. With regard to his own pecuniary interests, the protection of a person's own rights is not a ground listed in Article 8 § 2, and it cannot therefore serve as a justification for interfering with a person's rights as protected under Article 8 § 1 of the Convention. In sum, the interference with his private life did not pursue any of the legitimate aims listed in Article 8 § 2 of the Convention.

81. Finally, the applicant submitted that the interference had not been "necessary in a democratic society", as there had been no need to restrict his legal capacity. The Vasileostrovskiy District Court did not adduce any reason for its decision: there was no indication that the applicant had had problems managing his property in the past, was unable to work, abused his employment, and so on. The medical report was not corroborated by any evidence, and the court did not assess the applicant's past behaviour in any of the areas where it restricted his legal capacity.

82. Even if the Vasileostrovskiy District Court was satisfied that the applicant could not act in a certain area of life, it could have restricted his capacity in that specific area, without going further. However, Russian law, unlike the legislation in many other European countries, did not allow a partial limitation of one's legal capacity, but provided only for full incapacitation. The restricted capacity option could be used solely for those who abused drugs or alcohol. In such circumstances the court should have refused to apply a measure as drastic as full incapacitation. Instead, the court preferred to strip bluntly the applicant of all of his decision-making powers for an unlimited period of time.

B. Admissibility

83. The parties agreed that the judgment of 28 December 2004 amounted to an interference in the applicant's private life. The Court observes that Article 8 "secure[s] to the individual a sphere within which he can freely pursue the development and fulfilment of his personality" (see *Brüggemann and Scheuten v. Germany*, no. 6959/75, Commission's report of 12 July 1977, Decisions and Reports 10, p. 115, § 55). The judgment of 28 December 2004 deprived the applicant of his capacity to act independently in almost all areas of life: he was no longer able to sell or buy any property on his own, to work, to travel, to choose his place of residence, to join associations, to marry, and so on. Even his liberty could henceforth have been limited without his consent and without any judicial supervision. In sum, the Court concludes that the deprivation of legal capacity amounted to an interference with the private life of the applicant (see *Matter v. Slovakia*, no. 31534/96, § 68, 5 July 1999).

84. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

85. The Court reiterates that any interference with an individual's right to respect for his private life will constitute a breach of Article 8 unless it

was "in accordance with the law", pursued a legitimate aim or aims under paragraph 2 and was "necessary in a democratic society" in the sense that it was proportionate to the aims sought.

86. The Court took note of the applicant's contention that the measure applied to him had not been lawful and had not pursued any legitimate aim. However, in the Court's opinion it is not necessary to examine these aspects of the case, since the decision to incapacitate the applicant was in any event disproportionate to the legitimate aim invoked by the Government for the reasons set out below.

1. General principles

87. The applicant claimed that full incapacitation had been an inadequate response to the problems he experienced. Indeed, under Article 8 the authorities must strike a fair balance between the interests of a person of unsound mind and the other legitimate interests concerned. However, as a rule, in such a complex matter as determining somebody's mental capacity, the authorities should enjoy a wide margin of appreciation. This is mostly explained by the fact that the national authorities have the benefit of direct contact with the persons concerned and are therefore particularly well placed to determine such issues. The task of the Court is rather to review under the Convention the decisions taken by the national authorities in the exercise of their powers in this respect (see, *mutatis mutandis*, *Bronda v. Italy*, 9 June 1998, § 59, *Reports* 1998-IV).

88. At the same time, the margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake (see *Elsholz v. Germany* [GC], no. 25735/94, § 49, ECHR 2000-VIII). A stricter scrutiny is called for in respect of very serious limitations in the sphere of private life.

89. Further, the Court reiterates that, whilst Article 8 of the Convention contains no explicit procedural requirements, "the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8" (see *Görgülü v. Germany*, no. 74969/01, § 52, 26 February 2004). The extent of the State's margin of appreciation thus depends on the quality of the decision-making process. If the procedure was seriously deficient in some respect, the conclusions of the domestic authorities are more open to criticism (see, *mutatis mutandis*, *Sahin v. Germany*, no. 30943/96, §§ 46 et seq., 11 October 2001).

2. Application to the present case

90. Firstly, the Court notes that the interference with the applicant's private life was very serious. As a result of his incapacitation, the applicant became fully dependent on his official guardian in almost all areas of his life. Furthermore, "full incapacitation" was applied for an indefinite period

and could not, as the applicant's case shows, be challenged other than through the guardian, who herself opposed any attempts to discontinue the measure (see also paragraph 52 above).

91. Secondly, the Court has already found that the proceedings before the Vasileostrovskiy District Court were procedurally flawed. Thus, the applicant did not take part in the court proceedings and was not even examined by the judge in person. Further, the applicant was unable to challenge the judgment of 28 December 2004, since the St Petersburg City Court refused to examine his appeal. In sum, his participation in the decision-making process was reduced to zero. The Court is particularly struck by the fact that the only hearing on the merits in the applicant's case lasted ten minutes. In such circumstances it cannot be said that the judge had "had the benefit of direct contact with the persons concerned", which normally would call for judicial restraint on the part of this Court.

92. Thirdly, the Court must examine the reasoning of the judgment of 28 December 2004. In doing so, the Court will have in mind the seriousness of the interference complained of, and the fact that the court proceedings in the applicant's case were perfunctory at best (see above).

93. The Court notes that the District Court relied solely on the findings of the medical report of 12 November 2004. That report referred to the applicant's aggressive behaviour, negative attitudes and "antisocial" lifestyle; it concluded that the applicant suffered from schizophrenia and was thus unable to understand his actions. At the same time, the report did not explain what kind of actions the applicant was incapable of understanding and controlling. The incidence of the applicant's illness is unclear, as are the possible consequences of the applicant's illness for his social life, health, pecuniary interests, and so on. The report of 12 November 2004 was not sufficiently clear on these points.

94. The Court does not cast doubt on the competence of the doctors who examined the applicant and accepts that the applicant was seriously ill. However, in the Court's opinion the existence of a mental disorder, even a serious one, cannot be the sole reason to justify full incapacitation. By analogy with the cases concerning deprivation of liberty, in order to justify full incapacitation the mental disorder must be "of a kind or degree" warranting such a measure (see, *mutatis mutandis*, *Winterwerp*, cited above, § 39). However, the questions to the doctors, as formulated by the judge, did not concern "the kind and degree" of the applicant's mental illness. As a result, the report of 12 November 2004 did not analyse the degree of the applicant's incapacity in sufficient detail.

95. It appears that the existing legislative framework did not leave the judge any other choice. The Russian Civil Code distinguishes between full capacity and full incapacity, but it does not provide for any "borderline" situation other than for drug or alcohol addicts. The Court refers in this respect to the principles formulated by Recommendation No. R (99) 4 of the

Committee of Ministers of the Council of Europe, cited above in paragraph 59. Although these principles have no force of law for this Court, they may define a common European standard in this area. Contrary to these principles, Russian legislation did not provide for a "tailor-made response". As a result, in the circumstances the applicant's rights under Article 8 were restricted more than was strictly necessary.

96. In sum, having examined the decision-making process and the reasoning behind the domestic decisions, the Court concludes that the interference with the applicant's private life was disproportionate to the legitimate aim pursued. There was, therefore, a breach of Article 8 of the Convention on account of the applicant's full incapacitation.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

97. Under Article 5 § 1 of the Convention the applicant complained that his placement in the psychiatric hospital had been unlawful. The relevant parts of Article 5 provide:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (e) the lawful detention of persons ... of unsound mind ..."

A. The parties' submissions

1. The Government

98. The Government claimed that the applicant's placement in the hospital had been lawful. Under sections 28 and 29 of the Psychiatric Assistance Act of 2 July 1992, a person can be placed in a psychiatric hospital pursuant to a court order or at the request of the doctor, provided that the person suffers from a mental disorder. The law distinguishes between non-voluntary and voluntary confinement in hospital. The latter does not require a court order and may be authorised by the official guardian, if the person is legally incapable. The applicant was placed in the hospital at the request of his official guardian in relation to a worsening of his mental condition. In such circumstances, there was no need for a court order authorising the confinement.

99. The Government further indicated that section 47 of the Psychiatric Assistance Act provided for administrative and judicial remedies against the acts or negligence of medical personnel. However, under paragraph 2 of Article 31 of the Civil Code of the Russian Federation, if a person is legally incapable, it is his official guardian who should act in his stead before the

administrative bodies or the courts. The applicant's official guardian was his mother, who did not lodge any complaint. The prosecutor's office, after an inquiry, concluded that the applicant's rights had not been breached. Therefore, the domestic law provided effective remedies to protect the applicant's rights.

100. As to compensation for damages caused by the confinement in a psychiatric hospital, this is only recoverable if there was a fault on the part of the domestic authorities. The Government asserted that the medical personnel had acted lawfully.

2. The applicant

101. The applicant maintained his claims. Firstly, he alleged that his placement in hospital had amounted to a deprivation of his liberty. Thus, he was placed in a locked facility. After he attempted to flee the hospital in January 2006, he was tied to his bed and given an increased dose of sedative medication. He was not allowed to communicate with the outside world until his discharge. Finally, the applicant subjectively perceived his confinement in the hospital as a deprivation of liberty. Contrary to what the Government suggested, he had never regarded his detention as consensual and had unequivocally objected to it throughout the entire duration of his stay in the hospital.

102. Further, the applicant claimed that his detention in the hospital was not "in accordance with a procedure prescribed by law". Thus, under Russian law, his hospitalisation was regarded as voluntary confinement, regardless of his opinion, and, consequently, none of the procedural safeguards usually required in cases of non-voluntary hospitalisation applied to him. There should, however, be some procedural safeguards in place, especially where the person concerned clearly expressed his disagreement with his guardian's decision. In the present case the authorities did not assess the applicant's capacity to make an independent decision of a specific kind at the time of his hospitalisation. They relied on the applicant's status as a legally incapable person, no matter how far removed in time the court decision about his global capacity might be. In the present case it was made more than ten months prior to the hospitalisation.

103. Furthermore, Russian law did not sufficiently reflect the fact that a person's capacity could change over time. There was no mandatory periodic review of the capacity status, nor was there a possibility for the person under guardianship to request such a review. Even assuming that, at the time of the initial court decision declaring him incapable, the applicant's capacity was so badly impaired that he could not decide for himself the question of hospitalisation, his condition might have changed in the meantime.

B. Admissibility

104. The Government may be understood as claiming that the applicant's hospitalisation was, in domestic terms, voluntary, and, as such, did not fall under the scenario of "deprivation of liberty" within the meaning of Article 5 of the Convention. However, the Court cannot subscribe to this thesis.

105. It reiterates that, in order to determine whether there has been a deprivation of liberty, the starting-point must be the concrete situation of the individual concerned. Account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question (see *Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39, and *Ashingdane v. the United Kingdom*, 28 May 1985, § 41, Series A no. 93).

106. The Court further notes that the notion of deprivation of liberty within the meaning of Article 5 § 1 does not only comprise the objective element of a person's confinement in a particular restricted space for a not negligible length of time. A person can only be considered to have been deprived of his or her liberty if, as an additional subjective element, he or she had not validly consented to the confinement in question (see, *mutatis mutandis*, *H.M. v. Switzerland*, no. 39187/98, § 46, ECHR 2002-II).

107. The Court observes in this respect that the applicant's factual situation at the hospital was largely undisputed. The applicant was confined in the hospital for several months, he was not free to leave and his contact with the outside world was seriously restricted. As to the "subjective" element, it was disputed between the parties whether the applicant had consented to his stay in the clinic. The Government mostly relied on the legal construction of "voluntary confinement", whereas the applicant referred to his own perception of the situation.

108. The Court notes in this respect that, indeed, the applicant lacked *de jure* legal capacity to decide for himself. However, this does not necessarily mean that the applicant was *de facto* unable to understand his situation. Firstly, the applicant's own behaviour at the time of his confinement proves the contrary. Thus, on several occasions the applicant requested his discharge from hospital, contacted the hospital administration and a lawyer with a view to obtaining his release, and once attempted to escape from the hospital (see, *a fortiori*, *Storck v. Germany*, no. 61603/00, ECHR 2005-V, where the applicant consented to her stay in the clinic but then attempted to escape). Secondly, it follows from the Court's above conclusions that the findings of the domestic courts on the applicant's mental condition were questionable and quite remote in time (see paragraph 96 above).

109. In sum, even though the applicant was legally incapable of expressing his opinion, the Court is unable to accept in the circumstances the Government's view that the applicant agreed to his continued stay in the

hospital. The Court therefore concludes that the applicant was deprived of his liberty by the authorities within the meaning of Article 5 § 1 of the Convention.

110. The Court further notes that although the applicant's detention was requested by the applicant's guardian, a private person, it was implemented by a State-run institution – a psychiatric hospital. Therefore, the responsibility of the authorities for the situation complained of was engaged.

111. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

112. The Court accepts that the applicant's detention was "lawful", if this term is construed narrowly, in the sense of formal compatibility of the detention with the procedural and material requirements of the domestic law. It appears that the only condition for the applicant's detention was the consent of his official guardian, his mother, who was also the person who solicited the applicant's placement in the hospital.

113. However, the Court observes that the notion of "lawfulness" in the context of Article 5 § 1 (e) also has a broader meaning. "The notion underlying the term ['procedure prescribed by law'] ... is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary" (see *Winterwerp*, cited above, § 45). In other words, the detention cannot be considered "lawful" within the meaning of Article 5 § 1 if the domestic procedure does not provide sufficient guarantees against arbitrariness.

114. In its *Winterwerp* judgment (cited above), the Court set out three minimum conditions which have to be satisfied in order for there to be "the lawful detention of a person of unsound mind" within the meaning of Article 5 § 1 (e): except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder.

115. Turning to the present case, the Court notes that it was submitted on behalf of the applicant that his deprivation of liberty had been arbitrary, because he had not been reliably shown to be of unsound mind at the time of his confinement. The Government submitted nothing to refute this argument. Thus, the Government did not explain what made the applicant's

mother request his hospitalisation on 4 November 2005. Further, the Government did not provide the Court with any medical evidence concerning the applicant's mental condition at the moment of his admission to the hospital. It appears that the decision to hospitalise him relied merely on the applicant's legal status, as had been defined ten months earlier by the court, and probably on his medical history. Indeed, it is inconceivable that the applicant remained in hospital without any examination by specialist doctors. However, in the absence of any supporting documents or submissions by the Government concerning the applicant's mental condition during his placement, the Court has to conclude that it has not been "reliably shown" by the Government that the applicant's mental condition necessitated his confinement.

116. In view of the above, the Court concludes that the applicant's hospitalisation between 4 November 2005 and 16 May 2006 was not "lawful" within the meaning of Article 5 § 1 (e) of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

117. The applicant complains that he was unable to obtain his release from the hospital. Article 5 § 4, relied on by the applicant, provides:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The parties' submissions

118. The Government maintained that the applicant had had an effective remedy to challenge his admission to the psychiatric hospital. Thus, he could have applied for release or complained about the actions of the medical staff through his guardian, who represented him before third parties, including the court. Further, the General Prosecutor's Office had carried out a check of the applicant's situation and did not establish any violation of his rights.

119. The applicant claimed that Russian law allowed him to bring court proceedings only through his guardian, who was opposed to his release.

B. Admissibility

120. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

121. The Court observes that by virtue of Article 5 § 4, a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his detention (see *Winterwerp*, cited above, § 55, and *Luberti*, cited above, § 31; see also *Rakevich v. Russia*, no. 58973/00, §§ 43 et seq., 28 October 2003).

122. This is so in cases where the initial detention was initially authorised by a judicial authority (see *X v. the United Kingdom*, 5 November 1981, § 52, Series A no. 46), and it is *a fortiori* true in the circumstances of the present case, where the applicant's confinement was authorised not by a court but by a private person, namely the applicant's guardian.

123. The Court accepts that the forms of judicial review may vary from one domain to another, and depend on the type of deprivation of liberty in issue. It is not within the province of the Court to inquire into what would be the best or most appropriate system of judicial review in this sphere. However, in the present case the courts were not involved in deciding on the applicant's detention at any moment and in any form. It appears that Russian law does not provide for automatic judicial review of confinement in a psychiatric hospital in situations such as the applicant's. Further, the review cannot be initiated by the person concerned if that person has been deprived of his or her legal capacity. Such a reading of Russian law follows from the Government's submissions on the matter. In sum, the applicant was prevented from pursuing independently any legal remedy of judicial character to challenge his continued detention.

124. The Government claimed that the applicant could have initiated legal proceedings through his mother. However, that remedy was not directly accessible to him: the applicant fully depended on his mother who had requested his placement in hospital and opposed his release. As to the inquiry carried out by the prosecution authorities, it is unclear whether it concerned the "lawfulness" of the applicant's detention. In any event, a prosecution inquiry as such cannot be regarded as a judicial review satisfying the requirements of Article 5 § 4 of the Convention.

125. The Court notes its findings that the applicant's hospitalisation was not voluntary. Further, the last time that the courts had assessed the applicant's mental capacity was ten months before his admission to hospital. The "incapacitation" court proceedings were seriously flawed, and, in any event, the court never examined the necessity of the applicant's placement in a closed institution. Nor was this necessity assessed by a court at the time of his placement in hospital. In such circumstances the applicant's inability to obtain judicial review of his detention amounted to a violation of Article 5 § 4 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

126. The applicant submitted that the compulsory medical treatment he received in hospital amounted to inhuman and degrading treatment. Furthermore, on one occasion physical restraint was used against him, when he was tied to his bed for more than fifteen hours. Article 3 of the Convention, referred to by the applicant in this respect, provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

127. The Court notes that the complaint under Article 3 relates to two distinct facts: (a) involuntary medical treatment; and (b) the securing of the applicant to his bed after his attempted escape. As regards the second allegation, the Court notes that it was not part of the applicant's initial submissions to the Court and was not sufficiently substantiated. Reference to it appeared only in the applicant's observations in reply to those of the Government. Therefore, this incident falls outside the scope of the present application, and, as such, will not be examined by the Court.

128. It remains to be ascertained, however, whether the medical treatment of the applicant in the hospital amounted to "inhuman and degrading treatment" within the meaning of Article 3. According to the applicant, he was treated with Haloperidol and Chlorpromazine. He described these substances as obsolete medicine with strong and unpleasant side effects. The Court notes that the applicant did not provide any evidence showing that he had actually been treated with this medication. Furthermore, there is no evidence that the medication in question had the unpleasant effects he was complaining of. The applicant does not claim that his health has deteriorated as a result of such treatment. In such circumstances the Court finds that the applicant's allegations in this respect are unsubstantiated.

129. The Court concludes that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

VI. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

130. The applicant complained under Article 13 of the Convention, taken in conjunction with Articles 6 and 8, that he had been unable to obtain a review of his status as a legally incapable person. Article 13 provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

131. The Court finds that this complaint is linked to the complaints submitted under Articles 6 and 8 of the Convention, and it should therefore be declared admissible.

132. The Court further notes that, in analysing the proportionality of the measure complained of under Article 8, it took account of the fact that the measure was imposed for an indefinite period of time and could not be challenged by the applicant independently of his mother or other persons empowered by law to seek its withdrawal (see paragraph 90 above). Furthermore, this aspect of the proceedings was considered by the Court in its examination of the overall fairness of the incapacitation proceedings.

133. In these circumstances the Court does not consider it necessary to re-examine this aspect of the case separately through the prism of the "effective remedies" requirement of Article 13.

VII. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

134. The Court notes that under Article 14 of the Convention the applicant complained about his alleged discrimination. The Court finds that this complaint is linked to the complaints submitted under Articles 6 and 8 of the Convention, and it should therefore be declared admissible. However, in the circumstances and given its findings under Articles 5, 6 and 8 of the Convention, the Court considers that there is no need to examine the complaint under Article 14 of the Convention separately.

VIII. COMPLIANCE WITH ARTICLE 34 OF THE CONVENTION

135. The applicant maintained that by preventing him from meeting his lawyer in private for a long period of time despite the measure indicated by the Court under Rule 39 of the Rules of Court, Russia had failed to comply with its obligations under Article 34 of the Convention. Article 34 provides:

> "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

Rule 39 of the Rules of Court provides:

> "1. The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.
>
> 2. Notice of these measures shall be given to the Committee of Ministers.
>
> 3. The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated."

A. The parties' submissions

136. The Government maintained that the applicant had not been prevented from exercising his right of individual petition under Article 34 of the Convention. However, he was able to do so only through his mother – his official guardian. Since his mother had never asked Mr Bartenev (the lawyer) to represent her son, he was not his legal representative in the eyes of the domestic authorities. Consequently, the authorities acted lawfully in not allowing him to meet the applicant in hospital.

137. The applicant submitted that his right of individual petition had been breached. Thus, the hospital authorities prevented him from meeting his lawyer, confiscated writing materials from him and prohibited him from making or receiving telephone calls. The applicant was also threatened with the extension of his confinement if he continued his "litigious behaviour". When the Court indicated an interim measure, the hospital authorities refused to consider the decision of the Court under Rule 39 as legally binding. This position was later confirmed by the Russian courts. As a result, it was virtually impossible for the applicant to work on his case before the European Court during his whole stay in hospital. Moreover, the applicant's lawyer was unable to assess the applicant's condition and collect information about the treatment the applicant was subjected to while in the psychiatric hospital.

B. The Court's assessment

1. Compliance with Article 34 before the indication of an interim measure

138. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see *Akdivar and Others v. Turkey*, 16 September 1996, opinion of the

Commission, § 105, *Reports* 1996-IV; see also *Ergi v. Turkey*, 28 July 1998, § 105, *Reports* 1998-IV).

139. The Court notes that an interference with the right of individual petition may take different forms. Thus, in *Boicenco v. Moldova* (no. 41088/05, §§ 157 et seq., 11 July 2006), the Court found that the refusal by the authorities to let the applicant be examined by a doctor in order to substantiate his claims under Article 41 of the Convention constituted an interference with the applicant's right of individual petition, and thus was incompatible with Article 34 of the Convention.

140. In the present case the ban on contact with his lawyer lasted from the applicant's hospitalisation on 4 November 2005 until his discharge on 16 May 2006. Further, telephone calls and correspondence were also banned for virtually the whole period. Those restrictions made it almost impossible for the applicant to pursue his case before the Court, and thus the application form was completed by the applicant only after his discharge from the hospital. The authorities could not have been ignorant of the fact that the applicant had introduced an application with the Court concerning, *inter alia*, his confinement in the hospital. In such circumstances the authorities, by restricting the applicant's contact with the outside world to such an extent, interfered with his rights under Article 34 of the Convention.

2. Compliance with Article 34 after the indication of an interim measure

141. The Court further notes that in March 2006 it indicated to the Government an interim measure under Rule 39. The Court requested the Government to allow the applicant to meet his lawyer on the premises of the hospital and under the supervision of the hospital staff. That measure was supposed to ensure that the applicant was able to pursue his case before this Court.

142. The Court is struck by the authorities' refusal to comply with that measure. The domestic courts which examined the situation found that the interim measure was addressed to the Russian State as a whole, but not to any of its bodies in particular. The courts concluded that Russian law did not recognise the binding force of an interim measure indicated by the Court. Further, they considered that the applicant could not act without the consent of his mother. Therefore, Mr Bartenev (the lawyer) was not regarded as his lawful representative either in domestic terms, or for the purposes of the proceedings before this Court.

143. Such an interpretation of the Convention is contrary to the Convention. As regards the status of Mr Bartenev, it was not for the domestic courts to determine whether or not he was the applicant's representative for the purposes of the proceedings before the Court – it sufficed that the Court regarded him as such.

144. As to the legal force of an interim measure, the Court wishes to reiterate the following (*Aoulmi v. France*, no. 50278/99, § 107, ECHR 2006-I):

> "107. ... [U]nder the Convention system, interim measures, as they have consistently been applied in practice, play a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. Accordingly, in these conditions a failure by a respondent State to comply with interim measures will undermine the effectiveness of the right of individual application guaranteed by Article 34 and the State's formal undertaking in Article 1 to protect the rights and freedoms set forth in the Convention
>
> 108. Indications of interim measures given by the Court ... permit it not only to carry out an effective examination of the application but also to ensure that the protection afforded to the applicant by the Convention is effective; such indications also subsequently allow the Committee of Ministers to supervise execution of the final judgment. Such measures thus enable the State concerned to discharge its obligation to comply with the final judgment of the Court, which is legally binding by virtue of Article 46 of the Convention ..."

In sum, an interim measure is binding to the extent that non-compliance with it may lead to a finding of a violation under Article 34 of the Convention. For the Court, it makes no difference whether it was the State as a whole or any of its bodies which refused to implement an interim measure.

145. The Court notes in this respect the case of *Mamatkulov and Askarov v. Turkey* ([GC], nos. 46827/99 and 46951/99, §§ 92 et seq., ECHR 2005-I), in which the Court analysed the State's non-compliance with an interim measure indicated under Rule 39. The Court concluded that "the obligation set out in Article 34 *in fine* requires the Contracting States to refrain ... also from any act or omission which, by destroying or removing the subject matter of an application, would make it pointless or otherwise prevent the Court from considering it under its normal procedure" (§ 102).

146. By not allowing the applicant to communicate with his lawyer, the authorities *de facto* prevented him from complaining to the Court and this obstacle existed so long as the authorities kept the applicant in hospital. Therefore, the aim of the interim measure indicated by the Court was to avoid a situation "that would prevent the Court from properly examining the application and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted" (see *Aoulmi*, loc. cit.).

147. The Court notes that the applicant was eventually released and met with his lawyer, and was thus able to continue the proceedings before this Court. The Court therefore finally had all the elements to examine the applicant's complaint, despite previous non-compliance with the interim measure. However, the fact that the individual actually managed to pursue his application does not prevent an issue arising under Article 34: should the

Government's action make it more difficult for the individual to exercise his right of petition, this amounts to "hindering" his rights under Article 34 (see *Akdivar and Others*, cited above, § 105, and *Akdivar and Others v. Turkey*, 16 September 1996, opinion of the Commission, § 254, *Reports* 1996-IV). In any event, the applicant's release was not in any way connected with the implementation of an interim measure.

148. The Court takes note that the Russian legal system may have lacked a legal mechanism for implementing interim measures under Rule 39. However, it does not absolve the respondent State from its obligations under Article 34 of the Convention. In sum, in the circumstances the failure of the authorities to comply with an interim measure under Rule 39 amounted to a breach of Article 34 of the Convention.

3. Conclusion

149. Having regard to the material before it, the Court concludes that, by preventing the applicant for a long period of time from meeting his lawyer and communicating with him, as well as by failing to comply with the interim measure indicated under Rule 39 of the Rules of Court, the Russian Federation was in breach of its obligations under Article 34 of the Convention.

IX. APPLICATION OF ARTICLE 41 OF THE CONVENTION

150. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

151. The applicant claimed 85,000 euros in respect of non-pecuniary damage.

152. The Government considered these claims "fully unsubstantiated and anyway excessive". Further, the Government claimed that it was the applicant's mother who was entitled to claim any amounts on behalf of the applicant.

153. The Court notes that the applicant has legal standing in his own right within the Strasbourg proceedings and, consequently, can claim compensation under Article 41 of the Convention.

154. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the Government and the applicant (Rule 75 § 1 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaints under Article 5 (concerning confinement to the psychiatric hospital), Article 6 (concerning the incapacitation proceedings), Article 8 (concerning the applicant's incapacitation), Article 13 (concerning the absence of effective remedies) and Article 14 of the Convention (concerning the alleged discrimination) admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 of the Convention as regards the incapacitation proceedings;

3. *Holds* that there has been a violation of Article 8 of the Convention on account of the applicant's full incapacitation;

4. *Holds* that there has been a violation of Article 5 § 1 of the Convention as regards the lawfulness of the applicant's confinement in hospital;

5. *Holds* that there has been a violation of Article 5 § 4 of the Convention as regards the applicant's inability to obtain his release from hospital;

6. *Holds* that there is no need to examine the applicant's complaint under Article 13 of the Convention;

7. *Holds* that there is no need to examine the applicant's complaint under Article 14 of the Convention;

8. *Holds* that the State failed to comply with its obligations under Article 34 of the Convention by hindering the applicant's access to the Court and by not complying with an interim measure indicated by the Court in order to remove this hindrance;

9. *Holds* that the question of the application of Article 41 is not ready for decision;
   accordingly,
   (a) *reserves* the said question in whole;
   (b) *invites* the Government and the applicant to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in English, and notified in writing on 27 March 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF D.H. AND OTHERS v. THE CZECH REPUBLIC

(Application no. 57325/00)

JUDGMENT

STRASBOURG

13 November 2007

In the case of D.H. and Others v. the Czech Republic,

The European Court of Human Rights (Second Section), sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Boštjan M. Zupančič,
Rıza Türmen,
Karel Jungwiert,
Josep Casadevall,
Margarita Tsatsa-Nikolovska,
Kristaq Traja,
Vladimiro Zagrebelsky,
Elisabeth Steiner,
Javier Borrego Borrego,
Alvina Gyulumyan,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Ján Šikuta,
Ineta Ziemele,
Mark Villiger, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 17 January and 19 September 2007,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 57325/00) against the Czech Republic lodged with the Court on 18 April 2000 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eighteen Czech nationals ("the applicants"), whose details are set out in the Annex to this judgment.

2. The applicants were represented before the Court by the European Roma Rights Centre based in Budapest, Lord Lester of Herne Hill, QC, Mr J. Goldston, of the New York Bar, and Mr D. Strupek, a lawyer practising in the Czech Republic. The Czech Government ("the Government") were represented by their Agent, Mr V.A. Schorm.

3. The applicants alleged, *inter alia*, that they had been discriminated against in the enjoyment of their right to education on account of their race or ethnic origin.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 1 March 2005 following a hearing on admissibility and the merits (Rule 54 § 3), the Chamber declared the application partly admissible.

6. On 7 February 2006 a Chamber of that Section composed of Jean-Paul Costa, President, András Baka, Ireneu Cabral Barreto, Karel Jungwiert, Volodymyr Butkevych, Antonella Mularoni and Danutė Jočienė, judges, and Sally Dollé, Section Registrar, delivered a judgment in which it held by six votes to one that there had been no violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1.

7. On 5 May 2006 the applicants requested the referral of their case to the Grand Chamber in accordance with Article 43 of the Convention. On 3 July 2006 a panel of the Grand Chamber granted their request.

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24. At the final deliberations, Kristaq Traja and Josep Casadevall, substitute judges, replaced Christos Rozakis and Peer Lorenzen, who were unable to take part in the further consideration of the case (Rule 24 § 3).

9. The applicants and the Government each filed observations on the merits. In addition third-party comments were received from various non-governmental organisations, namely, the International Step by Step Association, the Roma Education Fund and the European Early Childhood Education Research Association; Interights and Human Rights Watch; Minority Rights Group International, the European Network Against Racism and the European Roma Information Office; and the International Federation for Human Rights (Fédération internationale des ligues des droits de l'Homme – FIDH), each of which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The Government replied to those comments (Rule 44 § 5).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 17 January 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr V.A. SCHORM, *Agent*,
Ms M. KOPSOVÁ,
Ms Z. KAPROVÁ,
Ms J. ZAPLETALOVÁ,
Mr R. BARINKA,
Mr P. KONŮPKA, *Counsel*;

(b) *for the applicants*
Lord LESTER OF HERNE HILL, QC,
Mr J. GOLDSTON,
Mr D. STRUPEK, *Counsel*.

The Court heard addresses by Lord Lester of Herne Hill, Mr Goldston and Mr Strupek, and by Mr Schorm.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. Details of the applicants' names and places of residence are set out in the Annex.

A. Historical background

12. According to documents available on the website of the Roma and Travellers Division of the Council of Europe, the Roma originated from the regions situated between north-west India and the Iranian plateau. The first written traces of their arrival in Europe date back to the fourteenth century. Today there are between eight and ten million Roma living in Europe. They are to be found in almost all Council of Europe member States and indeed, in some central and east European countries, they represent over 5% of the population. The majority of them speak Romany, an Indo-European language that is understood by a very large number of Roma in Europe, despite its many variants. In general, Roma also speak the dominant language of the region in which they live, or even several languages.

13. Although they have been in Europe since the fourteenth century, often they are not recognised by the majority of society as a fully fledged European people and they have suffered throughout their history from

rejection and persecution. This culminated in their attempted extermination by the Nazis, who considered them an inferior race. As a result of centuries of rejection, many Roma communities today live in very difficult conditions, often on the fringe of society in the countries where they have settled, and their participation in public life is extremely limited.

14. In the Czech Republic the Roma have national-minority status and, accordingly, enjoy the special rights associated therewith. The National Minorities Commission of the Government of the Czech Republic, a governmental consultative body without executive power, has responsibility for defending the interests of the national minorities, including the Roma.

As to the number of Roma currently living in the Czech Republic, there is a discrepancy between the official, census-based, statistics and the estimated number. According to the latter, which is available on the website of the Minorities Commission of the Government of the Czech Republic, the Roma community now numbers between 150,000 and 300,000 people.

B. Special schools

15. According to information supplied by the Czech Government, the special schools (*zvláštní školy*) were established after the First World War for children with special needs, including those suffering from a mental or social handicap. The number of children placed in these schools continued to rise (from 23,000 pupils in 1960 to 59,301 in 1988). Owing to the entrance requirements of the primary schools (*základní školy*) and the resulting selection process, prior to 1989 most Roma children attended special schools.

16. Under the terms of the Schools Act (Law no. 29/1984), the legislation applicable in the present case, special schools were a category of specialised school (*speciální školy*) and were intended for children with mental deficiencies who were unable to attend "ordinary" or specialised primary schools. Under the Act, the decision to place a child in a special school was taken by the head teacher on the basis of the results of tests to measure the child's intellectual capacity carried out in an educational psychology centre and was subject to the consent of the child's legal guardian.

17. Following the switch to the market economy in the 1990s, a number of changes were made to the system of special schools in the Czech Republic. These changes also affected the education of Roma pupils. In 1995 the Ministry of Education issued a directive concerning the provision of additional lessons for pupils who had completed their compulsory education in a special school. Since the 1996/97 school year, preparatory classes for children from disadvantaged social backgrounds have been opened in nursery, primary and special schools. In 1998 the Ministry of Education approved an alternative educational curriculum for children of

Roma origin who had been placed in special schools. Roma teaching assistants were also assigned to primary and special schools to assist the teachers and facilitate communication with the families. By virtue of amendment no. 19/2000 to the Schools Act, which came into force on 18 February 2000, pupils who had completed their compulsory education in a special school were also eligible for admission to secondary schools, provided they satisfied the entrance requirements for their chosen course.

18. According to data supplied by the applicants, which was obtained through questionnaires sent in 1999 to the head teachers of the 8 special schools and 69 primary schools in the town of Ostrava, the total number of pupils placed in special schools in Ostrava came to 1,360, of whom 762 (56%) were Roma. Conversely, Roma represented only 2.26% of the total of 33,372 primary-school pupils in Ostrava. Further, although only 1.8% of non-Roma pupils were placed in special schools, in Ostrava the proportion of Roma pupils assigned to such schools was 50.3%. Accordingly, a Roma child in Ostrava was 27 times more likely to be placed in a special school than a non-Roma child.

According to data from the European Monitoring Centre on Racism and Xenophobia (now the European Union Agency for Fundamental Rights), more than half of Roma children in the Czech Republic attend special schools.

The Advisory Committee on the Framework Convention for the Protection of National Minorities observed in its report of 26 October 2005 that, according to unofficial estimates, the Roma represent up to 70% of pupils enrolled in special schools.

Lastly, according to a comparison of data on fifteen countries, including countries from Europe, Asia and North America, gathered by the Organisation for Economic Cooperation and Development in 1999 and cited in the observations of the International Step by Step Association, the Roma Education Fund and the European Early Childhood Education Research Association[1], the Czech Republic ranked second highest in terms of placing children with physiological impairments in special schools and in third place in the table of countries placing children with learning difficulties in such schools. Further, of the eight countries who had provided data on the schooling of children whose difficulties arose from social factors, the Czech Republic was the only one to use special schools; the other countries concerned almost exclusively used ordinary schools for the education of such children.

1. P. Evans (2004), "Educating students with special needs: A comparison of inclusion practices in OECD countries", Education Canada 44 (1): 32-35.

C. The facts of the instant case

19. Between 1996 and 1999 the applicants were placed in special schools in Ostrava, either directly or after a spell in an ordinary primary school.

20. The material before the Court shows that the applicants' parents had consented to and in some instances expressly requested their children's placement in a special school. Consent was indicated by signing a pre-completed form. In the case of applicants nos. 12 and 16, the dates on the forms are later than the dates of the decisions to place the children in special schools. In both instances, the date has been corrected by hand, and one of them is accompanied by a note from the teacher citing a typing error.

The decisions on placement were then taken by the head teachers of the special schools concerned after referring to the recommendations of the educational psychology centres where the applicants had undergone psychological tests. The applicants' school files contained the report on their examination, including the results of the tests with the examiners' comments, drawings by the children and, in a number of cases, a questionnaire for the parents.

The written decision concerning the placement was sent to the children's parents. It contained instructions on the right to appeal, a right which none of them exercised.

21. On 29 June 1999 the applicants received a letter from the school authorities informing them of the possibilities available for transferring from a special school to a primary school. It would appear that four of the applicants (nos. 5, 6, 11 and 16 in the Annex) were successful in aptitude tests and thereafter attended ordinary schools.

22. In the review and appeals procedures referred to below, the applicants were represented by a lawyer acting on the basis of signed written authorities from their parents.

1. Request for reconsideration of the case outside the formal appeal procedure

23. On 15 June 1999 all the applicants apart from those numbered 1, 2, 10 and 12 in the Annex asked the Ostrava Education Authority (*Školský úřad*) to reconsider, outside the formal appeal procedure (*přezkoumání mimo odvolací řízení*), the administrative decisions to place them in special schools. They argued that their intellectual capacity had not been reliably tested and that their representatives had not been adequately informed of the consequences of consenting to their placement in special schools. They therefore asked the Education Authority to revoke the impugned decisions, which they maintained did not comply with the statutory requirements and infringed their right to education without discrimination.

24. On 10 September 1999 the Education Authority informed the applicants that, as the impugned decisions complied with the legislation, the conditions for bringing proceedings outside the appeal procedure were not satisfied in their case.

2. Constitutional appeal

25. On 15 June 1999 applicants nos. 1 to 12 in the Annex lodged a constitutional appeal in which they complained, *inter alia*, of *de facto* discrimination in the general functioning of the special-education system. In that connection, they relied on, *inter alia*, Articles 3 and 14 of the Convention and Article 2 of Protocol No. 1. While acknowledging that they had not appealed against the decisions to place them in special schools, they alleged that they had not been sufficiently informed of the consequences of placement and argued (on the question of the exhaustion of remedies) that their case concerned continuing violations and issues that went far beyond their personal interests.

In their grounds of appeal, the applicants explained that they had been placed in special schools under a practice that had been established in order to implement the relevant statutory rules. In their submission, that practice had resulted in *de facto* racial segregation and discrimination that were reflected in the existence of two separately organised educational systems for members of different racial groups, namely special schools for the Roma and "ordinary" primary schools for the majority of the population. That difference in treatment was not based on any objective and reasonable justification, amounted to degrading treatment, and had deprived them of the right to education (as the curriculum followed in special schools was inferior and pupils in special schools were unable to return to primary school or to obtain a secondary education other than in a vocational training centre). Arguing that they had received an inadequate education and an affront to their dignity, the applicants asked the Constitutional Court (*Ústavní soud*) to find a violation of their rights, to quash the decisions to place them in special schools, to order the respondents (the special schools concerned, the Ostrava Education Authority and the Ministry of Education) to refrain from any further violation of their rights and to restore the status quo ante by offering them compensatory lessons.

26. In their written submissions to the Constitutional Court, the special schools concerned pointed out that all the applicants had been enrolled on the basis of a recommendation from an educational psychology centre and with the consent of their representatives. Furthermore, despite having been notified of the relevant decisions, none of the representatives had decided to appeal. According to the schools, the applicants' representatives had been informed of the differences between the special-school curriculum and the primary-school curriculum. Regular meetings of teaching staff were held to assess pupils (with a view to their possible transfer to primary school). They

added that some of the applicants (nos. 5 to 11 in the Annex) had been advised that there was a possibility of their being placed in primary school.

The Education Authority pointed out in its written submissions that the special schools had their own legal personality, that the impugned decisions contained advice on the right of appeal and that the applicants had at no stage contacted the Schools Inspectorate.

The Ministry of Education denied any discrimination and noted a tendency on the part of the parents of Roma children to have a rather negative attitude to school work. It asserted that each placement in a special school was preceded by an assessment of the child's intellectual capacity and that parental consent was a decisive factor. It further noted that there were eighteen educational assistants of Roma origin in schools in Ostrava.

27. In their final written submissions, the applicants pointed out (i) that there was nothing in their school files to show that their progress was being regularly monitored with a view to a possible transfer to primary school, (ii) that the reports from the educational psychology centres contained no information on the tests that were used, and (iii) that their recommendations for placement in a special school were based on grounds such as an insufficient command of the Czech language, an over-tolerant attitude on the part of the parents or an ill-adapted social environment, etc. They also argued that the gaps in their education made a transfer to primary school impossible in practice and that social or cultural differences could not justify the alleged difference in treatment.

28. On 20 October 1999 the Constitutional Court dismissed the applicants' appeal, partly on the ground that it was manifestly unfounded and partly on the ground that it had no jurisdiction to hear it. It nevertheless invited the competent authorities to give careful and constructive consideration to the applicants' proposals.

(a) With regard to the complaint of a violation of the applicants' rights as a result of their placement in special schools, the Constitutional Court held that, as only five decisions had actually been referred to in the notice of appeal, it had no jurisdiction to decide the cases of those applicants who had not appealed against the decisions concerned.

As to the five applicants who had lodged constitutional appeals against the decisions to place them in special schools (nos. 1, 2, 3, 5 and 9 in the Annex), the Constitutional Court decided to disregard the fact that they had not lodged ordinary appeals against those decisions, as it agreed that the scope of their constitutional appeals went beyond their personal interests. However, it found that there was nothing in the material before it to show that the relevant statutory provisions had been interpreted or applied unconstitutionally, since the decisions had been taken by head teachers vested with the necessary authority on the basis of recommendations by educational psychology centres and with the consent of the applicants' representatives.

(b) With regard to the complaints of insufficient monitoring of the applicants' progress at school and of racial discrimination, the Constitutional Court noted that it was not its role to assess the overall social context and found that the applicants had not furnished concrete evidence in support of their allegations. It further noted that the applicants had had a right of appeal against the decisions to place them in special schools, but had not exercised it. As to the objection that insufficient information had been given about the consequences of placement in a special school, the Constitutional Court considered that the applicants' representatives could have obtained this information by liaising with the schools and that there was nothing in the file to indicate that they had shown any interest in transferring to a primary school. The Constitutional Court therefore ruled that this part of the appeal was manifestly ill-founded.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Schools Act 1984 (Law no. 29/1984 – since repealed by Law no. 561/2004, which came into force on 1 January 2005)

29. Prior to 18 February 2000, section 19(1) of the Schools Act provided that to be eligible for secondary-school education pupils had to have successfully completed their primary-school education.

Following amendment no. 19/2000, which came into force on 18 February 2000, the amended section 19(1) provided that to be eligible for secondary-school education pupils had to have completed their compulsory education and demonstrated during the admission procedure that they satisfied the conditions of eligibility for their chosen course.

30. Section 31(1) provided that special schools were intended for children with "mental deficiencies" (*rozumové nedostatky*) that prevented them from following the curricula in ordinary primary schools or in specialised primary schools (*speciální základní škola*) intended for children suffering from sensory impairment, illness or disability.

B. The Schools Act 2004 (Law no. 561/2004)

31. This new Act on school education no longer provides for special schools in the form that had existed prior to its entry into force. Primary education is now provided by primary schools and specialised primary schools, the latter being intended for pupils with severe mental disability or multiple disabilities and for autistic children.

32. Section 16 contains provisions governing the education of children and pupils with special educational needs. These are defined in subsection 1 as children suffering from a disability, health problems or a social

disadvantage. Section 16(4) provides that for the purposes of the Act a child is socially disadvantaged, *inter alia*, if it comes from a family environment with low socio-cultural status or at risk of socio-pathological phenomena. Subsection 5 provides that the existence of special educational needs is to be assessed by an educational guidance centre.

33. The Act also makes provision, *inter alia*, for educational assistants, individualised education projects, preparatory classes for socially disadvantaged children prior to the period of compulsory school education and additional lessons for pupils who have not received a basic education.

C. Decree no. 127/1997 on specialised schools (since repealed by Decree no. 73/2005, which came into force on 17 February 2005)

34. Article 2 § 4 of the Decree laid down that the following schools were available for pupils suffering from mental disability: specialised nursery schools (*speciální mateřské školy*), special schools, auxiliary schools (*pomocné školy*), vocational training centres (*odborná učiliště*) and practical training schools (*praktické školy*).

35. Article 6 § 2 stipulated that if during the pupil's school career there was a change in the nature of his or her disability or if the specialised school was no longer adapted to the level of disability, the head teacher of the school attended by the pupil was required, after an interview with the pupil's representative, to recommend the pupil's placement in another specialised school or an ordinary school.

36. Article 7 § 1 stipulated that the decision to place a pupil in or transfer a pupil to, *inter alia*, a special school was to be taken by the head teacher, provided that the pupil's legal guardians consented. Article 7 § 2 provided that a proposal for a pupil to be placed, *inter alia*, in a special school could be made to the head teacher by the pupil's legal guardian, the pupil's current school, an educational psychology centre, a hospital or clinic, an authority with responsibility for family and child welfare, a health centre, etc. In the event of the pupil not receiving a place in a special school, the head teacher was required by Article 7 § 3 to notify the pupil's legal guardian and the competent school authority or the municipality in which the pupil was permanently resident of the decision. The education authority was then required, after consulting the municipality, to make a proposal regarding the school in which the pupil would receive his or her compulsory education. Article 7 § 4 required the educational psychology centre to assemble all the documents relevant to the decision and to make a recommendation to the head teacher regarding the type of school.

D. Decree no. 73/2005 on the education of children, pupils and students with special educational needs and gifted children, pupils and students

37. Article 1 of the Decree provides that pupils and students with special educational needs are to be educated with the help of support measures that go beyond or are different from the individualised educational and organisational measures available in ordinary schools.

38. Article 2 provides that children whose special educational needs have been established with the aid of an educational or psychological examination performed by an educational guidance centre will receive special schooling if they have clear and compelling needs that warrant their placement in a special education system.

E. Domestic practice at the material time

1. Psychological examination

39. The testing of intellectual capacity in an educational psychology centre with the consent of the child's legal guardians was neither compulsory nor automatic. The recommendation for the child to sit the tests was generally made by teachers – either when the child first enrolled at the school or if difficulties were noted in its ordinary primary-school education – or by paediatricians.

40. According to the applicants, who cited experts in this field, the most commonly used tests appeared to be variants of the Wechsler Intelligence Scale for Children (PDW and WISC-III) and the Stanford-Binet intelligence test. Citing various opinions, including those of teachers and psychologists and the Head of the Special Schools Department at the Czech Ministry of Education in February 1999, the applicants submitted that the tests used were neither objective nor reliable, as they had been devised solely for Czech children, and had not recently been standardised or approved for use with Roma children. Moreover, no measures had been taken to enable Roma children to overcome their cultural and linguistic disadvantages in the tests. Nor had any instructions been given to restrict the latitude that was given in the administration of the tests and the interpretation of the results. The applicants also drew attention to a 2002 report in which the Czech Schools Inspectorate noted that children without any significant mental deficiencies were still being placed in special schools.

41. In the report submitted by the Czech Republic on 1 April 1999 pursuant to Article 25 § 1 of the Framework Convention for the Protection of National Minorities, it was noted that the psychological tests "are conceived for the majority population and do not take Romany specifics into consideration".

The Advisory Committee on the Framework Convention noted in its first report on the Czech Republic, which was published on 25 January 2002, that while these schools were designed for mentally handicapped children it appeared that many Roma children who were not mentally handicapped were placed in them owing to real or perceived language and cultural differences between Roma and the majority. The Committee stressed that "placing children in such special schools should take place only when it is absolutely necessary and always on the basis of consistent, objective and comprehensive tests".

In its second report on the Czech Republic published on 26 October 2005 the Advisory Committee observed: "Tests and methods used to assess children's intellectual abilities upon school enrolment have already been revised with a view to ensuring that they are not misused to the detriment of Roma children." However, it noted with concern that "revision of the psychological tests used in this context has not had a marked impact. According to unofficial estimates, Roma account for up to 70% of pupils in [special] schools, and this – having regard to the percentage of Roma in the population – raises doubts concerning the tests' validity and the relevant methodology followed in practice".

42. In its report on the Czech Republic published on 21 March 2000, the European Commission against Racism and Intolerance (ECRI) noted that channelling of Roma children to special schools was reported to be often quasi-automatic. According to ECRI, the poor results obtained by these children in the pre-school aptitude tests could be explained by the fact that in the Czech Republic most Roma children did not attend kindergarten education. ECRI therefore considered that the practice of channelling Roma/Gypsy children into special schools for those with mental retardation should be fully examined, to ensure that any testing used was fair and that the true abilities of each child were properly evaluated.

In its next report on the Czech Republic, which was published in June 2004, ECRI noted that the test developed by the Czech Ministry of Education for assessing a child's mental level was not mandatory, and was only one of a battery of tools and methods recommended to the educational guidance centres.

43. In his final report on the human rights situation of the Roma, Sinti and Travellers in Europe of 15 February 2006, the Commissioner for Human Rights observed: "Roma children are frequently placed in classes for children with special needs without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin."

44. According to the observations submitted by the International Step by Step Association, the Roma Education Fund and the European Early Childhood Education Research Association, countries in east-central and south-eastern Europe typically lacked national definitions of "disability" (related to the placement of students in special schools) and used definitions

in which some form of disability was connected to the socio-cultural background of the child, thus leaving the door to discriminatory practices open. Data on children with disabilities were drawn largely from administrative sources rather than being derived from a thorough assessment of the actual characteristics of the child. Thus, divisive practices and the use of a single test were common in the 1990s.

It is alleged in the observations that the assessment used to place Roma children in special schools in the Ostrava region ran contrary to effective assessment indicators that were well known by the mid 1990s, for example, those published in 1987 by the National Association for the Education of Young Children (USA). These indicators were now associated with the Global Alliance for the Education of Young Children, which included member organisations in Europe and, more particularly, the Czech Republic. Relevant indicators included: ethical principles to guide assessment practices; the use of assessment instruments for their intended purposes and in such a way as to meet professional quality criteria; assessments appropriate to the ages and other characteristics of the children being assessed; recognition of the developmental and educational significance of the subject matter of the assessment; the use of assessment evidence to understand and improve learning; the gathering of assessment evidence from realistic settings and in situations that reflected children's actual performance; the use of multiple sources of evidence gathered over time for assessments; the existence of a link between screening and follow-up; limitations on the use of individually administered, norm-referenced tests; and adequate information for staff and families involved in the assessment process.

Thus, the assessment of Roma children in the Ostrava region did not take into account the language and culture of the children, or their prior learning experiences, or their unfamiliarity with the demands of the testing situation. Single rather than multiple sources of evidence were used. Testing was done in one sitting, not over time. Evidence was not obtained in realistic or authentic settings where children could demonstrate their skills. Undue emphasis was placed on individually administered, standardised tests normed on other populations.

According to studies cited in these observations (UNICEF Innocenti Insight (2005); Save the Children (2001), *Denied a future? The right to education of Roma/Gypsy and Traveller children*; D.J. Losen and G. Orfield (2002), *Introduction: Racial inequity in special education*, Cambridge, MA: Harvard Education Press), disproportionately placing certain groups of students in special education resulted from an array of factors, including "unconscious racial bias on the part of school authorities, large resource inequalities, an unjustifiable reliance on IQ and other evaluation tools, educators' inappropriate responses to the pressures of high-stakes testing, and power differentials between minority parents and school officials".

Thus, school placement through psychological testing often reflected racial biases in the society concerned.

45. The Government observed that the unification of European norms used by psychologists was currently under way and that the State authorities had taken all reasonable steps to ensure that the psychological tests were administered by appropriately qualified experts with university degrees applying the latest professional and ethical standards in their specialised field. In addition, research conducted in 1997 by Czech experts at the request of the Ministry of Education showed that Roma children had attained in a standard test of intelligence (WISC-III) only insignificantly lower results than comparable non-Roma Czech children (one point on the IQ scale).

2. Consent to placement in a special school

46. Article 7 of Decree no. 127/1997 on specialised schools made the consent of the legal guardians a condition *sine qua non* for the child's placement in a special school. The applicants noted that the Czech legislation did not require the consent to be in writing. Nor did information on the education provided by special schools or the consequences of the child's placement in a special school have to be provided beforehand.

47. In its report on the Czech Republic published in March 2000, ECRI observed that Roma parents often favoured the channelling of Roma children to special schools, partly to avoid abuse from non-Roma children in ordinary schools and isolation of the child from other neighbourhood Roma children, and partly owing to a relatively low level of interest in education.

In its report on the Czech Republic published in June 2004, ECRI noted that when deciding whether or not to give their consent parents of Roma children continued "to lack information concerning the long-term negative consequences of sending their children to such schools", which were "often presented to parents as an opportunity for their children to receive specialised attention and be with other Roma children".

48. According to information obtained by the International Federation for Human Rights from its Czech affiliate, many schools in the Czech Republic are reluctant to accept Roma children. That reluctance is explained by the reaction of the parents of non-Roma children, which, in numerous cases, has been to remove their children from integrated schools because the parents fear that the level of the school will fall following the arrival of Roma children or, quite simply, because of prejudice against the Roma. It is in that context that Roma children undergo tests designed to ascertain their capacity to follow the ordinary curriculum, following which parents of Roma children are encouraged to place their children in special schools. The parents' choice to place their children in special schools, where that is what they choose to do, is consistent with the school authorities' desire not to

admit so many Roma children that their arrival might induce the parents of non-Roma children to remove their own children from the school.

3. Consequences

49. Pupils in special schools follow a special curriculum supposedly adapted to their intellectual capacity. After completing their course of compulsory education in this type of school, they may elect to continue their studies in vocational training centres or, since 18 February 2000, in other forms of secondary school (provided they are able to establish during the admissions procedure that they satisfy the entrance requirements for their chosen course).

Further, Article 6 § 2 of Decree no. 127/1997 stipulated that, if during the pupil's school career there was a change in the nature of his or her disability or if the specialised school was no longer adapted to the level of disability, the head teacher of the school attended by the child or pupil was required, after an interview with the pupil's guardian, to recommend the pupil's placement in another specialised school or in an ordinary school.

50. In his final report on the human rights situation of the Roma, Sinti and Travellers in Europe of 15 February 2006, the Commissioner for Human Rights noted: "Being subjected to special schools or classes often means that these children follow a curriculum inferior to those of mainstream classes, which diminishes their opportunities for further education and for finding employment in the future. The automatic placement of Roma children in classes for children with special needs is likely to increase the stigma by labelling the Roma children as less intelligent and less capable. At the same time, segregated education denies both the Roma and non-Roma children the chance to know each other and to learn to live as equal citizens. It excludes Roma children from mainstream society at the very beginning of their lives, increasing the risk of their being caught in the vicious circle of marginalisation."

51. The Advisory Committee on the Framework Convention for the Protection of National Minorities noted in its second report on the Czech Republic, which was published on 26 October 2005, that placement in a special school "makes it more difficult for Roma children to gain access to other levels of education, thus reducing their chances of integrating in the society. Although legislation no longer prevents children from advancing from 'special' to ordinary secondary schools, the level of education offered by 'special' schools generally does not make it possible to cope with the requirements of secondary schools, with the result that most drop out of the system".

52. According to the observations submitted by the International Step by Step Association, the Roma Education Fund and the European Early Childhood Education Research Association, the placement of children in segregated special schools was an example of a very early "tracking" of

students, in this case by assigning children perceived to be of "low ability" or "low potential" to special schools from an early age. Such practices increased educational inequity as they had especially negative effects on the achievement levels of disadvantaged children (see, *inter alia*, the Communication from the Commission of the European Communities to the Council and to the European Parliament on efficiency and equity in European education and training systems (COM/2006/0481, 8 September 2006)). The longer-term consequences of "tracking" included pupils being channelled towards less prestigious forms of education and training and pupils dropping out of school early. Tracking could thus help create a social construction of failure.

53. In their observations to the Court, the organisations Minority Rights Group International, European Network Against Racism and European Roma Information Office noted that children in special schools followed a simplified curriculum that was considered appropriate for their lower level of development. Thus, in the Czech Republic, children in special schools were not expected to know the alphabet or numbers up to ten until the third or fourth year of school, while their counterparts in ordinary schools acquired that knowledge in the first year.

III. COUNCIL OF EUROPE SOURCES

A. The Committee of Ministers

Recommendation No. R (2000) 4 of the Committee of Ministers to member States on the education of Roma/Gypsy children in Europe (adopted by the Committee of Ministers on 3 February 2000 at the 696th meeting of the Ministers' Deputies)

54. The Recommendation provides as follows:

"The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members and that this aim may be pursued, in particular, through common action in the field of education;

Recognising that there is an urgent need to build new foundations for future educational strategies toward the Roma/Gypsy people in Europe, particularly in view of the high rates of illiteracy or semi-literacy among them, their high drop-out rate, the low percentage of students completing primary education and the persistence of features such as low school attendance;

Noting that the problems faced by Roma/Gypsies in the field of schooling are largely the result of long-standing educational policies of the past, which led either to assimilation or to segregation of Roma/Gypsy children at school on the grounds that they were 'socially and culturally handicapped';

Considering that the disadvantaged position of Roma/Gypsies in European societies cannot be overcome unless equality of opportunity in the field of education is guaranteed for Roma/Gypsy children;

Considering that the education of Roma/Gypsy children should be a priority in national policies in favour of Roma/Gypsies;

Bearing in mind that policies aimed at addressing the problems faced by Roma/Gypsies in the field of education should be comprehensive, based on an acknowledgement that the issue of schooling for Roma/Gypsy children is linked with a wide range of other factors and pre-conditions, namely the economic, social and cultural aspects, and the fight against racism and discrimination;

Bearing in mind that educational policies in favour of Roma/Gypsy children should be backed up by an active adult education and vocational education policy;

...

Recommends that in implementing their education policies the governments of the member States:

– be guided by the principles set out in the appendix to this Recommendation;

– bring this Recommendation to the attention of the relevant public bodies in their respective countries through the appropriate national channels."

55. The relevant sections of the Appendix to Recommendation No. R (2000) 4 read as follows:

"*Guiding principles of an education policy for Roma/Gypsy children in Europe*

I. Structures

1. Educational policies for Roma/Gypsy children should be accompanied by adequate resources and the flexible structures necessary to meet the diversity of the Roma/Gypsy population in Europe and which take into account the existence of Roma/Gypsy groups which lead an itinerant or semi-itinerant lifestyle. In this respect, it might be envisaged having recourse to distance education, based on new communication technologies.

2. Emphasis should be put on the need to better coordinate the international, national, regional and local levels in order to avoid dispersion of efforts and to promote synergies.

3. To this end member States should make the Ministries of Education sensitive to the question of education of Roma/Gypsy children.

4. In order to secure access to school for Roma/Gypsy children, pre-school education schemes should be widely developed and made accessible to them.

5. Particular attention should also be paid to the need to ensure better communication with parents, where necessary using mediators from the Roma/Gypsy community which could then lead to specific career possibilities. Special information and advice should be given to parents about the necessity of education and about the support mechanisms that municipalities can offer families. There has to be mutual understanding between parents and schools. The parents' exclusion and lack of knowledge and education (even illiteracy) also prevent children from benefiting from the education system.

6. Appropriate support structures should be set up in order to enable Roma/Gypsy children to benefit, in particular through positive action, from equal opportunities at school.

7. The member States are invited to provide the necessary means to implement the above-mentioned policies and arrangements in order to close the gap between Roma/Gypsy pupils and majority pupils.

II. Curriculum and teaching material

8. Educational policies in favour of Roma/Gypsy children should be implemented in the framework of broader intercultural policies, taking into account the particular features of the Romani culture and the disadvantaged position of many Roma/Gypsies in the member States.

9. The curriculum, on the whole, and the teaching material should therefore be designed so as to take into account the cultural identity of Roma/Gypsy children. Romani history and culture should be introduced in the teaching material in order to reflect the cultural identity of Roma/Gypsy children. The participation of representatives of the Roma/Gypsy community should be encouraged in the development of teaching material on the history, culture or language of the Roma/Gypsies.

10. However, the member States should ensure that this does not lead to the establishment of separate curricula, which might lead to the setting up of separate classes.

11. The member States should also encourage the development of teaching material based on good practices in order to assist teachers in their daily work with Roma/Gypsy pupils.

12. In the countries where the Romani language is spoken, opportunities to learn in the mother tongue should be offered at school to Roma/Gypsy children.

III. Recruitment and training of teachers

13. It is important that future teachers should be provided with specific knowledge and training to help them understand better their Roma/Gypsy pupils. The education of Roma/Gypsy pupils should however remain an integral part of the general educational system.

14. The Roma/Gypsy community should be involved in the designing of such curricula and should be directly involved in the delivery of information to future teachers.

15. Support should also be given to the training and recruitment of teachers from within the Roma/Gypsy community.

...”

B. The Parliamentary Assembly

1. Recommendation No. 1203 (1993) on Gypsies in Europe

56. The Parliamentary Assembly made, *inter alia*, the following general observations:

"1. One of the aims of the Council of Europe is to promote the emergence of a genuine European cultural identity. Europe harbours many different cultures, all of them, including the many minority cultures, enriching and contributing to the cultural diversity of Europe.

2. A special place among the minorities is reserved for Gypsies. Living scattered all over Europe, not having a country to call their own, they are a true European minority, but one that does not fit into the definitions of national or linguistic minorities.

3. As a non-territorial minority, Gypsies greatly contribute to the cultural diversity of Europe. In different parts of Europe they contribute in different ways, be it by language and music or by their trades and crafts.

4. With central and east European countries now member States, the number of Gypsies living in the area of the Council of Europe has increased drastically.

5. Intolerance of Gypsies by others has existed throughout the ages. Outbursts of racial or social hatred, however, occur more and more regularly, and the strained relations between communities have contributed to the deplorable situation in which the majority of Gypsies lives today.

6. Respect for the rights of Gypsies, individual, fundamental and human rights and their rights as a minority is essential to improve their situation.

7. Guarantees for equal rights, equal chances, equal treatment, and measures to improve their situation will make a revival of Gypsy language and culture possible, thus enriching the European cultural diversity.

8. The guarantee of the enjoyment of the rights and freedoms set forth in Article 14 of the European Convention on Human Rights is important for Gypsies as it enables them to maintain their individual rights.

..."

57. As far as education is concerned, the Recommendation states:

"...

vi. the existing European programmes for training teachers of Gypsies should be extended;

vii. special attention should be paid to the education of women in general and mothers together with their younger children;

viii. talented young Gypsies should be encouraged to study and to act as intermediaries for Gypsies;

..."

2. Recommendation No. 1557 (2002) on the legal situation of Roma in Europe

58. This Recommendation states, *inter alia*:

"...

3. Today Roma are still subjected to discrimination, marginalisation and segregation. Discrimination is widespread in every field of public and personal life, including access to public places, education, employment, health services and housing, as well as crossing borders and access to asylum procedures. Marginalisation

and the economic and social segregation of Roma are turning into ethnic discrimination, which usually affects the weakest social groups.

4. Roma form a special minority group, in so far as they have a double minority status. They are an ethnic community and most of them belong to the socially disadvantaged groups of society.

...

15. The Council of Europe can and must play an important role in improving the legal status, the level of equality and the living conditions of Roma. The Assembly calls upon the member States to complete the six general conditions, which are necessary for the improvement of the situation of Roma in Europe:

...

c. to guarantee equal treatment for the Romany minority as an ethnic or national minority group in the field of education, employment, housing, health and public services. Member States should give special attention to:

i. promoting equal opportunities for Roma on the labour market;

ii. providing the possibility for Romany students to participate in all levels of education from kindergarten to university;

iii. developing positive measures to recruit Roma in public services of direct relevance to Roma communities, such as primary and secondary schools, social welfare centres, local primary health care centres and local administration;

iv. eradicating all practices of segregated schooling for Romany children, particularly that of routing Romany children to schools or classes for the mentally disabled;

d. to develop and implement positive action and preferential treatment for the socially deprived strata, including Roma as a socially disadvantaged community, in the field of education, employment and housing:

...

e. to take specific measures and create special institutions for the protection of the Romany language, culture, traditions and identity:

...

ii. to encourage Romany parents to send their children to primary school, secondary school and higher education, including college or university, and give them adequate information about the necessity of education;

...

v. to recruit Roma teaching staff, particularly in areas with a large Romany population;

f. to combat racism, xenophobia and intolerance and to ensure non-discriminatory treatment of Roma at local, regional, national and international levels:

...

vi. to pay particular attention to the phenomenon of the discrimination against Roma, especially in the fields of education and employment;

...”

C. The European Commission against Racism and Intolerance (ECRI)

1. *ECRI General Policy Recommendation No. 3: Combating racism and intolerance against Roma/Gypsies (adopted by ECRI on 6 March 1998)*

59. The relevant sections of this Recommendation state:

"The European Commission against Racism and Intolerance:

...

Recalling that combating racism, xenophobia, antisemitism and intolerance forms an integral part of the protection and promotion of human rights, that these rights are universal and indivisible, and that all human beings, without any distinction whatsoever, are entitled to these rights;

Stressing that combating racism, xenophobia, antisemitism and intolerance is above all a matter of protecting the rights of vulnerable members of society;

Convinced that in any action to combat racism and discrimination, emphasis should be placed on the victim and the improvement of his or her situation;

Noting that Roma/Gypsies suffer throughout Europe from persisting prejudices, are victims of a racism which is deeply-rooted in society, are the target of sometimes violent demonstrations of racism and intolerance and that their fundamental rights are regularly violated or threatened;

Noting also that the persisting prejudices against Roma/Gypsies lead to discrimination against them in many fields of social and economic life, and that such discrimination is a major factor in the process of social exclusion affecting many Roma/Gypsies;

Convinced that the promotion of the principle of tolerance is a guarantee of the preservation of open and pluralistic societies allowing for a peaceful coexistence;

recommends the following to Governments of member States:

...

– to ensure that discrimination as such, as well as discriminatory practices, are combated through adequate legislation and to introduce into civil law specific provisions to this end, particularly in the fields of employment, housing and education;

...

– to vigorously combat all forms of school segregation towards Roma/Gypsy children and to ensure the effective enjoyment of equal access to education;

..."

2. ECRI General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination (adopted by ECRI on 13 December 2002)

60. The following definitions are used for the purposes of this Recommendation:

> "9a) 'racism' shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.
>
> (b) 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.
>
> (c) 'indirect racial discrimination' shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages ... persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

61. In the explanatory memorandum to this Recommendation, it is noted (point 8) that the definitions of direct and indirect racial discrimination contained in paragraph 1 (b) and (c) of the Recommendation draw inspiration from those contained in Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and in Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, and on the case-law of the European Court of Human Rights.

3. The report on the Czech Republic published in September 1997

62. In the section of the report dealing with the policy aspects of education and training, ECRI stated that public opinion appeared sometimes to be rather negative towards certain groups, especially the Roma/Gypsy community, and suggested that further measures should be taken to raise public awareness of the issues of racism and intolerance and to improve tolerance towards all groups in society. It added that special measures should be taken as regards the education and training of the members of minority groups, particularly members of the Roma/Gypsy community.

4. The report on the Czech Republic published in March 2000

63. In this report, ECRI stated that the disadvantages and effective discrimination faced by members of the Roma/Gypsy community in the field of education were of particularly serious concern. It was noted that

Roma/Gypsy children were vastly over-represented in special schools and that their channelling to special schools was reported to be often quasi-automatic. Roma/Gypsy parents often favoured this solution, partly to avoid abuse from non-Roma/Gypsy children in ordinary schools and isolation of the child from other neighbourhood Roma/Gypsy children, and partly owing to a relatively low level of interest in education. Most Roma/Gypsy children were consequently relegated to educational facilities designed for other purposes, offering little opportunity for skills training or educational preparation and therefore very limited opportunity for further study or employment. Participation of members of the Roma/Gypsy community in education beyond the primary school level was extremely rare.

64. ECRI therefore considered that the practice of channelling Roma/Gypsy children into special schools for those with mental retardation should be fully examined to ensure that any testing used was fair and that the true abilities of each child were properly evaluated. ECRI also considered that it was fundamental that Roma/Gypsy parents should be made aware of the need for their children to receive a normal education. In general, ECRI considered that there was a need for closer involvement of members of the Roma/Gypsy community in matters concerning education. As a start, the authorities needed to ensure that Roma/Gypsy parents were kept fully informed of measures taken and were encouraged to participate in educational decisions affecting their children.

5. The report on the Czech Republic published in June 2004

65. With regard to the access of Roma children to education, ECRI said in this report that it was concerned that Roma children continued to be sent to special schools which, besides perpetuating their segregation from mainstream society, severely disadvantaged them for the rest of their lives. The standardised test developed by the Czech Ministry of Education for assessing a child's mental level was not mandatory and was only one of a battery of tools and methods recommended to the psychological counselling centres. As to the other element required in order to send a child to a special school – the consent of the child's legal guardian – ECRI observed that parents making such decisions continued to lack information concerning the long-term negative consequences of sending their children to such schools, which were often presented to parents as an opportunity for their children to receive specialised help and be with other Roma children. ECRI also said that it had received reports of Roma parents being turned away from ordinary schools.

ECRI also noted that the Schools Act had come into force in January 2000 and provided the opportunity for pupils from special schools to apply for admission to secondary schools. According to various sources, that remained largely a theoretical possibility as special schools did not provide children with the knowledge required to follow the secondary-school

curriculum. There were no measures in place to provide additional education to pupils who had gone through the special-school system to bring them to a level where they would be adequately prepared for ordinary secondary schools.

ECRI had received very positive feedback concerning the success of 'zero-grade courses' (preparatory classes) at pre-school level in increasing the number of Roma children who attended ordinary schools. It expressed its concern, however, over a new trend to maintain the system of segregated education in a new form – this involved special classes in mainstream schools. In that connection, a number of concerned actors were worried that the proposed new Schools Act created the possibility for even further separation of Roma through the introduction of a new category of special programmes for the "socially disadvantaged".

Lastly, ECRI noted that, despite initiatives taken by the Ministry of Education (classroom assistants, training programmes for teachers, revision of the primary-school curriculum), the problem of low levels of Roma participation in secondary and higher education that had been described by ECRI in its second report persisted.

D. Framework Convention for the Protection of National Minorities

1. The report submitted by the Czech Republic on 1 April 1999 pursuant to Article 25 § 1 of the Framework Convention for the Protection of National Minorities

66. The report stated that the government had adopted measures in the education sphere that were focused on providing suitable conditions especially for children from socially and culturally disadvantaged environments, in particular the Roma community, by opening preparatory classes in elementary and special schools. It was noted that "Romany children with average or above-average intellect are often placed in such schools on the basis of results of psychological tests (this happens always with the consent of the parents). These tests are conceived for the majority population and do not take Romany specifics into consideration. Work is being done on restructuring these tests". In some special schools Roma pupils made up between 80% and 90% of the total number of pupils.

2. The report submitted by the Czech Republic on 2 July 2004

67. The Czech Republic accepted that the Roma were particularly exposed to discrimination and social exclusion and said that it was preparing to introduce comprehensive anti-discrimination tools associated with the implementation of the Council Directive implementing the principle of equal treatment. New legislation was due to be enacted in 2004

(the Act, Law no. 561/2004, was passed on 24 September 2004 and came into force on 1 January 2005).

In the field of Roma education, the report said that the State had taken various measures of affirmative action in order to radically change the present situation of Roma children. The government regarded the practice of referring large numbers of Roma children to special schools as untenable. The need for affirmative action was due not only to the socio-cultural handicap of Roma children, but also to the nature of the whole education system and its inability to sufficiently reflect cultural differences. The proposed new Schools Act would bring changes to the special-education system by transforming "special schools" into "special primary schools", thus providing the children targeted assistance in overcoming their socio-cultural handicap. These included preparatory classes, individual study programmes for children in special schools, measures concerning pre-school education, an expanded role for assistants from the Roma community and specialised teacher-training programmes. As one of the main problems encountered by Roma pupils was their poor command of the Czech language, the Ministry of Education considered that the best solution (and the only realistic one) would be to provide preparatory classes at the pre-school stage for children from disadvantaged socio-cultural backgrounds.

The report also cited a number of projects and programmes that had been implemented nationally in this sphere (Support for Roma integration, Programme for Roma integration/Multicultural education reform, and Reintegrating Roma special-school pupils in primary schools).

3. Opinion on the Czech Republic of the Advisory Committee on the Framework Convention for the Protection of National Minorities, published on 25 January 2002

68. The Advisory Committee noted that, while the special schools were designed for mentally handicapped children, it appeared that many Roma children who were not mentally handicapped were placed in these schools due to real or perceived language and cultural differences between Roma and the majority. It considered that this practice was not compatible with the Framework Convention and stressed that placing children in such schools should take place only when absolutely necessary and always on the basis of consistent, objective and comprehensive tests.

69. The special schools had led to a high level of separation of Roma pupils from others and to a low level of educational skills in the Roma community. This was recognised by the Czech authorities. Both governmental and civil society actors agreed on the need for a major reform. There was however disagreement about the precise nature of the reform to be carried out, the amount of resources to be made available and the speed with which reforms were to be implemented. The Advisory Committee was of the opinion that the Czech authorities ought to develop the reform, in

consultation with the persons concerned, so as to ensure equal opportunities for access to schools for Roma children and equal rights to an ordinary education, in accordance with the principles set out in Committee of Ministers Recommendation No. R (2000) 4 on the education of Roma/Gypsy children in Europe.

70. The Advisory Committee noted with approval the initiatives that had been taken to establish so-called zero classes, allowing the preparation of Roma children for basic school education, *inter alia*, by improving their Czech language skills, and encouraged the authorities to make these facilities more broadly available. It also considered the creation of posts of Roma pedagogical advisers in schools, a civil society initiative, to be a most positive step. The Advisory Committee encouraged the State authorities in their efforts to ensure the increase and development of such posts. A further crucial objective was to ensure a much higher number of Roma children had access to and successfully completed secondary education.

4. The Advisory Committee's opinion on the Czech Republic, published on 26 October 2005

71. In this opinion, the Advisory Committee noted that the authorities were genuinely committed to improving the educational situation of Roma children, and were trying, in various ways, to realise this aim in practice. In that connection, it noted that it was too early to determine whether the revised educational system introduced by the new Schools Act (Law no. 561/2004) would substantially change the existing situation of over-representation of Roma children in special schools or special classes.

72. The Advisory Committee noted that the authorities were paying special attention to the unjustified placement of Roma children in special schools. Tests and methods used to assess children's intellectual abilities upon school enrolment had already been revised with a view to ensuring that they were not misused to the detriment of Roma children. Special educational programmes had been launched to help Roma children overcome their problems. These included waiving fees for the last year of pre-school education, relaxing the rules on minimum class sizes, more individualised education, appointing educational assistants (mostly Roma), as well as producing methodological handbooks and guidelines for teachers working with Roma children. Preparatory pre-school classes had also been organised for Roma children, and had worked well, although on a fairly limited scale. To accommodate all the children concerned, these measures needed to be applied more widely. The Advisory Committee also took note of the special support programme for Roma access to secondary and higher education, and of the efforts that had been made to build up a network of qualified Roma teachers and educational assistants.

73. The Advisory Committee noted, however, that although constant monitoring and evaluation of the school situation of Roma children was one

of the government's priorities the relevant report submitted by the Czech Republic said little about the extent to which they were currently integrated in schools, or the effectiveness and impact of the many measures that had been taken for them. It noted with concern that the measures had produced few improvements and that local authorities did not systematically implement the government's school support scheme and did not always have the determination needed to act effectively in this field.

74. The Advisory Committee noted with concern that, according to non-governmental sources, a considerable number of Roma children were still being placed in special schools at a very early age, and that revision of the psychological tests used in this context had not had a marked impact. According to unofficial estimates, Roma accounted for up to 70% of pupils in these schools, and this – having regard to the percentage of Roma in the population – raised doubts concerning the tests' validity and the methodology followed. This situation was made all the more disturbing by the fact that it also made it more difficult for Roma children to gain access to other levels of education, thus reducing their chances of integrating in society. Although legislation no longer prevented children from advancing from special to ordinary secondary schools, the level of education offered by special schools generally did not make it possible to cope with the requirements of secondary schools, with the result that most dropped out of the system. Although estimates of the number of Roma children who remained outside the school system varied, those who did attend school rarely advanced beyond primary school.

75. In addition, the Advisory Committee noted that, in spite of the awareness-raising initiatives taken by the Ministry of Education, many of the Roma children who attended ordinary schools were isolated by other children and by teaching staff, or even placed in separate classes. At the same time, it was recognised that in some schools Roma children were the largest pupil group simply because the schools concerned were located near the places where Roma resided compactly. According to other sources, material conditions in some of the schools they attended were precarious and the teaching they received was still, in most cases, insufficiently adapted to their situation. It was important to ensure that these schools, too, provided quality education.

76. According to the Advisory Committee priority had to go to placing Roma children in ordinary schools, supporting and promoting preparatory classes and also to educational assistants. Recruiting Roma teaching staff and making all education staff aware of the specific situation of Roma children also needed to receive increased attention. An active involvement on the part of the parents, in particular with regard to the implementation of the new Schools Act, also needed to be promoted as a condition *sine qua non* for the overall improvement of the educational situation of the Roma. Lastly, more determined action was needed to combat isolation of Roma

children in both ordinary and special schools. A clearer approach, coupled with instructions and immediate action on all levels, was needed to put an end to unjustified placement of these children in special schools designed for children with mental disabilities. Effective monitoring measures, particularly designed to eliminate undue placement of children in such schools, had to be one of the authorities' constant priorities.

E. Commissioner for Human Rights

Final Report by Mr Alvaro Gil-Robles on the Human Rights Situation of the Roma, Sinti and Travellers in Europe (dated 15 February 2006)

77. In the third section of the report, which concerns discrimination in education, the Commissioner for Human Rights noted that the fact that a significant number of Roma children did not have access to education of a similar standard enjoyed by other children was in part a result of discriminatory practices and prejudices. In that connection, he noted that segregation in education was a common feature in many Council of Europe member States. In some countries there were segregated schools in segregated settlements, in others special classes for Roma children in ordinary schools or a clear over-representation of Roma children in classes for children with special needs. Roma children were frequently placed in classes for children with special needs without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin. Being subjected to special schools or classes often meant that these children followed a curriculum inferior to those of mainstream classes, which diminished their opportunities for further education and for finding employment in the future. The automatic placement of Roma children in classes for children with special needs was likely to increase the stigma by labelling the Roma children as less intelligent and less capable. At the same time, segregated education denied both the Roma and non-Roma children the chance to know each other and to learn to live as equal citizens. It excluded Roma children from mainstream society at the very beginning of their lives, increasing the risk of their being caught in the vicious circle of marginalisation.

78. The Commissioner was told that in the Czech Republic the young members of the Roma/Gypsy community were drastically over-represented in "special" schools and classes for children with a slight mental disability. At the same time he noted that the authorities had introduced Roma assistant teachers in ordinary classes and set up preliminary classes and that these initiatives had had promising results, though only on a small scale due to the lack of adequate resources. In particular, preparatory classes for socially disadvantaged children had been central in efforts to overcome

excessive attendance of Roma children in special schools. The Czech authorities deemed that preparatory schools attached to nursery schools had been particularly successful in easing the integration of Roma children in ordinary schools. In 2004 the Czech Republic also had 332 teaching assistants who attended to the special needs of Roma pupils.

79. It was also noted that special classes or special curricula for the Roma had been introduced with good intentions, for the purposes of overcoming language barriers or remedying the lack of pre-school attendance of Roma children. Evidently, it was necessary to respond to such challenges, but segregation or systematic placement of Roma children in classes which followed a simplified or a special Romany-language curriculum while isolating them from other pupils was clearly a distorted response. Instead of segregation, significant emphasis had to be placed on measures such as pre-school and in-school educational and linguistic support as well as the provision of school assistants to work alongside teachers. In certain communities, it was crucial to raise the awareness of Roma parents, who themselves might not have had the possibility to attend school, of the necessity and benefits of adequate education for their children.

80. In conclusion, the Commissioner made a number of recommendations related to education. Where segregated education still existed in one form or another, it had to be replaced by ordinary integrated education and, where appropriate, banned through legislation. Adequate resources had to be made available for the provision of pre-school education, language training and school-assistant training in order to ensure the success of desegregation efforts. Adequate assessment had to be made before children were placed in special classes, in order to ensure that the sole criterion in the placement was the objective needs of the child, not his or her ethnicity.

IV. RELEVANT COMMUNITY LAW AND PRACTICE

81. The principle prohibiting discrimination or requiring equality of treatment is well established in a large body of Community law instruments based on Article 13 of the Treaty establishing the European Community. This provision enables the Council, through a unanimous decision following a proposal/recommendation by the Commission and consultation of the European Parliament, to take the measures necessary to combat discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation.

82. Thus, Article 2 § 2 of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex provides that “indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher

proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex". Article 4 § 1, which concerns the burden of proof, reads: "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."

83. Similarly, the aim of Council Directives 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation is to prohibit in their respective spheres all direct or indirect discrimination based on race, ethnic origin, religion or belief, disability, age or sexual orientation. The preambles to these Directives state as follows: "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" and "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."

84. In particular, Directive 2000/43/EC provides as follows:

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 based on racial or ethnic origin.

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 grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin 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.

..."

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 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.

...

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."

85. Under the case-law of the Court of Justice of the European Communities (CJEC), discrimination, which entails the application of different rules to comparable situations or the application of the same rule to different situations, may be overt or covert and direct or indirect.

86. In its *Giovanni Maria Sotgiu v. Deutsche Bundespost* judgment of 12 February 1974 (Case 152-73, point 11), the CJEC stated:

"The rules regarding equality of treatment ... forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

..."

87. In its *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* judgment of 13 May 1986 (Case 170/84, point 31), it stated:

"... Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex."

88. In *Regina v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez* (judgment of 9 February 1999, Case C-167/97, points 51, 57, 62, 65 and 77), the CJEC observed:

"... the national court seeks to ascertain the legal test for establishing whether a measure adopted by a Member State has disparate effect as between men and women to such a degree as to amount to indirect discrimination. ...

...

... the Commission proposes a 'statistically significant' test, whereby statistics must form an adequate basis of comparison and the national court must ensure that they are not distorted by factors specific to the case. The existence of statistically significant evidence is enough to establish disproportionate impact and pass the onus to the author of the allegedly discriminatory measure.

...

It is also for the national court to assess whether the statistics concerning the situation ... are valid and can be taken into account, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant (see Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 17). ...

...

Accordingly, ... in order to establish whether a measure adopted by a Member State has disparate effect as between men and women to such a degree as to amount to indirect discrimination for the purposes of Article 119 of the Treaty, the national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by that measure. If that is the case, there is indirect sex discrimination, unless that measure is justified by objective factors unrelated to any discrimination based on sex.

...

... if a considerably smaller percentage of women than men is capable of fulfilling the requirement ... imposed by the disputed rule, it is for the Member State, as the author of the allegedly discriminatory rule, to show that the said rule reflects a legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex, and that it could reasonably consider that the means chosen were suitable for attaining that aim."

89. In its judgment of 23 October 2003 in *Hilde Schönheit v. Stadt Frankfurt am Main* (Case C-4/02) and *Silvia Becker v. Land Hessen* (Case C-5/02), the CJEC noted at points 67-69 and 71:

"... it must be borne in mind that Article 119 of the Treaty and Article 141(1) and (2) EC set out the principle that men and women should receive equal pay for equal work. That principle precludes not only the application of provisions leading to direct sex discrimination, but also the application of provisions which maintain different treatment between men and women at work as a result of the application of criteria not based on sex where those differences of treatment are not attributable to objective factors unrelated to sex discrimination ...

It is common ground that the provisions of the BeamtVG at issue do not entail discrimination directly based on sex. It is therefore necessary to ascertain whether they can amount to indirect discrimination ...

To establish whether there is indirect discrimination, it is necessary to ascertain whether the provisions at issue have a more unfavourable impact on women than on men ...

...

Therefore it is necessary to determine whether the statistics available indicate that a considerably higher percentage of women than men is affected by the provisions of the BeamtVG entailing a reduction in the pensions of civil servants who have worked part-time for at least a part of their career. Such a situation would be evidence of apparent discrimination on grounds of sex unless the provisions at issue were justified by objective factors unrelated to any discrimination based on sex."

90. In *Debra Allonby v. Accrington & Rossendale College, Education Lecturing Services ... and Secretary of State for Education and Employment* (judgment of 13 January 2004, Case C-256/01), it stated (point 81):

> "... it must be held that a woman may rely on statistics to show that a clause in State legislation is contrary to Article 141(1) EC because it discriminates against female workers. ..."

91. Lastly, in *Commission of the European Communities v. Republic of Austria* (judgment of 7 July 2005, Case C-147/03), the CJEC observed (points 41 and 46-48):

> "According to settled case-law, the principle of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result (see, in particular, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11; Case C-65/03 *Commission v. Belgium*, cited above, paragraph 28; and Case C-209/03 *Bidar* [2005] ECR [I-02119], paragraph 51).
>
> ...
>
> ... the legislation in question places holders of secondary education diplomas awarded in a Member State other than the Republic of Austria at a disadvantage, since they cannot gain access to Austrian higher education under the same conditions as holders of the equivalent Austrian diploma.
>
> Thus, although paragraph ... applies without distinction to all students, it is liable to have a greater effect on nationals of other Member States than on Austrian nationals, and therefore the difference in treatment introduced by that provision results in indirect discrimination.
>
> Consequently, the differential treatment in question could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and were proportionate to the legitimate aim of the national provisions (Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 27, and *D'Hoop*, cited above, paragraph 36)."

V. RELEVANT UNITED NATIONS MATERIALS

A. International Covenant on Civil and Political Rights

92. Article 26 of the Covenant provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

B. United Nations Human Rights Committee

93. In points 7 and 12 of its General Comment No. 18 of 10 November 1989 on non-discrimination, the Committee expressed the following opinion:

> "... the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.
>
> ...
>
> ... when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory ..."

94. In point 11.7 of its Views dated 31 July 1995 on Communication no. 516/1992 concerning the Czech Republic, the Committee noted:

> "... The Committee is of the view, however, that the intent of the legislature is not alone dispositive in determining a breach of Article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with Article 26. But an act which is not politically motivated may still contravene Article 26 if its effects are discriminatory."

C. International Convention on the Elimination of All Forms of Racial Discrimination

95. Article 1 of this Convention provides:

> "... the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
>
> ..."

D. Committee on the Elimination of Racial Discrimination

96. In its General Recommendation No. 14 of 22 March 1993 on the definition of discrimination, the Committee noted, *inter alia*:

> "1. ... A distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms. This is confirmed by the obligation placed upon States Parties by Article 2, paragraph 1 (c), to nullify any law or practice which has the effect of creating or perpetuating racial discrimination.
>
> 2. ... In seeking to determine whether an action has an effect contrary to the Convention, [the Committee] will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.

...”

97. In its General Recommendation No. 19 of 18 August 1995 on racial segregation and apartheid, the Committee observed:

> “3. ... while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons. In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds.
>
> 4. The Committee therefore affirms that a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities. ...”

98. In its General Recommendation No. 27 of 16 August 2000 on discrimination against Roma, the Committee made, *inter alia*, the following recommendation in the education sphere:

> “17. To support the inclusion in the school system of all children of Roma origin and to act to reduce drop-out rates, in particular among Roma girls, and, for these purposes, to cooperate actively with Roma parents, associations and local communities.
>
> 18. To prevent and avoid as much as possible the segregation of Roma students, while keeping open the possibility for bilingual or mother-tongue tuition; to this end, to endeavour to raise the quality of education in all schools and the level of achievement in schools by the minority community, to recruit school personnel from among members of Roma communities and to promote intercultural education.
>
> 19. To consider adopting measures in favour of Roma children, in cooperation with their parents, in the field of education.”

99. In its concluding observations of 30 March 1998 following its examination of the report submitted by the Czech Republic, the Committee noted, *inter alia*:

> “13. The marginalization of the Roma community in the field of education is noted with concern. Evidence that a disproportionately large number of Roma children are placed in special schools, leading to *de facto* racial segregation, and that they also have a considerably lower level of participation in secondary and higher education, raises doubts about whether Article 5 of the Convention is being fully implemented.”

E. Convention on the Rights of the Child

100. Articles 28 and 30 of this Convention provide:

Article 28

> “1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
>
> (a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries."

Article 30

"In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

F. Unesco

101. Articles 1 to 3 of the Convention against Discrimination in Education of 14 December 1960 provide:

Article 1

"1. For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) Of depriving any person or group of persons of access to education of any type or at any level;

(b) Of limiting any person or group of persons to education of an inferior standard;

(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

...”

Article 2

“When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article [1] of this Convention:

(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil’s parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.”

Article 3

“In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:

(a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;

(b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;

...”

102. The Declaration on Race and Racial Prejudice adopted by the Unesco General Conference on 27 November 1978 proclaims as follows:

Article 1

“1. All human beings belong to a single species and are descended from a common stock. They are born equal in dignity and rights and all form an integral part of humanity.

2. All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. However, the diversity of life styles and the right to be different may not, in any circumstances, serve as a pretext for racial prejudice; they may not justify either in law or in fact any discriminatory practice whatsoever, nor provide a ground for the policy of apartheid, which is the extreme form of racism.

...”

Article 2

"...

2. Racism includes racist ideologies, prejudiced attitudes, discriminatory behaviour, structural arrangements and institutionalized practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable; it is reflected in discriminatory provisions in legislation or regulations and discriminatory practices as well as in anti-social beliefs and acts; it hinders the development of its victims, perverts those who practise it, divides nations internally, impedes international cooperation and gives rise to political tensions between peoples; it is contrary to the fundamental principles of international law and, consequently, seriously disturbs international peace and security.

3. Racial prejudice, historically linked with inequalities in power, reinforced by economic and social differences between individuals and groups, and still seeking today to justify such inequalities, is totally without justification."

Article 3

"Any distinction, exclusion, restriction or preference based on race, colour, ethnic or national origin or religious intolerance motivated by racist considerations, which destroys or compromises the sovereign equality of States and the right of peoples to self-determination, or which limits in an arbitrary or discriminatory manner the right of every human being and group to full development is incompatible with the requirements of an international order which is just and guarantees respect for human rights; the right to full development implies equal access to the means of personal and collective advancement and fulfilment in a climate of respect for the values of civilizations and cultures, both national and world-wide."

Article 5

"1. Culture, as a product of all human beings and a common heritage of mankind, and education in its broadest sense, offer men and women increasingly effective means of adaptation, enabling them not only to affirm that they are born equal in dignity and rights, but also to recognize that they should respect the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international contexts, it being understood that it rests with each group to decide in complete freedom on the maintenance, and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity.

2. States, in accordance with their constitutional principles and procedures, as well as all other competent authorities and the entire teaching profession, have a responsibility to see that the educational resources of all countries are used to combat racism, more especially by ensuring that curricula and textbooks include scientific and ethical considerations concerning human unity and diversity and that no invidious distinctions are made with regard to any people; by training teachers to achieve these ends; by making the resources of the educational system available to all groups of the population without racial restriction or discrimination; and by taking appropriate steps to remedy the handicaps from which certain racial or ethnic groups suffer with regard to their level of education and standard of living and in particular to prevent such handicaps from being passed on to children.

..."

Article 6

"1. The State has prime responsibility for ensuring human rights and fundamental freedoms on an entirely equal footing in dignity and rights for all individuals and all groups.

2. So far as its competence extends and in accordance with its constitutional principles and procedures, the State should take all appropriate steps, *inter alia* by legislation, particularly in the spheres of education, culture and communication, to prevent, prohibit and eradicate racism racist propaganda, racial segregation and apartheid and to encourage the dissemination of knowledge and the findings of appropriate research in natural and social sciences on the causes and prevention of racial prejudice and racist attitudes with due regard to the principles embodied in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

3. Since laws proscribing racial discrimination are not in themselves sufficient, it is also incumbent on States to supplement them by administrative machinery for the systematic investigation of instances of racial discrimination, by a comprehensive framework of legal remedies against acts of racial discrimination, by broadly based education and research programmes designed to combat racial prejudice and racial discrimination and by programmes of positive political, social, educational and cultural measures calculated to promote genuine mutual respect among groups. Where circumstances warrant, special programmes should be undertaken to promote the advancement of disadvantaged groups and, in the case of nationals, to ensure their effective participation in the decision-making processes of the community."

Article 9

"1. The principle of the equality in dignity and rights of all human beings and all peoples, irrespective of race, colour and origin, is a generally accepted and recognized principle of international law. Consequently any form of racial discrimination practised by a State constitutes a violation of international law giving rise to its international responsibility.

2. Special measures must be taken to ensure equality in dignity and rights for individuals and groups wherever necessary, while ensuring that they are not such as to appear racially discriminatory. In this respect, particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in force, in particular in regard to housing, employment and health; to respect the authenticity of their culture and values; and to facilitate their social and occupational advancement, especially through education.

..."

VI. OTHER SOURCES

A. European Monitoring Centre on Racism and Xenophobia (now the European Union Agency for Fundamental Rights)

103. The information on education in the Czech Republic available on the website of the European Monitoring Centre includes the following.

"In the Czech Republic, there are no official or non-official data on racism and discrimination in education available.

The most serious problem of the Czech education system is still the segregatory placement of children from socially disadvantaged backgrounds (very often Roma) in special schools. More than half of Roma children study there. Such tendencies of the Czech education system especially at elementary schools were proved by extensive research carried out by the Institute of Sociology of the Academy of Sciences of the Czech Republic. Only a very small percentage of Roma youth enter secondary schools."

104. The Monitoring Centre's report entitled "Roma and Travellers in Public Education", which was published in May 2006 and concerned what at the time were twenty-five member States of the European Union, noted, *inter alia*, that although systematic segregation of Roma children no longer existed as educational policy segregation was practised by schools and educational authorities in a number of different, mostly indirect, ways, sometimes as the unintended effect of policies and practices and sometimes as a result of residential segregation. Schools and educational authorities may, for example, segregate pupils on the basis of a perception of "their different needs" and/or as a response to behavioural issues and learning difficulties. The latter could also lead to the frequent placement of Roma pupils in special schools for mentally handicapped children, which was still a worrying phenomenon in member States of the European Union like Hungary, Slovakia and the Czech Republic. However, steps were being taken to review testing and placement procedures taking into account the norms and behavioural patterns of the Roma children's social and cultural background.

B. The House of Lords

105. In its decision of 9 December 2004 in the case of *Regina v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, the House of Lords unanimously held that British immigration officers working at Prague Airport had discriminated against Roma wishing to travel from the airport to the United Kingdom as they had on racial grounds treated them less favourably than other people travelling to the same destination.

106. Baroness Hale of Richmond said, *inter alia*:

"73. ... The underlying concept in both race and sex discrimination laws is that individuals of each sex and all races are entitled to be treated equally. Thus it is just as discriminatory to treat men less favourably than women as it is to treat women less favourably than men; and it is just as discriminatory to treat whites less favourably than blacks as it is to treat blacks less favourably than whites. The ingredients of unlawful discrimination are (i) a difference in treatment between one person and another person (real or hypothetical) from a different sex or racial group; (ii) that the treatment is less favourable to one; (iii) that their relevant circumstances are the same or not materially different; and (iv) that the difference in treatment is on sex or racial

grounds. However, because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence. Once treatment less favourable than that of a comparable person (ingredients (i), (ii) and (iii)) is shown, the court will look to the alleged discriminator for an explanation. The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds ...

74. If direct discrimination of this sort is shown, that is that. Save for some very limited exceptions, there is no defence of objective justification. The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. ...

75. The complaint in this case is of direct discrimination against the Roma. Indirect discrimination arises where an employer or supplier treats everyone in the same way, but he applies to them all a requirement or condition which members of one sex or racial group are much less likely to be able to meet than members of another: for example, a test of heavy lifting which men would be much more likely to pass than women. This is only unlawful if the requirement is one which cannot be justified independently of the sex or race of those involved ... But it is the requirement or condition that may be justified, not the discrimination. This sort of justification should not be confused with the possibility that there may be an objective justification for discriminatory treatment which would otherwise fall foul of Article 14 of the European Convention on Human Rights.

...

90. It is worth remembering that good equal opportunities practice may not come naturally. Many will think it contrary to common sense to approach all applicants with an equally open mind, irrespective of the very good reasons there may be to suspect some of them more than others. But that is what is required by a law which tries to ensure that individuals are not disadvantaged by the general characteristics of the group to which they belong. In 2001, when the operation with which we are concerned began, the race relations legislation had only just been extended to cover the activities of the immigration service. It would scarcely be surprising if officers acting under considerable pressure of time found it difficult to conform in all respects to procedures and expectations which employers have been struggling to get right for more than quarter of a century.

91. It is against this background that such evidence as there is of what happened on the ground at Prague Airport needs to be assessed. The officers did not make any record of the ethnic origin of the people they interviewed. The respondents cannot therefore provide us with figures of how many from each group were interviewed, for how long, and with what result. This, they suggest, makes it clear that the officers were not relying on the Authorisation: if they had been, they would only have had to record their view of the passenger's ethnicity. If correct, that would have been enough to justify refusal of leave. But what it also shows is that no formal steps were being taken to gather the information which might have helped ensure that this high-risk operation was not being conducted in a discriminatory manner. It also means that the only information available is that supplied by the claimants, and in particular the ERRC which was attempting to monitor the operation. The respondents can cast doubt on the reliability of this, but they cannot contradict it or provide more reliable information themselves. ..."

C. The United States Supreme Court

107. The Supreme Court issued its decision in the case of *Griggs v. Duke Power Co.*, 401 US 424 (1971), in which it established the disparate impact test, after black employees at an electricity generating plant had brought proceedings on the grounds that their employers' practice of requiring them to hold a high school diploma or to pass an aptitude test, even for the least well-paid jobs, was discriminatory. Fewer blacks had managed to obtain the diploma or pass the standardised tests. The Supreme Court stated:

> "The [Civil Rights] Act [of 1964] requires the elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race, and, if, as here, an employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent. ...
>
> The Act does not preclude the use of testing or measuring procedures, but it does proscribe giving them controlling force unless ... they are demonstrably a reasonable measure of job performance ...
>
> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> ... Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

THE LAW

I. SCOPE OF THE GRAND CHAMBER'S JURISDICTION

108. In their final observations, which were lodged with the Grand Chamber on 26 September 2006, the applicants repeated their contention that there had been a violation of their rights under Article 3 and Article 6 § 1 of the Convention.

109. Under the Court's case-law, the "case" referred to the Grand Chamber is the application as it has been declared admissible (see, among other authorities, *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 128, ECHR 2005-XI, and *Üner v. the Netherlands* [GC], no. 46410/99, § 41, ECHR 2006-XII). The Grand Chamber notes that in its partial decision of 1 March 2005 the Chamber declared inadmissible all the applicants' complaints that did not relate to Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1, including those under Articles 3 and 6 § 1 of the Convention. Accordingly, the latter complaints – assuming the applicants

still wish to rely on them – are not within the scope of the case before the Grand Chamber.

II. THE GOVERNMENT'S PRELIMINARY OBJECTION

110. The Court notes that in its decision on the admissibility of the application the preliminary objection made by the Government in their observations of 15 March 2004 of a failure to exhaust domestic remedies was joined to the merits of the complaint under Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1. In its judgment of 7 February 2006 (§ 31), the Chamber found that the parties' submissions on the issue of the exhaustion of domestic remedies raised questions that were closely linked to the merits of the case. It agreed with the Czech Constitutional Court that the application raised points of considerable importance and that vital interests were at stake. Accordingly, and in view of its finding that for other reasons pertaining to the merits there had been no violation, the Chamber did not consider it necessary to examine whether the applicants had satisfied that requirement in the present case.

111. It will be recalled that where a case is referred to it, the Grand Chamber may also examine issues relating to the admissibility of the application, for example where they have been joined to the merits or are otherwise relevant at the merits stage (see *K. and T. v. Finland* [GC], no. 25702/94, § 141, ECHR 2001-VII).

112. In these circumstances, the Grand Chamber considers it necessary to determine whether the applicants have in the instant case satisfied the exhaustion of domestic remedies requirement.

113. The Government argued that the applicants had not used all available means to remedy their position. None of them had exercised their right to appeal against the decisions to place them in special schools. Six had failed to lodge a constitutional appeal. Further, of those applicants who had appealed to the Constitutional Court only five had actually contested the decisions to place them in special schools. No attempt had been made by the applicants to defend their dignity by bringing an action under the Civil Code to protect their personality rights and their parents had not referred the matter to the Schools Inspectorate or the Ministry of Education.

114. The applicants submitted, firstly, that there were no remedies available in the Czech Republic that were effective and adequate to deal with complaints of racial discrimination in the education sphere. More specifically, the right to lodge a constitutional appeal had been rendered ineffective by the reasoning followed by the Constitutional Court in the instant case and its refusal to attach any significance to the general practice that had been referred to by the applicants. In the applicants' submission, no criticism could therefore be made of those applicants who had chosen not to lodge such an appeal. As to why they had not lodged an administrative

appeal, the applicants said that their parents had only gained access to the requisite information after the time allowed for lodging such an appeal had expired. Even the Constitutional Court had disregarded that omission. Finally, an action to protect personality rights could not be regarded as a means of challenging enforceable administrative decisions and the Government had not provided any evidence that such a remedy was effective.

Further, even supposing that an effective remedy existed, the applicants submitted that it did not have to be exercised in cases in which an administrative practice, such as the system of special schools in the Czech Republic, made racism possible or encouraged it. They also drew the Court's attention to the racial hatred and numerous acts of violence directed at Roma in the Czech Republic and to the unsatisfactory nature of the penalties imposed for racist and xenophobic criminal offences.

115. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention is based on the assumption that the domestic system provides an effective remedy in respect of the alleged breach. It is for the Government claiming non-exhaustion to satisfy the Court that an effective remedy was available in theory and in practice at the relevant time; that is to say, that the remedy was accessible, capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success (see *V. v. the United Kingdom* [GC], no. 24888/94, § 57, ECHR 1999-IX).

116. The application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. The Court has accordingly recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see *İlhan v. Turkey* [GC], no. 22277/93, § 59, ECHR 2000-VII).

117. In the present case, the Government complained, firstly, that none of the applicants had sought to appeal against the decision ordering their placement in a special school or brought an action to protect their personality rights.

118. In this connection, the Court, like the applicants, notes that the Czech Constitutional Court decided to disregard that omission (see paragraph 28 above). In these circumstances, it considers that it would be unduly formalistic to require the applicants to exercise a remedy which even the highest court of the country concerned had not obliged them to use.

119. Secondly, the Government stated that of the twelve applicants who had lodged a constitutional appeal, only five had actually contested the decisions to place them in special schools, so enabling the Constitutional Court to hear their cases.

120. The Court notes that by virtue of the fact that the five applicants concerned had brought a constitutional appeal in due form, the Constitutional Court was given an opportunity to rule on all the complaints which the applicants have now referred to the Court. The Constitutional Court also found that the scope of the appeals went beyond the applicants' own personal interests so that, in that sense, its decision was of more general application.

121. Further, it can be seen from its decision of 20 October 1999 that the Constitutional Court confined itself to verifying the competent authorities' interpretation and application of the relevant statutory provisions without considering their impact, which the applicants argued was discriminatory. As regards the complaint of racial discrimination, it also stated that it was not its role to assess the overall social context.

122. In these circumstances, there is nothing to suggest that the Constitutional Court's decision would have been different had it been called upon to decide the cases of the thirteen applicants who did not lodge a constitutional appeal or challenge the decision of the head teacher of the special school. In the light of these considerations, the Court is not satisfied that, in the special circumstances of the present case, this remedy was apt to afford the applicants redress for their complaints or offered reasonable prospects of success.

123. Consequently, the Government's preliminary objection in this case must be rejected.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 2 OF PROTOCOL No. 1

124. The applicants maintained that they had been discriminated against in that because of their race or ethnic origin they had been treated less favourably than other children in a comparable situation without any objective and reasonable justification. They relied in that connection on Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1, which provide as follows:

Article 14 of the Convention

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 2 of Protocol No. 1

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

A. The Chamber judgment

125. The Chamber held that there had been no violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No 1. In its view, the Government had succeeded in establishing that the system of special schools in the Czech Republic had not been introduced solely to cater for Roma children and that considerable efforts had been made in those schools to help certain categories of pupils to acquire a basic education. In that connection, it observed that the rules governing children's placement in special schools did not refer to the pupils' ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes and disabilities of the children.

126. The Chamber noted in particular that the applicants had not succeeded in refuting the experts' findings that their learning difficulties were such as to prevent them from following the ordinary primary-school curriculum. It was further noted that the applicants' parents had failed to take any action or had even requested their children's placement or continued placement in a special school themselves.

127. The Chamber accepted in its judgment that it was not easy to choose an education system that reconciled the various competing interests and that there did not appear to be an ideal solution. However, while acknowledging that the statistical evidence disclosed worrying figures and

that the general situation in the Czech Republic concerning the education of Roma children was by no means perfect, it considered that the concrete evidence before it did not enable it to conclude that the applicants' placement or, in some instances, continued placement in special schools was the result of racial prejudice.

B. The parties' submissions

1. The applicants

128. The applicants submitted that the restrictive interpretation the Chamber had given to the notion of discrimination was incompatible not only with the aim of the Convention but also with the case-law of the Court and of other jurisdictions in Europe and beyond.

129. They firstly asked the Grand Chamber to correct the obscure and contradictory test the Chamber had used for deciding whether there had been discrimination. They noted that, while reaffirming the established principle that if a policy or general measure had disproportionately prejudicial effects on a group of people, the possibility of its being considered discriminatory could not be ruled out even if it was not specifically aimed or directed at that group. The Chamber had nevertheless departed from the Court's previous case-law (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; *Hoogendijk v. the Netherlands* (dec.), no. 58641/00, 6 January 2005; and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 157, ECHR 2005-VII) by erroneously requiring the applicants to prove discriminatory intent on the part of the Czech authorities. In the applicants' submission, such a requirement was unrealistic and illogical as the question whether or not special schools were designed to segregate along ethnic lines was irrelevant since that was indisputably the effect they had in practice. The reality was that well-intentioned actors often engaged in discriminatory practices through ignorance, neglect or inertia.

130. The applicants observed in particular that in explaining why it had refused to shift the burden of proof in *Nachova and Others* (cited above, § 157) the Court had been careful to distinguish between racially-motivated violent crime and non-violent acts of racial discrimination in, for example, employment or the provision of services. In their submission, racial discrimination in access to education fell precisely in the latter category of discriminatory acts which could be proved in the absence of intent. More recently, the Court had ruled in *Zarb Adami v. Malta* (no. 17209/02, §§ 75-76, ECHR 2006-VIII) that a difference in treatment did not need to be set forth in legislative text in order to breach Article 14 and that a "well-established practice" or "*de facto* situation" could also give rise to discrimination. As, in the instant case, the applicants considered that they

had indisputably succeeded in establishing the existence of a disproportionate impact, the burden of proof had to shift to the Government to prove that the applicants' ethnic origin had had no bearing on the impugned decisions and that sufficient safeguards against discrimination were in place.

131. In that connection, the applicants noted that in its General Policy Recommendation No. 7, ECRI had invited the States to prohibit both direct discrimination and indirect discrimination, with neither concept requiring proof of discriminatory intent. A clear majority of the member States of the Council of Europe had already expressly prohibited discrimination in sections of their national legislation without requiring proof of such intent and this was reflected in the judicial practice of those States. The applicants referred in this context to, *inter alia*, the decision of the House of Lords in the case of *Regina v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* (see paragraph 105 above) and to the jurisprudence of the Court of Justice of the European Communities. Lastly, they noted that indirect discrimination was also prohibited under international law, including the International Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination.

132. Accordingly, in view of the vital importance of Article 14 protection and the need to make it effective, the applicants considered that it would be helpful for the Court to clarify the rules it applied in such situations to ensure, *inter alia*, that the principle of non-discrimination was interpreted and applied consistently by the two European courts. For this reason, the applicants asked the Grand Chamber to give a clear ruling that intent was not necessary to prove discrimination under Article 14, except in cases – such as of racially motivated violence – where it was already an element of the underlying offence.

133. In the instant case, the applicants did not claim that the competent authorities had at the relevant time harboured invidiously racist attitudes towards Roma, or that they had intended to discriminate against Roma, or even that they had failed to take positive measures. All the applicants needed to prove – and, in their submission, had proved – was that the authorities had subjected the applicants to differential adverse treatment in comparison with similarly situated non-Roma, without objective and reasonable justification. The question of a common European standard that had been raised by the Government was, in the applicants' view, more of a political issue and the existence or otherwise of such a standard was of no relevance as the principle of equality of treatment was a binding rule of international law.

134. Similarly, the applicants asked the Grand Chamber to provide guidance concerning the kinds of proof, including but not limited to statistical evidence, which might be relevant to a claim of a violation of

Article 14. They noted that the Chamber had discounted the overwhelming statistical evidence they had adduced, without checking whether or not it was accurate, despite the fact that it had been corroborated by independent specialised intergovernmental bodies (ECRI, the Committee on the Elimination of Racial Discrimination, and the Advisory Committee on the Framework Convention for the Protection of National Minorities) and by the government's own admission (see paragraphs 41 and 66 above). According to this data, although Roma represented only 5% of all primary-school pupils at the time the application was lodged, they made up more than 50% of the population of special schools. Whereas fewer than 2% of non-Roma pupils in Ostrava were assigned to special schools, over 50% of Roma children were sent to such schools. Overall, a Roma child was more than twenty-seven times more likely than a similarly situated non-Roma child to be assigned to a special school.

135. In the applicants' view, these figures strongly suggested that, whether through conscious design or reprehensible neglect, race or ethnicity had infected the process of school assignment to a substantial – perhaps determining – extent. The presumption that they, like other Roma children in the city of Ostrava, had been the victims of discrimination on the grounds of ethnic origin had never been rebutted. It was undisputed that as a result of their assignment to special schools the applicants had received a substantially inferior education as compared with non-Roma children and that this had effectively deprived them of the opportunity to pursue a secondary education other than in a vocational training centre.

136. In this context, they argued that both in Europe and beyond statistical data was often used in cases which, as here, concerned discriminatory effect, as sometimes it was the only means of proving indirect discrimination. Statistical data was accepted as a means of proof of discrimination by the bodies responsible for supervising the United Nations treaties and by the Court of Justice of the European Communities. Council Directive 2000/43/EC expressly provided that indirect discrimination could be established by any means "including on the basis of statistical evidence".

137. With respect to the Convention institutions, the applicants noted that, in finding racial discrimination in *East African Asians v. the United Kingdom* (nos. 4403/70-4530/70, Commission's report of 14 December 1973, Decisions and Reports 78-A, p. 5), the Commission took into account the surrounding circumstances including statistical data on the disproportionate effect the legislation had had on British citizens of Asian origin. Recently, the Court had indicated in its decision in *Hoogendijk* (cited above) that, while statistics alone were not sufficient to prove discrimination, they could – particularly where they were undisputed – amount to prima facie evidence requiring the Government to provide an objective explanation of the differential treatment. Further, in its judgment

in *Zarb Adami* (cited above), the Court had relied, *inter alia*, on statistical evidence of disproportionate effect.

138. The applicants added that it would be helpful for the Grand Chamber to clarify the Court's case-law by determining whether there was an objective and reasonable justification for the purposes of Article 14 for the difference in treatment in the present case and specifying the conclusions that should be drawn in the absence of a satisfactory explanation. Referring to, *inter alia*, the judgments in *Timishev v. Russia* (nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII) and *Moldovan and Others v. Romania (no. 2)* (nos. 41138/98 and 64320/01, § 140, 12 July 2005), they stated that where an applicant had established a difference in treatment the onus was on the respondent State to prove that it was justified. In the absence of a racially neutral explanation, it was legitimate to conclude that the difference in treatment was based on racial grounds. In the applicants' submission, neither an inadequate command of the Czech language, nor poverty nor a different socio-economic status could constitute an objective and reasonable justification in their case. They denied that the disproportionately large number of Roma children in special schools could be explained by the results of intellectual capacity tests or justified by parental consent (see also paragraphs 141-42 below).

139. In view of the importance of the fight against racial and ethnic discrimination that had constantly been reaffirmed by the Strasbourg institutions, the applicants considered that the Grand Chamber should state in clear terms that the States' "margin of appreciation" could not serve to justify segregation in education. The approach adopted by the Chamber, which left an unlimited margin of appreciation to the Czech State, was unjustified in view of the serious allegations of racial and ethnic discrimination in the instant case and was inconsistent with the Court's case-law. The present case warranted all the more the Court's attention in that it concerned one of the most important substantive rights, namely the right to education.

140. The applicants further argued that the Chamber had misinterpreted crucial evidence and drawn inappropriate conclusions on two decisive issues, namely parental consent and the reliability of the psychological tests.

141. There were no uniform rules at the material time governing the manner in which the tests used by the educational psychology centres were administered and the results interpreted, so that much had been left to the discretion of the psychologists and there had been considerable scope for racial prejudice and cultural insensitivity. Further, the tests which they and other Roma children had been forced to sit were scientifically flawed and educationally unsound. The documentary evidence showed that a number of the applicants had been placed in special schools for reasons other than intellectual deficiencies (such as absenteeism, bad behaviour, and even misconduct on the part of the parents). The Czech Government had

themselves acknowledged the discriminatory effect of the tests (see paragraph 66 above). They had also admitted in their observations on the present case that one of the applicants had been placed in a special school despite possessing good verbal communication skills.

142. Nor, in the applicants' submission, could the discriminatory treatment to which they had been subjected be justified by their parents' consent to their placement in the special schools. Governments were legally bound to protect the higher interest of the child and in particular the equal right of all children to education. Neither parental conduct nor parental choice could deprive them of that right.

The credibility of the "consent" allegedly given by the parents of several of the applicants had been called into question by inconsistencies in the school records that raised doubts as to whether they had indeed agreed. In any event, even supposing that consent had been given by all the parents, it had no legal value as the parents concerned had never been properly informed of their right to withhold their consent, of alternatives to placement in a special school or of the risks and consequences of such a placement. The procedure was largely formal: the parents were given a pre-completed form and the results of the psychological tests, results they believed they had no right to contest. As to the alleged right subsequently to request a transfer to an ordinary school, the applicants pointed out that from their very first year at school they had received a substantially inferior education that made it impossible for them subsequently to meet the requirements of the ordinary schools.

Moreover, it was unrealistic to consider the issue of consent without taking into account the history of Roma segregation in education and the absence of adequate information on the choices available to Roma parents. Referring to the view that had been expressed by the Court (see *Håkansson and Sturesson v. Sweden*, 21 February 1990, § 66, Series A no. 171-A) that a waiver may be lawful for certain rights but not for others and that it must not run counter to any important public interest, the applicants submitted that there could be no waiver of the child's right not to be racially discriminated against in education.

143. The instant case raised "a serious issue of general importance", namely whether European governments were capable of coping with increasing racial and ethnic diversity and of protecting vulnerable minorities. In that connection, the most important issue was that of equality of opportunity in education as discrimination against Roma in that sphere persisted in all the member States of the Council of Europe. Putting an end to discrimination at school would enable Roma to enjoy equality of treatment generally.

144. The racial segregation of Roma children in Czech schools had not materially changed since the date the application was filed. The applicants' own futures and lack of prospects revealed the harm that their

discriminatory placement in special schools had caused. Thus, in May 2006 eight of the applicants were continuing their education in a special school while a further six who had completed special school found themselves unemployed. Of the four applicants who had been allowed to attend ordinary primary school after passing the aptitude tests, two were still at school, one was unemployed and the fourth was enrolled in a vocational secondary school. The applicants considered that it was already clear that none of them would receive a general secondary-school education, still less a university education.

145. Finally, the applicants pointed out that a new Schools Act had been passed in late 2004, which had purported to end the special-school system. The new legislation thus acknowledged that the very existence of schools deemed "special" imposed a badge of inferiority on those placed there. In reality, however, the new law had not brought about changes in practice as it had merely altered the criteria on which educational programmes were based. Extensive research carried out by the European Roma Rights Centre in 2005 and 2006 showed that in many cases special schools had simply been renamed "remedial schools" or "practical schools" without any substantial change in the composition of their teaching staff or the content of their curriculum.

2. The Government

146. The Government stated that the case raised complex issues concerning the social problem of the position of Roma in contemporary society. Although the Roma ostensibly enjoyed the same rights as other citizens, in reality their prospects were limited by both objective and subjective factors. There could be no improvement in their situation without the involvement and commitment of all members of the Roma community. When they attempted to eliminate these inequalities, member States were confronted with numerous political, social, economic and technical problems which could not be confined to the question of respect for fundamental rights. It was for this reason that the courts, including the European Court of Human Rights, had to exercise a degree of restraint when examining measures adopted in this field and confine themselves to deciding whether or not the competent authorities had overstepped their margin of appreciation.

147. Referring to their previous written and oral observations, the Government reiterated that race, colour or association with a national minority had not played a determining role in the applicants' education. There was no specific evidence of any difference in treatment of the applicants on the basis of those grounds. The applicants' school files showed beyond doubt that their placement in special schools was not based on their ethnic origin, but on the results of psychological tests carried out at the educational psychology centres. Since the applicants had been placed in

special schools on account of their specific educational needs resulting essentially from their intellectual capacity and since the criteria, the process by which the criteria were applied and the system of special schools were all racially neutral, as the Chamber had confirmed in its judgment, it was not possible to speak of overt or direct discrimination in the instant case.

148. The Government next turned to the applicants' argument that the instant case was one of indirect discrimination which, in some instances, could only be established with the aid of statistics. They contended that the case of *Zarb Adami* (cited above), in which the Court had relied extensively on statistical evidence submitted by the parties, was not comparable to the instant case. Firstly, *Zarb Adami* was far less complex. Secondly, the statistical disparities found in that case between the number of men and women called to perform jury service were the result of a decision by the State, whereas the statistics relied on by the applicants in the instant case reflected first and foremost the parents' wishes for their children to attend special school, not any act or omission on the part of the State. Had the parents not expressed such a wish (by giving their consent) the children would not have been placed in a special school.

Further, the statistical information that had been submitted in the instant case by the applicants was not sufficiently conclusive as the data had been furnished by the head teachers of the schools and therefore only reflected their subjective opinions. There was no official information on the ethnic origin of the pupils. The Government further considered that the statistics had no informative value without an evaluation of the socio-cultural background of the Roma, their family situation and their attitude towards education. They pointed out in that connection that the Ostrava region had one of the largest Roma populations in the Czech Republic.

As to the comparative studies on countries from central and eastern Europe and beyond cited in the observations of the third-party interveners, the Government did not consider that there was any relevant link between those statistics and the substantive issues in the case to hand. In their submission, those studies tended to confirm that creating an education system optimised for Roma children was an extremely complex task.

149. Nevertheless, even assuming that the data submitted by the applicants were reliable and that the State could be considered responsible for the situation, that did not, in the Government's submission, amount to indirect discrimination that was incompatible with the Convention. The impugned measure was consistent with the principle of non-discrimination as it pursued a legitimate aim, namely the adaptation of the education process to the capacity of children with specific educational needs. It was also objectively and reasonably justified.

150. On this latter point, the Government contested the applicants' claim that they had not submitted any satisfactory explanation regarding the large number of Roma in special schools. While admitting that the situation of the

Roma with regard to education was not ideal, the Government considered that they had demonstrated that the special schools had not been established for the Roma community and that ethnic origin had not been a criterion for deciding on placements in special schools. They reiterated that special-school placements were only possible after prior individualised pedagogical and psychological testing. The testing process was a technical tool that was the subject of continuing scientific research and for that reason could only be carried out by qualified personnel. The courts did not possess the necessary qualifications and therefore had to exercise a degree of restraint in this field. As regards the professional standards referred to in the observations of the International Step by Step Association and others, the Government emphasised that these were not legal norms possessing force of law but, at most, non-binding recommendations or indications by specialists and that the failure to apply them could not, by definition, entail international legal responsibility.

151. The files of each of the applicants contained full details of the methods that had been used and the results of the testing. These had not been challenged at the time by any of the applicants. The applicants' allegations that the psychologists had followed a subjective approach appeared to be biased and not based on any evidence.

152. The Government again conceded that there might have been rare situations where the reason for the placement in a special school was on the borderline between learning difficulties and a socio-culturally disadvantaged environment. Among the eighteen cases, this had apparently happened in one case only, that of the ninth applicant. Otherwise, the pedagogical-psychological diagnostics and the testing at the educational psychology centres had proved learning difficulties in the case of all the applicants.

153. The educational psychology centres that had administered the tests had only made recommendations concerning the type of school in which the child should be placed. The essential, decisive factor was the wishes of the parents. In the instant case, the parents had been informed that their children's placement in a special school depended on their consent and the consequences of such a decision had been explained to them. If the effect of their consent was not entirely clear, they could have appealed against the decision regarding placement and could at any time have required their child's transfer to a different type of school. If, as they now alleged, their consent was not informed, they should have sought information from the competent authorities. The Government noted in this respect that Article 2 of Protocol No. 1 emphasised the primary role and responsibility of parents in the education of their children. The State could not intervene if there was nothing in the parents' conduct to indicate that they were unable or unwilling to decide on the most appropriate form of education for their

children. Interference of that sort would contravene the principle that the State had to respect parents' wishes regarding education and teaching.

In the instant case, the Government noted that apart from appealing to the Constitutional Court and lodging an application with the European Court of Human Rights, the applicants' parents had on the whole done nothing to spare their children the alleged discriminatory treatment and had played a relatively passive role in their education.

154. The Government rejected the applicants' argument that their placement in special schools had prevented them from pursuing a secondary or higher education. Whether the applicants had finished their compulsory education before or after the entry into force of the new Schools Act (Law no. 561/2004), it had been open to them to pursue their secondary education, to take additional lessons to bring them up to the appropriate level or to seek career advice. However, none of the applicants had established that they had attempted to do so (albeit unsuccessfully) or that their (alleged) difficulties were due to a more limited education as a result of their earlier placement in a special school. On the contrary, several of the applicants had decided not to pursue their studies or had abandoned them. The Government were firmly convinced that the applicants had deprived themselves of the possibility of continuing their studies through a lack of interest. Their situation, which in many cases was unfavourable, had stemmed mainly from their own lack of interest, and was not something for which the State could be held responsible.

155. The Government conceded that the national authorities had to take all reasonable steps to ensure that measures did not produce disproportionate effects or, if that was not feasible, to mitigate and compensate for such effects. However, neither the Convention nor any other international instrument contained a general definition of the State's positive obligations concerning the education of Roma pupils or, more generally, of children from national or ethnic minorities. The Government noted in this connection that when determining the State's positive obligations the Court sometimes referred to developments in the legislation of the Contracting Parties. However, they said that no European standard or consensus currently existed regarding the criteria to be used to determine whether children should be placed in special schools or how children with special learning needs should be educated and the special school was one of the possible and acceptable solutions to the problem.

156. Moreover, the positive obligations under Article 14 of the Convention could not be construed as an obligation to take affirmative action. That had to remain an option. It was not possible to infer from Article 14 a general obligation on the part of the State actively to compensate for all the disabilities which different sections of the population suffered from.

157. In any event, since special schools had to be regarded as an alternative, but not inferior, form of education, the Government submitted that they had in the instant case adopted reasonable measures to compensate for the disabilities of the applicants, who required a special education as a result of their individual situation, and that they had not overstepped the margin of appreciation which the Convention afforded the States in the education sphere. They observed that the State had allocated twice the level of resources to special schools as to ordinary schools and that the domestic authorities had made considerable efforts to deal with the complex issue of the education of Roma children.

158. The Government went on to provide information on the applicants' current situation obtained from the files of both the school and the Ostrava Job Centre (where those applicants who were unemployed had signed on). As a preliminary, they noted that the Ostrava region was afflicted by a high rate of unemployment and that, in general, young people who had received only a primary education had difficulties in finding work. While it was possible to obtain a qualification and career counselling from the State, the active participation of the job applicant was essential.

In concrete terms, two applicants were currently in their final year at primary school. Seven had begun vocational training in a secondary school in September 2006. Four had started but later abandoned their secondary-school studies, the majority through a lack of interest, and had instead signed on at the job centre. Lastly, five of the applicants had not sought to pursue their studies at secondary-school level but had registered at the job centre. Those applicants who had registered at a job centre had not cooperated with it or shown any interest in the offers of training or employment that had been made, with the result that some of them had already been struck off the job-applicants register (in some instances repeatedly).

159. Lastly, the Government rejected the applicants' claim that nothing had been changed by the introduction of the Schools Act (Law no. 561/2004). The Act unified the previously existing types of primary school and standardised the educational programmes. It did not provide for a separate, independent system of specialised schools, with the exception of schools for pupils with serious mental disorders, autism or combined mental and physical defects. Pupils with disabilities were individually integrated, wherever possible and desirable, into conventional schools. However, schools were authorised to set up separate classes with educational techniques and methods adjusted to their needs. The former "special schools" could continue to function as separate institutions, but were now "primary schools" providing education under a modified educational programme for primary education. Schools at which socially disadvantaged pupils were educated often made use of their right to establish assistant teacher's posts and preparatory classes designed to improve the children's

communication skills and command of the Czech language. Teaching assistants from the Roma community often served as a link between the school, family, and, in some instances, other experts and helped to integrate pupils into the education system. The region where the applicants lived favoured integrating Roma pupils in classes drawn from the majority population.

160. In their concluding submissions, the Government asked the Court carefully to examine the issue of the applicants' access to education in each individual case, though without losing sight of the overall context, and to hold that there had been no violation of the Convention.

3. The third-party interveners

(a) Interights and Human Rights Watch

161. Interights and Human Rights Watch stated that it was essential that Article 14 of the Convention should afford effective protection against indirect discrimination, a concept which the Court had not yet had many occasions to consider. They submitted that aspects of the Chamber's reasoning were out of step with recent developments in cases such as *Timishev* (cited above), *Zarb Adami* (cited above) and *Hoogendijk* (cited above). The Grand Chamber needed to consolidate a purposive interpretation of Article 14 and to bring the Court's jurisprudence on indirect discrimination in line with existing international standards.

162. Interights and Human Rights Watch noted that the Court itself had confirmed in *Zarb Adami* that discrimination was not always direct or explicit and that a policy or general measure could result in indirect discrimination. It had also accepted that intent was not required in cases of indirect discrimination (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001). In their submission, it was sufficient in the case of indirect discrimination that the practice or policy resulted in a disproportionate adverse effect on a particular group.

163. As to proof of indirect discrimination, it was widely accepted in Europe and internationally and also by the Court (see *Timishev*, cited above, § 57, and *Hoogendijk*, cited above) that the burden of proof had to shift once a prima facie case of discrimination had been established. In cases of indirect discrimination, where the applicant had demonstrated that significantly more people of a particular category were placed at a disadvantage by a given policy or practice, a presumption of discrimination arose. The burden then shifted to the State to reject the basis for the prima facie case, or to provide a justification for it.

164. It was therefore critical for the Court to engage with the type of evidence that might be produced in order to shift the burden of proof. Interights and Human Rights Watch submitted on this point that the Court's position with regard to statistical evidence, as set out in *Hugh Jordan* (cited

above, § 154), was at variance with international and comparative practice. In Council directives and international instruments, statistics were the key method of proving indirect discrimination. Where measures were neutral on their face, statistics sometimes proved the only effective means of identifying their varying impact on different segments of society. Obviously, courts had to assess the credibility, strength and relevance of the statistics to the case at hand, requiring that they be tied to the applicant's allegations in concrete ways.

If, however, the Court were to maintain the position that statistics alone were not sufficient to disclose a discriminatory practice, Interights and Human Rights Watch submitted that the general social context should be taken into account, as it provided valuable insight into the extent to which the effects of the measure on the applicants were disproportionate.

(b) Minority Rights Group International, the European Network Against Racism and the European Roma Information Office

165. The Minority Rights Group International, the European Network Against Racism and the European Roma Information Office submitted that the wrongful assignment of Roma children to special schools for the mentally disabled was the most obvious and odious form of discrimination against the Roma. Children in such special schools followed a simplified curriculum considered appropriate for their lower level of intellectual development. Thus, for example, in the Czech Republic, children in special schools were not expected to know the Czech alphabet or numbers up to ten until the third or fourth year of school, while their counterparts in ordinary schools acquired that knowledge in the first year.

166. This practice had received considerable attention, both at the European level and within the human rights bodies of the United Nations, which had expressed their concern in various reports as to the over-representation of Roma children in special schools, the adequacy of the tests employed and the quality of the alleged parental consent. All these bodies had found that no objective and reasonable justification could legitimise the disadvantage faced by Roma children in the field of education. The degree of consistency among the institutions and quasi-judicial bodies was persuasive in confirming the existence of widespread discrimination against Roma children.

167. The interveners added that whatever the merits of separate education for children with genuine mental disabilities, the decision to place Roma children in special schools was in the majority of cases not based on any actual mental disability but rather on language and cultural differences which were not taken into account in the testing process. In order to fulfil their obligation to secure equal treatment for Roma in the exercise of their right to education, the first requirement of States was to amend the testing

process so that it was not racially prejudiced against Roma and to take positive measures in the area of language training and social-skills training.

(c) International Step by Step Association, the Roma Education Fund and the European Early Childhood Education Research Association

168. The International Step by Step Association, the Roma Education Fund and the European Early Childhood Education Research Association sought to demonstrate that the assessment used to place Roma children in special schools in the Ostrava region disregarded the numerous effective and appropriate indicators that were well known by the mid-1990s (see paragraph 44 above). In their submission, the assessment had not taken into account the language and culture of the children, their prior learning experiences or their unfamiliarity with the demands of the testing situation. Single rather than multiple sources of evidence had been used. Testing had been done in one sitting, not over time. Evidence had not been obtained in realistic or authentic settings where children could demonstrate their learning. Undue emphasis had been placed on individually administered, standardised tests normed on other populations.

169. Referring to various studies that had been carried out (see paragraph 44 above), the interveners noted that minority children and those from vulnerable families were over-represented in special education in central and eastern Europe. This resulted from an array of factors, including unconscious racial bias on the part of school authorities, large resource inequalities, unjustifiable reliance on IQ and other evaluation tools, educators' inappropriate responses to the pressures of "high stakes" testing and power differentials between minority parents and school officials. School placement through psychological testing often reflected racial biases in the society concerned.

170. The Czech Republic was notable for its placement of children in segregated settings because of "social disadvantage". According to a comparison of data on fifteen countries collected by the Organisation for Economic Co-operation and Development in 1999 (see paragraph 18 *in fine* above), the Czech Republic ranked third in placing pupils with learning difficulties in special-school settings. Of the eight countries that provided data on the placement of pupils as a result of social factors, the Czech Republic was the only one to have recourse to special schools; the other countries almost exclusively used ordinary schools for educating such pupils.

171. Further, the practice of referring children labelled as being of low ability to special schools at an early age (educational tracking) frequently led, whether intentionally or not, to racial segregation and had particularly negative effects on the level of education of disadvantaged children. This had long-term detrimental consequences for both them and society,

including premature exclusion from the education system with the resulting loss of job opportunities for those concerned.

(d) International Federation for Human Rights (*Fédération internationale des ligues des droits de l'Homme* – FIDH)

172. The FIDH considered that the Chamber had unjustifiably placed significant weight in its judgment on the consent the applicants' parents had allegedly given to the situation forming the subject of their complaint to the Court. It noted that under the Court's case-law there were situations in which the waiver of a right was not considered capable of exempting the State from its obligation to guarantee to every person within its jurisdiction the rights and freedoms laid down in the Convention. That applied, in particular, where the waiver conflicted with an important public interest, or was not explicit or unequivocal. Furthermore, in order to be capable of justifying a restriction of the right or freedom of the individual, the waiver of that guarantee by the person concerned had to take place in circumstances from which it could be concluded that he was fully aware of the consequences, in particular the legal consequences, of his choice. In the case of *R. v. Borden* ([1994] 3 RCS 145, p. 162), the Supreme Court of Canada had developed the following principle on that precise point: "[i]n order for a waiver of the right ... to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful."

173. The question therefore arose as to whether, in the light of the nature of the principle of equality of treatment, and of the link between the prohibition of racial discrimination and the wider concept of human dignity, waiver of the right to protection against discrimination ought not to be precluded altogether. In the instant case, the consent obtained from the applicants' parents was binding not solely on the applicants but on all the children of the Roma community. It was perfectly possible – indeed, in the FIDH's submission, probable – that all parents of Roma children would prefer an integrated education for their children, but that, being uncertain as regards the choice that would be made by other parents in that situation, they preferred the "security" offered by special education, which was followed by the vast majority of Roma children. In a context characterised by a history of discrimination against the Roma, the choice available to the parents of Roma children was between (a) placing their children in schools where the authorities were reluctant to admit them and where they feared being the subject of various forms of harassment and of manifestations of hostility on the part of their fellow pupils and of teachers, or (b) placing them in special schools where Roma children were in a large majority and where, consequently, they would not have to fear the manifestation of such

prejudices. In reality, the applicants' parents had chosen what they saw as being the lesser of two evils, in the absence of any real possibility of receiving an integrated education which would unreservedly welcome Roma. The disproportion between the two alternatives was such that the applicants' parents had been obliged to make the choice for which the Government now sought to hold them responsible.

174. For the reasons set out above, the FIDH considered that in the circumstances of the instant case, the alleged waiver by the applicants' parents of the right for their children to receive an education in normal schools could not justify exempting the Czech Republic from its obligations under the Convention.

C. The Court's assessment

1. Recapitulation of the main principles

175. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV, and *Okpisz v. Germany*, no. 59140/00, § 33, 25 October 2005). However, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (merits), 23 July 1968, p. 34, § 10, Series A no. 6; *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; and *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 51, ECHR 2006-VI). The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group (see *Hugh Jordan*, cited above, and *Hoogendijk*, cited above), and that discrimination potentially contrary to the Convention may result from a *de facto* situation (see *Zarb Adami*, cited above).

176. Discrimination on account of, *inter alia*, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment (see *Nachova*, cited above, and *Timishev*, cited above). The Court has also held that no difference in treatment which is based exclusively or to a decisive

extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (see *Timishev*, cited above, § 58).

177. As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment it is for the Government to show that it was justified (see, among other authorities, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III, and *Timishev*, cited above, § 57).

178. As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, the Court stated in *Nachova and Others* (cited above, § 147) that in proceedings before it there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.

179. The Court has also recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation – see *Aktaş v. Turkey*, no. 24351/94, § 272, ECHR 2003-V). In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII, and *Anguelova v. Bulgaria*, no. 38361/97, § 111, ECHR 2002-IV). In *Nachova and Others* (cited above, § 157), the Court did not rule out requiring a respondent Government to disprove an arguable allegation of discrimination in certain cases, even though it considered that it would be difficult to do so in that particular case in which the allegation was that an act of violence had been motivated by racial prejudice. It noted in that connection that in the legal systems of many countries proof of the discriminatory effect of a policy, decision or practice would dispense with the need to prove intent in respect of alleged discrimination in employment or in the provision of services.

180. As to whether statistics can constitute evidence, the Court has in the past stated that statistics could not in themselves disclose a practice which could be classified as discriminatory (see *Hugh Jordan*, cited above, § 154). However, in more recent cases on the question of discrimination in which

the applicants alleged a difference in the effect of a general measure or *de facto* situation (see *Hoogendijk*, cited above, and *Zarb Adami*, cited above, §§ 77-78), the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations.

Thus, in *Hoogendijk* the Court stated: "[W]here an applicant is able to show, on the basis of undisputed official statistics, the existence of a prima facie indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination."

181. Lastly, as noted in previous cases, the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 96, ECHR 2001-I, and *Connors v. the United Kingdom*, no. 66746/01, § 84, 27 May 2004).

In *Chapman* (cited above, §§ 93-94), the Court also observed that there could be said to be an emerging international consensus among the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.

2. Application of the above-mentioned principles to the instant case

182. The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority (see also the general observations in the Parliamentary Assembly's Recommendation No. 1203 (1993) on Gypsies in Europe, cited in paragraph 56 above, and point 4 of its Recommendation no. 1557 (2002) on the legal situation of Roma in Europe, cited in paragraph 58 above). As the Court has noted in previous cases, they therefore require special protection (see paragraph 181 above). As is attested by the activities of numerous European and international organisations and the recommendations of the Council of Europe bodies (see paragraphs 54-61 above), this protection also extends to the sphere of education. The present case therefore warrants particular attention, especially as when the applications were lodged with the Court the

applicants were minor children for whom the right to education was of paramount importance.

183. The applicants' allegation in the present case is not that they were in a different situation from non-Roma children that called for different treatment or that the respondent State had failed to take affirmative action to correct factual inequalities or differences between them (see *Thlimmenos*, cited above, § 44, and *Stec and Others*, cited above, § 51). In their submission, all that has to be established is that, without objective and reasonable justification, they were treated less favourably than non-Roma children in a comparable situation and that this amounted in their case to indirect discrimination.

184. The Court has already accepted in previous cases that a difference in treatment may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group (see *Hugh Jordan*, cited above, § 154, and *Hoogendijk*, cited above). In accordance with, for instance, Council Directives 97/80/EC and 2000/43/EC (see paragraphs 82-84 above) and the definition provided by ECRI (see paragraph 60 above), such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent.

(a) Whether a presumption of indirect discrimination arises in the instant case

185. It was common ground that the impugned difference in treatment did not result from the wording of the statutory provisions on placements in special schools in force at the material time. Accordingly, the issue in the instant case is whether the manner in which the legislation was applied in practice resulted in a disproportionate number of Roma children – including the applicants – being placed in special schools without justification, and whether such children were thereby placed at a significant disadvantage.

186. As mentioned above, the Court has noted in previous cases that applicants may have difficulty in proving discriminatory treatment (*Nachova and Others*, cited above, §§ 147 and 157). In order to guarantee those concerned the effective protection of their rights, less strict evidential rules should apply in cases of alleged indirect discrimination.

187. On this point, the Court observes that Council Directives 97/80/EC and 2000/43/EC stipulate that persons who consider themselves wronged because the principle of equal treatment has not been applied to them may establish before a domestic authority by any means, including on the basis of statistical evidence, facts from which it may be presumed that there has been discrimination (see paragraphs 82-83 above). The recent case-law of the Court of Justice of the European Communities (see paragraphs 88-89 above) shows that it permits claimants to rely on statistical evidence and the national courts to take such evidence into account where it is valid and significant.

The Grand Chamber further notes the information furnished by the third-party interveners that the courts of many countries and the supervisory bodies of the United Nations treaties habitually accept statistics as evidence of indirect discrimination in order to facilitate the victims' task of adducing prima facie evidence.

The Court also recognised the importance of official statistics in the above-mentioned cases of *Hoogendijk* and *Zarb Adami* and has shown that it is prepared to accept and take into consideration various types of evidence (see *Nachova and Others*, cited above, § 147).

188. In these circumstances, the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.

189. Where an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not discriminatory (see, *mutatis mutandis*, *Nachova and Others*, cited above, § 157). Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case (ibid., § 147), it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof.

190. In the present case, the statistical data submitted by the applicants were obtained from questionnaires that were sent out to the head teachers of special and primary schools in the town of Ostrava in 1999. They indicate that at the time 56% of all pupils placed in special schools in Ostrava were Roma. Conversely, Roma represented only 2.26% of the total number of pupils attending primary school in Ostrava. Further, whereas only 1.8% of non-Roma pupils were placed in special schools, the proportion of Roma pupils in Ostrava assigned to special schools was 50.3%. According to the Government, these figures are not sufficiently conclusive as they merely reflect the subjective opinions of the head teachers. The Government also noted that no official information on the ethnic origin of the pupils existed and that the Ostrava region had one of the largest Roma populations.

191. The Grand Chamber observes that these figures are not disputed by the Government and that they have not produced any alternative statistical evidence. In view of their comment that no official information on the ethnic origin of the pupils exists, the Court accepts that the statistics submitted by the applicants may not be entirely reliable. It nevertheless considers that these figures reveal a dominant trend that has been confirmed both by the respondent State and the independent supervisory bodies which have looked into the question.

192. In their reports submitted in accordance with Article 25 § 1 of the Framework Convention for the Protection of National Minorities, the Czech authorities accepted that in 1999 Roma pupils made up between 80% and 90% of the total number of pupils in some special schools (see paragraph 66 above) and that in 2004 "large numbers" of Roma children were still being placed in special schools (see paragraph 67 above). The Advisory Committee on the Framework Convention observed in its report of 26 October 2005 that according to unofficial estimates Roma accounted for up to 70% of pupils enrolled in special schools. According to the report published by ECRI in 2000, Roma children were "vastly over-represented" in special schools. The Committee on the Elimination of Racial Discrimination noted in its concluding observations of 30 March 1998 that a disproportionately large number of Roma children were placed in special schools (see paragraph 99 above). Lastly, according to the figures supplied by the European Monitoring Centre on Racism and Xenophobia, more than half of Roma children in the Czech Republic attended special school.

193. In the Court's view, the latter figures, which do not relate solely to the Ostrava region and therefore provide a more general picture, show that, even if the exact percentage of Roma children in special schools at the material time remains difficult to establish, their number was disproportionately high. Moreover, Roma pupils formed a majority of the pupils in special schools. Despite being couched in neutral terms, the relevant statutory provisions therefore had considerably more impact in practice on Roma children than on non-Roma children and resulted in statistically disproportionate numbers of placements of the former in special schools.

194. Where it has been shown that legislation produces such a discriminatory effect, the Grand Chamber considers that, as with cases concerning employment or the provision of services (see, *mutatis mutandis*, *Nachova and Others*, cited above, § 157), it is not necessary in cases in the educational sphere to prove any discriminatory intent on the part of the relevant authorities (see paragraph 184 above).

195. In these circumstances, the evidence submitted by the applicants can be regarded as sufficiently reliable and significant to give rise to a strong presumption of indirect discrimination. The burden of proof must therefore shift to the Government, which must show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin.

(b) Objective and reasonable justification

196. The Court reiterates that a difference in treatment is discriminatory if "it has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be

realised (see, among many other authorities, *Larkos v. Cyprus* [GC], no. 29515/95, § 29, ECHR 1999-I, and *Stec and Others*, cited above, § 51). Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.

197. In the instant case, the Government sought to explain the difference in treatment between Roma children and non-Roma children by the need to adapt the education system to the capacity of children with special needs. In the Government's submission, the applicants were placed in special schools on account of their specific educational needs, essentially as a result of their low intellectual capacity measured with the aid of psychological tests in educational psychology centres. After the centres had made their recommendations regarding the type of school in which the applicants should be placed, the final decision had lain with the applicants' parents and they had consented to the placements. The argument that the applicants were placed in special schools on account of their ethnic origin was therefore unsustainable.

For their part, the applicants strenuously contested the suggestion that the disproportionately high number of Roma children in special schools could be explained by the results of the intellectual capacity tests or be justified by parental consent.

198. The Court accepts that the Government's decision to retain the special-school system was motivated by the desire to find a solution for children with special educational needs. However, it shares the disquiet of the other Council of Europe institutions who have expressed concerns about the more basic curriculum followed in these schools and, in particular, the segregation the system causes.

199. The Grand Chamber observes, further, that the tests used to assess the children's learning abilities or difficulties have given rise to controversy and continue to be the subject of scientific debate and research. While accepting that it is not its role to judge the validity of such tests, various factors in the instant case nevertheless lead the Grand Chamber to conclude that the results of the tests carried out at the material time were not capable of constituting objective and reasonable justification for the purposes of Article 14 of the Convention.

200. In the first place, it was common ground that all the children who were examined sat the same tests, irrespective of their ethnic origin. The Czech authorities themselves acknowledged in 1999 that "Romany children with average or above-average intellect" were often placed in such schools on the basis of the results of psychological tests and that the tests were conceived for the majority population and did not take Roma specifics into consideration (see paragraph 66 above). As a result, they had revised the tests and methods used with a view to ensuring that they "were not misused to the detriment of Roma children" (see paragraph 72 above).

In addition, various independent bodies have expressed doubts over the adequacy of the tests. Thus, the Advisory Committee on the Framework Convention for the Protection of National Minorities observed that children who were not mentally handicapped were frequently placed in these schools "[owing] to real or perceived language and cultural differences between Roma and the majority". It also stressed the need for the tests to be "consistent, objective and comprehensive" (see paragraph 68 above). ECRI noted that the channelling of Roma children to special schools for those with mental retardation was reportedly often "quasi-automatic" and needed to be examined to ensure that any testing used was "fair" and that the true abilities of each child were "properly evaluated" (see paragraphs 63-64 above). The Council of Europe Commissioner for Human Rights noted that Roma children were frequently placed in classes for children with special needs "without an adequate psychological or pedagogical assessment, the real criteria clearly being their ethnic origin" (see paragraph 77 above).

Lastly, in the submission of some of the third-party interveners, placements following the results of the psychological tests reflected the racial prejudices of the society concerned.

201. The Court considers that, at the very least, there is a danger that the tests were biased and that the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. In these circumstances, the tests in question cannot serve as justification for the impugned difference in treatment.

202. As regards parental consent, the Court notes the Government's submission that this was the decisive factor without which the applicants would not have been placed in special schools. In view of the fact that a difference in treatment has been established in the instant case, it follows that any such consent would signify an acceptance of the difference in treatment, even if discriminatory, in other words a waiver of the right not to be discriminated against. However, under the Court's case-law, the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner, and be given in full knowledge of the facts, that is to say on the basis of informed consent (see *Pfeifer and Plankl v. Austria*, 25 February 1992, §§ 37-38, Series A no. 227) and without constraint (see *Deweer v. Belgium*, 27 February 1980, § 51, Series A no. 35).

203. In the circumstances of the present case, the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent. The Government themselves admitted that consent in this instance had been given by means of a signature on a pre-completed form that contained no information on the available alternatives or the differences between the special-school curriculum and the curriculum followed in other

schools. Nor do the domestic authorities appear to have taken any additional measures to ensure that the Roma parents received all the information they needed to make an informed decision or were aware of the consequences that giving their consent would have for their children's futures. It also appears indisputable that the Roma parents were faced with a dilemma: a choice between ordinary schools that were ill-equipped to cater for their children's social and cultural differences and in which their children risked isolation and ostracism, and special schools where the majority of the pupils were Roma.

204. In view of the fundamental importance of the prohibition of racial discrimination (see *Nachova and Others*, cited above, § 145, and *Timishev*, cited above, § 56), the Grand Chamber considers that, even assuming the conditions referred to in paragraph 202 above were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest (see, *mutatis mutandis*, *Hermi v. Italy* [GC], no. 18114/02, § 73, ECHR 2006-XII).

(c) Conclusion

205. As is apparent from the documentation produced by ECRI and the report of the Commissioner for Human Rights of the Council of Europe, the Czech Republic is not alone in having encountered difficulties in providing schooling for Roma children: other European States have had similar difficulties. The Court is gratified to note that, unlike some countries, the Czech Republic has sought to tackle the problem and acknowledges that, in its attempts to achieve the social and educational integration of the disadvantaged group which the Roma form, it has had to contend with numerous difficulties as a result of, *inter alia*, the cultural specificities of that minority and a degree of hostility on the part of the parents of non-Roma children. As the Chamber noted in its admissibility decision in the instant case, the choice between a single school for everyone, highly specialised structures and unified structures with specialised sections is not an easy one. It entails a difficult balancing exercise between the competing interests. As to the setting and planning of the curriculum, this mainly involves questions of expediency on which it is not for the Court to rule (see *Valsamis v. Greece*, 18 December 1996, § 28, *Reports of Judgments and Decisions* 1996-VI).

206. Nevertheless, whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation (see *Buckley v. the United Kingdom*, 25 September 1996, § 76, *Reports* 1996-IV, and *Connors*, cited above, § 83).

207. The facts of the instant case indicate that the schooling arrangements for Roma children were not attended by safeguards (see paragraph 28 above) that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State took into account their special needs as members of a disadvantaged class (see, *mutatis mutandis*, *Buckley*, cited above, § 76, and *Connors*, cited above, § 84). Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population. Indeed, the Government have implicitly admitted that job opportunities are more limited for pupils from special schools.

208. In these circumstances and while recognising the efforts made by the Czech authorities to ensure that Roma children receive schooling, the Court is not satisfied that the difference in treatment between Roma children and non-Roma children was objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued. In that connection, it notes with interest that the new legislation has abolished special schools and provides for children with special educational needs, including socially disadvantaged children, to be educated in ordinary schools.

209. Lastly, since it has been established that the relevant legislation as applied in practice at the material time had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases.

210. Consequently, there has been a violation in the instant case of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1 as regards each of the applicants.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

211. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

212. The applicants did not allege any pecuniary damage.

213. They claimed 22,000 euros (EUR) each (making a total of EUR 396,000) for the non-pecuniary damage they had sustained, including educational, psychological and emotional harm and compensation for the anxiety, frustration and humiliation they had suffered as a result of their discriminatory placement in special schools. They stressed that the effects of this violation were serious and ongoing and affected all areas of their lives.

214. Further, referring to the judgments in *Broniowski v. Poland* ([GC], no. 31443/96, § 189, ECHR 2004-V) and *Hutten-Czapska v. Poland* ([GC], no. 35014/97, §§ 235-37, ECHR 2006-VIII), the applicants said that the violation of their rights "was neither prompted by an isolated incident nor attributable to the particular turn of events in [their] case, but was rather the consequence of administrative and regulatory conduct on the part of the authorities towards an identifiable class of citizens". Accordingly, in their submission, general measures had to be taken at the national level either to remove any hindrance to the implementation of the right of the numerous persons affected by the situation or to provide equivalent redress.

215. The Government submitted, with particular regard to the psychological and educational damage, that it related to the complaints under Article 3 of the Convention and Article 2 of Protocol No. 1 taken individually, which had been declared inadmissible by the Court in its decision of 1 March 2005. In their submission, there was therefore no causal link between any violation of the Convention and the alleged non-pecuniary damage. They further contended that the sum claimed by the applicants was excessive and that any finding of a violation would constitute sufficient just satisfaction.

216. The Court reiterates, firstly, that by virtue of Article 46 of the Convention the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision

by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. However, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Broniowski*, cited above, § 192, and *Čonka v. Belgium*, no. 51564/99, § 89, ECHR 2002-I). The Court notes in this connection that the legislation impugned in the instant case has been repealed and that the Committee of Ministers recently made recommendations to the member States on the education of Roma/Gypsy children in Europe (see paragraphs 54-55 above). Consequently, it does not consider it appropriate to reserve the question.

217. The Court cannot speculate on what the outcome of the situation complained of by the applicants would have been had they not been placed in special schools. It is clear, however, that they have sustained non-pecuniary damage – in particular as a result of the humiliation and frustration caused by the indirect discrimination of which they were victims – for which the finding of a violation of the Convention does not afford sufficient redress. However, the amounts claimed by the applicants are excessive. Ruling on an equitable basis, the Court assesses the non-pecuniary damage sustained by each of the applicants at EUR 4,000.

B. Costs and expenses

218. The applicants have not amended the initial claim they made before the Chamber. The costs and expenses do not, therefore, include those incurred in the proceedings before the Grand Chamber.

The Court notes that the total amount claimed in the request signed by all the applicants' representatives was EUR 10,737, comprising EUR 2,550 (1,750 pounds sterling (GBP)) for the fees invoiced by Lord Lester of Herne Hill, QC, and EUR 8,187 for the costs incurred by Mr D. Strupek in the domestic proceedings and those before the Chamber. However, the bill of costs drawn up by Lord Lester, enclosed with the claim for just satisfaction, put his fees at GBP 11,750 (approximately EUR 17,000), including GBP 1,750 in value-added tax (VAT), for 45 hours of legal work. The applicants' other representatives, Mr J. Goldston and the European Centre for Roma Rights, have not sought the reimbursement of their costs.

219. The Government noted that, apart from a detailed list of the legal services he had provided, Mr Strupek had not submitted any invoice to prove that the alleged costs and expenses had in fact been paid to him by the applicants. They did not comment on the discrepancy between the claim for just satisfaction as formulated by the applicants and the fee note submitted by Lord Lester. The Government further pointed out that only part of the

application had been declared admissible and continued to be the subject of examination by the Court. They therefore submitted that the applicants should not be awarded more than a reasonable portion (not exceeding EUR 3,000) of the costs and expenses claimed.

220. The Court reiterates that legal costs are only recoverable to the extent that they relate to the violation that has been found (see *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002). In the present case, this is solely the violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1. The Court notes that Lord Lester has submitted details of his professional fees, which were invoiced to the European Centre for Roma Rights. Mr Strupek has produced a breakdown of the 172 hours of legal services he rendered at an hourly rate of EUR 40, to which has to be added VAT at the rate of 19%.

Having regard to all the relevant factors and to Rule 60 § 2 of the Rules of Court, the Court makes a joint award to all the applicants of EUR 10,000 for costs and expenses.

C. Default interest

221. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection;

2. *Holds* by thirteen votes to four that there has been a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 1;

3. *Holds* by thirteen votes to four
   (a) that the respondent State is to pay the applicants, within three months, the following amounts together with any tax that may be chargeable:
      (i) to each of the eighteen applicants EUR 4,000 (four thousand euros) in respect of non-pecuniary damage, to be converted into Czech korunas at the rate applicable on the date of payment;
      (ii) jointly, to all the applicants, EUR 10,000 (ten thousand euros) in respect of costs and expenses, to be converted into Czech korunas at the rate applicable on the date of payment;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 13 November 2007.

Michael O'Boyle	Nicolas Bratza
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Judge Zupančič;
(b) dissenting opinion of Judge Jungwiert;
(c) dissenting opinion of Judge Borrego Borrego;
(d) dissenting opinion of Judge Šikuta.

N.B.
M.O'B.

DISSENTING OPINION OF JUDGE ZUPANČIČ

I agree entirely with the comprehensive dissenting opinion of Judge Karel Jungwiert. I wish only to add the following.

As the majority explicitly, and implicitly elsewhere in the judgment, admitted in paragraphs 198 and 205, the Czech Republic is the only Contracting State which has in fact tackled the special-educational troubles of Roma children. It then borders on the absurd to find the Czech Republic in violation of anti-discrimination principles. In other words, this "violation" would never have happened had the respondent State approached the problem with benign neglect.

No amount of politically charged argumentation can hide the obvious fact that the Court in this case has been brought into play for ulterior purposes, which have little to do with the special education of Roma children in the Czech Republic.

The future will show what specific purpose this precedent will serve.

DISSENTING OPINION OF JUDGE JUNGWIERT

(Translation)

1. I strongly disagree with the majority's finding in the present case of a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1.

While I am able to agree to an extent with the formulation of the relevant principles under Article 14 in the judgment, I cannot accept the manner in which the majority have applied those principles in the instant case.

2. Before specifying all the matters with which I disagree, I would like to put this judgment into a more general perspective.

It represents a new development in the Court's case-law, as it set about evaluating and criticising a country's entire education system.

However authoritative the precedents cited at paragraphs 175 to 181 of the judgment may be, in practice they have very little in common with the instant case other perhaps than the Roma origin of the applicants in most of the cases (for instance in *Nachova and Others v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, ECHR 2005-VII) and *Buckley v. the United Kingdom* (25 September 1996, *Reports of Judgments and Decisions* 1996-IV), among others).

3. In my opinion for the principles to be applied correctly requires, firstly, a sound knowledge of the facts and also of the circumstances of the case, primarily the historical context and the situation obtaining in other European countries.

As regards the historical context, the data presented in the judgment (paragraphs 12 to 14) provides information that is inaccurate, inadequate and of a very general nature.

The facts as presented in the judgment do not permit the slightest comparison to be made between Roma communities in Europe with respect, *inter alia*, to such matters as demographic evolution or levels of school attendance.

4. I will endeavour to supply some facts and figures to make up for this lack of information.

I should perhaps begin with the awful truth that, so far as the current territory of the Czech Republic is concerned, we are not talking about an "attempted" extermination of the Roma by the Nazis (see paragraph 13) but about their almost total annihilation. Of the nearly 7,000 Roma who were living in the country at the start of the war, scarcely 600 survived[1].

The situation is thus very different from that in other countries: the Czech Roma, almost all of whom were exterminated, were replaced from 1945 onwards by successive waves of new arrivals in their tens of

1. A. Fraser (M. Miklušáková), *The Gypsies*, Prague, 2002, p. 275.

thousands, mainly from Slovakia, Hungary and Romania. The vast majority of this new population were not only illiterate and completely uprooted, they did not speak the Czech language. The same is not true of other countries on whose territory the Roma have – in principle – been living for decades and even centuries and have attained a degree of familiarity with the environment and language.

To complete and close this incursion into the historical and demographic context, I believe that a further comparison, which helps to explain the scale and complexity of the problem, would be useful.

An estimation of the numbers of Roma living in certain European countries has given the following minimum and maximum figures (which of course remain approximate):

	min	max	population (millions)
Germany	110,000	140,000	80
France	300,000	400,000	60
Italy	90,000	120,000	60
United Kingdom	100,000	150,000	60
Poland	35,000	45,000	38
Portugal	40,000	50,000	10
Belgium	25,000	35,000	10
Czech Republic	200,000	250,000	10[1, 2]

These figures provide an indication of the scale of the problem facing the Czech Republic in the education field.

5. An important question that needs to be asked is what is the position in Europe and what standards or minimum requirements have to be met?

The question of the schooling and education of Roma children has for almost thirty years been the subject of analysis and, on the initiative of the Council of Europe, proposals by the European Commission and other institutions.

The judgment contains more than twenty-five pages (paragraphs 54-107) of citations from Council of Europe texts, Community law and practice, United Nations materials and other sources.

However, the majority of the recommendations, reports and other documents it cites are relatively vague, largely theoretical and, most important of all, were published *after* the period with which the instant case is concerned (1996-99 – see paragraph 19 of the judgment).

1. J.-P. Liégeois, *Roma in Europe*, Council of Europe Publishing, 2008, p. 31.
2. Nevertheless, in a census taken of the population of the Czech Republic on 3 March 1991, only 32,903 people claimed to be members of the Roma (*Statistical Yearbook of the Czech Republic 1993*, Prague, 1993, p. 142).

I should therefore like to quote the author mentioned above, whose opinion I agree with. In his book *Roma in Europe*, Jean-Pierre Liégeois stresses:

> "We must avoid over-use of vague terms ('emancipation', 'autonomy', 'integration', 'inclusion', etc.) which mask reality, put things in abstract terms and have no functional value ...
>
> ... officials often formulate complex questions and demand immediate answers, but such an approach leads only to empty promises or knee-jerk responses that assuage the electorate, or the liberal conscience, in the short term."[1]

In this connection, the sole resolution on the subject that is concrete and accurate – a major founding text of perhaps historic value – is the *Resolution of the Council and the Ministers of Education meeting within the Council of 22 May 1989 on school provision for gypsy and traveller children*[2].

6. Regrettably and to my great surprise, this crucial document is not among the sources cited in the Grand Chamber's judgment.

I should therefore like to quote some of the passages from this resolution:

> "THE COUNCIL AND THE MINISTERS FOR EDUCATION, MEETING WITHIN THE COUNCIL,
>
> ...
>
> Considering that the present situation is disturbing in general, and in particular with regard to schooling, *that only 30 to 40% of gypsy or traveller children attend school with any regularity, that half of them have never been to school* [emphasis added], that a very small percentage attend secondary school and beyond, that the level of educational skills, especially reading and writing, bears little relationship to the presumed length of schooling, and that the illiteracy rate among adults is frequently over 50% and in some places 80% or more,
>
> Considering that over [500,000] children are involved and that this number must constantly be revised upwards on account of the high proportion of young people in gypsy and traveller communities, half of whom are under 16 years of age,
>
> Considering that schooling, in particular by providing the means of adapting to a changing environment and achieving personal and professional autonomy, is a key factor in the cultural, social and economic future of gypsy and traveller communities, that parents are aware of this fact and their desire for schooling for their children is increasing,
>
> ..."

7. How astonishing! In the twelve countries that formed the European Union in 1989 it is acknowledged that between 250,000 and 300,000 children had never attended school.

It is an inescapable fact that the trend since then has tended to confirm this diagnosis. There is nothing to suggest an improvement in the situation

1. Op. cit., pp. 274-75.
2. *Official Journal of the European Communities* C 153 of 21 June 1989, pp. 3 and 4.

in this sphere, especially with the enlargement of the European Union. The population of the Roma community is estimated (by the same source) at 400,000 in Slovakia, 600,000 in Hungary, 750,000 in Bulgaria and 2,100,000 in Romania. In total, there are more than 4,000,000 Roma children in Europe, *approximately 2,000,000 of whom will, in all probability, never attend school in their lifetimes*.

8. I am determined to bring this terrible and largely concealed truth out into the open, as I consider it shameful that such a situation should exist in Europe in the twenty-first century. What has caused this alarming silence?

9. Statistical data on the former Czechoslovakia indicates that in 1960 some 30% of Roma had never attended school. This figure has fallen and was only 10% in 1970.

A numerical comparison of the Czech Republic data on the number of children born and the number attending school shows school-attendance levels attaining almost 100% twenty years later[1].

10. Nevertheless, in this sorry state of affairs, some people consider it necessary to focus criticism on the Czech Republic, one of the few countries in Europe where virtually all children, including Roma children, attend school.

Further, for the school year 1989/90 there were 7,957 teachers for 58,889 pupils and for the school year 1992/93 8,325 teachers for 48,394 pupils[2], that is to say *one teacher for every seven pupils*.

11. For years, European States have produced an often strange mix of achievements and projects which combine successes with failures. The problem concerns the education systems of many countries, not just the special schools[3].

The Czech Republic has chosen to develop a system that was introduced back in the 1920s (see paragraph 15 of the judgment), and to improve it while providing the following procedural safeguards for placements in special schools (see paragraphs 20-21):

– parental consent;
– recommendations of the educational psychology centres;
– a right of appeal;
– an opportunity to transfer back to an ordinary primary school from a special school.

1. *Statistical Yearbook of the Czech Republic 1993*, Prague, 1993, pp. 88 and 302.
2. Op. cit., Prague, 1993, p. 307.
3. In the public debate currently under way in France, it has been noted that "40% of pupils entering the first form do not have a basic education. At the end of the fourth form, 150,000 young people leave the system without mastering any subject (Editorial in *Le Figaro*, 4 September 2007). The same newspaper related in an article on 7 September 2007 that "according to the Education Board, 40% of primary-school pupils – 300,000 children in all – leave each year with severe failings or in great difficulty".

In a way, the Czech Republic has thereby established an education system that is inegalitarian. However, this inegalitarianism has a positive aim: to get children to attend school in order to have a chance to succeed through positive discrimination in favour of a disadvantaged population.

Despite this, the majority feel compelled to say that it is not satisfied that the difference in treatment between Roma children and non-Roma children pursued the legitimate aim of adapting the education system to the needs of the former and that there existed a reasonable relationship of proportionality between the means used and the aim pursued (see paragraph 208 of the judgment).

No one has conveyed the following opinion better than Arthur Schopenhauer, who was the first to express it:

> "This peculiar satisfaction in words contributes more than anything else to the perpetuation of errors. For, relying on the words and phrases received from his predecessors, each one confidently passes over obscurities and problems."[1]

12. I fully accept that, while much has been done to help certain categories of pupil acquire a basic knowledge, the situation regarding the education of Roma children in the Czech Republic is far from ideal and leaves room for improvement.

Nevertheless, a closer examination of the situation leads me to ask but one question: which country in Europe has done more, or indeed as much, in this sphere? To require more, to require an immediate and infallible solution, is to my mind asking too much, perhaps even the impossible, at least as far as the relevant period, which began just a few years after the fall of the communist regime, is concerned.

13. I consider it important both in the analyses and in all the assessments and conclusions for a distinction to be drawn between what is desirable and what one might term realistic, possible or simply feasible.

This rule should also apply to the sphere of law generally and in the instant case *in concreto*. According to the applicants, no measures were taken to enable Roma children to overcome their cultural and linguistic disadvantages in the tests (see paragraph 40).

However, this is but another excellent illustration of their lack of realism. It is, in my view, illusory to think that a situation that has obtained for decades, even centuries, can be changed from one day to the next by a few statutory provisions – unless the idea is to dispense with the tests altogether or to make them an irrelevance.

1. A. Schopenhauer, *The World as Will and Representation (Volume II)*, this translation by E.F.J. Payne, Dover, New York, 1966, p. 145.

14. Nor should it be forgotten that every school system entails not only education but also a process of assessment, differentiation, competition and selection. This fact of life is currently the subject of a wide debate on the reform of the French education system. The President of the French Republic has in a letter of 4 September 2007 to the teaching professions introduced the notion of a selection procedure for entry to lower and higher secondary education:

> "No one should go into the first form unless he has shown that he is able to follow lower secondary-school education. No one should enter the fifth form unless he has demonstrated his ability to follow an upper secondary-school education ..."[1]

15. I find the conclusions reached by the majority (see paragraphs 205-10 of the judgment) somewhat contradictory. They note that difficulties exist in the education of Roma children not just in the Czech Republic but in other European States as well.

To describe *the total absence of a school education for half of Roma children* (see points 6 and 7 above) in a number of States as "difficulties" is an extraordinary euphemism. To explain this illogical approach, the majority note with satisfaction that, unlike some countries, the Czech Republic has chosen to tackle the problem (see paragraph 205 of the judgment).

The implication is that it is probably preferable and less risky to do nothing and to leave things as they are elsewhere, in other words to make no effort to confront the problems with which a large section of the Roma community is faced.

16. In my view, such abstract, theoretical reasoning renders the majority's conclusions wholly unacceptable.

1. *Le Figaro*, 5 September 2007, p. 8.

DISSENTING OPINION OF JUDGE BORREGO BORREGO

(Translation)

1. I am somewhat saddened by the judgment in the present case.

2. In 2002 Judge Bonello said that he found it "*particularly disturbing that the Court, in over fifty years of pertinacious judicial scrutiny, has not, to date, found one single instance of violation of the right [guaranteed by Article 2 or Article 3] induced by the race ... of the victim*" (see *Anguelova v. Bulgaria*, no. 38361/97, ECHR 2002-IV, dissenting opinion). While I agree with Judge Bonello's criticism that the absence, five years ago, of a single case of racial discrimination concerning the core Convention rights was disturbing, the judgment in the present case has now got the Court off to a flying start. The Grand Chamber has in this judgment behaved like a Formula One car, hurtling at high speed into the new and difficult terrain of education and, in so doing, has inevitably strayed far from the line normally followed by the Court.

3. In my opinion, the Second Section's judgment of 17 February 2006 in the present case was sound and wise and a good example of the Court's case-law. Regrettably, I cannot say the same of the Grand Chamber judgment. (The Chamber judgment is seventeen pages long, the Grand Chamber's, seventy-eight pages, which just goes to show that the length of a judgment is no measure of its sagacity.)

I will focus on two points only.

4. The approach:

After noting the concerns of various organisations about the realities of the Roma's situation, the Chamber stated: "*The Court points out, however, that its role is different from that of the aforementioned bodies and that, like the Czech Constitutional Court, it is not its task to assess the overall social context. Its sole task in the instant case is to examine the individual applications* ..." (§ 45).

5. Yet the Grand Chamber does the exact opposite. In contradiction with the role which all judicial bodies assume, the entire judgment is devoted to assessing the overall social context – from the first page ("historical background") to the last paragraph, including a review of the "Council of Europe sources" (fourteen pages), "Community law and practice" (five pages), United Nations materials (seven pages) and "other sources" (three pages, which, curiously, with the exception of the reference to the European Monitoring Centre, are taken exclusively from the Anglo-American system, that is, the House of Lords and the United States Supreme Court). Thus, to cite but one example, the Court states at the start of paragraph 182: "*The Court notes that as a result of their turbulent history and constant uprooting the Roma have become a specific type of*

disadvantaged and vulnerable minority." Is it the Court's role to be doing this?

6. Following this same line, which to my mind is not one appropriate for a court, the Grand Chamber stated in paragraph 209 after finding a discriminatory difference in treatment between Roma and non-Roma children: "*... since it has been established that the relevant legislation ... had a disproportionately prejudicial effect on the Roma community, the Court considers that the applicants as members of that community necessarily suffered the same discriminatory treatment. Accordingly, it does not need to examine their individual cases*."

7. This, then, is the Court's new role: to become a second ECRI (European Commission against Racism and Intolerance) and dispense with an examination of the individual applications, for example the situation of applicants nos. 9, 10, 11, 16 and 17, in complete contrast to the procedure followed by the Chamber in paragraphs 49 and 50 of its judgment.

8. At the hearing on 17 January 2007 the representatives (from London and New York) of the applicant children (from Ostrava) confined themselves in their oral submissions to an account of the discrimination which they say the Roma are subjected to in Europe.

9. None of the applicant children or the parents of those applicants who were still minors were present at the hearing. The individual circumstances of the applicants and their parents were forgotten. Since Rule 36 § 4 of the Rules of Court states that representatives act on behalf of the applicants, I put a very simple question to the two British and American representatives – had they met the minor applicants and/or their parents? And had they been to Ostrava? I did not receive an answer.

10. I still have the same impression: the hearing room of the Grand Chamber had become an ivory tower, divorced from the life and problems of the minor applicants and their parents, a place where those in attendance could display their superiority over the absentees.

11. The Roma parents and the education of their children:

On the subject of the children's education, the Chamber judgment states: "*[T]he Court notes that it was the parents' responsibility, as part of their natural duty to ensure that their children receive an education ...*" (at § 51). After an analysis of the facts the Chamber went on to hold that there had been no violation of Article 14 taken in conjunction with Article 2 of Protocol No. 1.

12. I consider the stance taken by the Grand Chamber with respect to the parents of the minor applicants to be extremely preoccupying and, since it concerned all the Roma parents, one that is quite frankly unacceptable. It represents a major deviation from the norm and reflects a sentiment of superiority that ought to be inconceivable in a court of human rights and strikes at the human dignity of the Roma parents.

13. The Grand Chamber begins by calling into question the capacity of Roma parents to perform their parental duty. The judgment states "*the Court is not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent*" (at paragraph 203). Such assertions are unduly harsh, superfluous and, above all, unwarranted.

14. The Grand Chamber then proceeds to compound its negative appraisal of the Roma parents: "*[T]he Grand Chamber considers that, even assuming the conditions [for an informed consent] were satisfied, no waiver of the right not to be subjected to racial discrimination can be accepted, as it would be counter to an important public interest ...*" (paragraph 204).

I find this particularly disquieting. The Grand Chamber asserts that *all* parents of Roma children, "even assuming" them to be capable of giving informed consent, are unable to choose their children's school. Such a view can lead to the awful experiences with which we are only too familiar of children being "abducted" from their parents when the latter belong to a particular social group because certain "well intentioned" people feel constrained to impose their conception of life on all. An example of the sad human tradition of fighting racism through racism.

15. How cynical: the parents of the applicant minors are not qualified to bring up their children, even though they are qualified to sign an authority in favour of British and North American representatives whom they do not even know!

16. Clearly, I agree with the dissenting opinions expressed by my colleagues, whose views I wholly subscribe to.

17. Any departure by the European Court from its judicial role will lead it into a state of confusion and that can only have negative consequences for Europe. The deviation from the norm implicit in this judgment is substantial and the fact that all Roma parents are deemed unfit to educate their children is, in my view, insulting. I therefore take my place alongside the victims of that insult and declare: "*Jsem český Rom*" (I am a Czech Rom).

DISSENTING OPINION OF JUDGE ŠIKUTA

To my great regret, I cannot share the opinion of the majority, which has found that in the instant case there has been a violation of Article 14 of the Convention taken in conjunction with Article 2 of Protocol No. 1. I wish to briefly explain my main reasons for not concurring.

I do agree that, in general terms, the situation of Roma in central and eastern Europe is very complex, not easy and simple, and requires efforts from all the key players involved, in particular the governments. This situation, however, has developed over hundreds of years and been influenced by various historical, political, economic, cultural and other factors. Governments have to play a proactive role in this process and are obliged therefore to adopt relevant measures and projects, with a view to reaching a satisfactory situation. The Roma issue should be seen from that perspective, as a living and continuously evolving issue.

The Court's case-law[1] clearly establishes that a difference in treatment of "persons in otherwise similar situations" does not constitute discrimination contrary to Article 14 where it has an objective and reasonable justification; that is, where it can be shown that it pursues "a legitimate aim" or there is "a reasonable relationship of proportionality" between the means employed and the aim sought to be realised. The validity of the justification must be assessed by reference to the aim and effects of the measures under consideration, regard being had to the principles that apply in democratic societies.

In assessing whether and to what extent differences in "otherwise similar situations" justify different treatment, the Court has allowed the Contracting States a certain margin of appreciation[2]. The fact that the Government chose to fulfil the task of providing all children with compulsory education through the establishment of special schools was fully within the scope of their margin of appreciation.

The special schools were introduced for children with special learning difficulties and special learning needs as a way of fulfilling the government's task of securing to all children a basic education, which was fully compulsory. The introduction of special schools should be seen as another step in the above-mentioned process, whose ultimate aim was to reach a satisfactory, or at least an improved, educational situation. The introduction of special schooling, though not a perfect solution, should be seen as positive action on the part of the State to help children with special educational needs to overcome their different level of preparedness to attend an ordinary school and to follow the ordinary curriculum.

---

1. See, for example, *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV.
2. *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports of Judgments and Decisions* 1996-IV.

It can therefore be seen that, in general, there existed objective and reasonable justification for treating children placed in special schools differently from those placed in ordinary schools, on the basis of objective results in the psychological tests, administered by qualified professionals, who were able to select suitable methods. I do agree that the treatment of the children attending ordinary schools on the one hand and of those attending special schools on the other was different. But, at the same time, both types of school, ordinary and special, were accessible and also *de facto* attended, at the material time, by both categories of children – Roma and non-Roma.

The only decisive criterion, therefore, for determining which child would be recommended to which type of school was the outcome of the psychological test, a test designed by experts, qualified professionals, whose professionalism none of the parties disputed. The difference in treatment of the children attending either type of school (ordinary or special) was simply determined by the different level of intellectual capacity of the children concerned and by their different level of preparedness and readiness to successfully follow all the requirements imposed by the existing school system represented by the ordinary schools.

Therefore, isolated statistical evidence, especially when from a particular region of the country, does not by itself enable one to conclude that the placement of the applicants in special schools was the result of racial prejudice, because, by way of example, special schools were attended by both Roma and, at the same time, non-Roma children. Statistics are not by themselves sufficient to disclose a practice which could be classified as discriminatory (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001). The fact that ordinary schools were attended by Roma children as well proves only that there existed other selection criteria than race or ethnic origin. Also, the fact that some of the applicants were transferred to ordinary schools proves that the situation was not irreversible.

It should also be noted that the parents of the children placed in the special schools agreed to their placement and some of them actually asked the competent authorities to place their children there. Such positive action on the part of the applicants' parents only serves to show that they were sufficiently and adequately informed about the existence of such schools and about their role in the schooling system. I have no doubt that, in general, a professional will be more competent to take a decision on the education of a minor child than its parents. Be that as it may, had there been any doubt that a decision of the parents to place their children in a special school was not "in the best interest of the child", the Child Care Department of the Ostrava Welfare Office, which had the power and duty to bring such cases to the Juvenile Court to assess the best interest of the child, could have intervened. But that was not the case, as neither the Welfare Office, nor the

applicants' parents, turned to the Juvenile Court, which was competent to deal with this issue.

Having said all this, I have come to the conclusion that the *difference in treatment was* between children attending ordinary schools on the one hand and children attending special schools on the other, regardless of whether they were of Roma or non-Roma origin. Such difference in treatment had an objective and reasonable justification and pursued a legitimate aim – providing all children with compulsory education.

However, I have also come to the conclusion that *there was no difference in treatment* between children attending the same special school, which children (Roma and non-Roma) are to be considered as "*persons in otherwise similar situations*". I found no legal or factual ground in the instant case for the conclusion that Roma children attending special school were treated less favourably than non-Roma children attending the same special school. It is not acceptable to conclude that only Roma children attending special schools were discriminated against in comparison to non-Roma children (or all children) attending ordinary schools, since these two groups of children are not "persons in [an] otherwise similar situation". It is also not acceptable to conclude this because both "groups" had the same conditions of access and attended both types of school: non-Roma children were attending special schools and, at the same time, Roma children were attending ordinary schools solely on the basis of the results achieved by passing the psychological test, which test was the same for all children regardless of their race.

Based on the above, I do not share the opinion that the applicants, because of their membership of the Roma community, were subjected to discriminatory treatment by their placement in special schools.

ANNEX

LIST OF THE APPLICANTS

1. Ms D.H. is a Czech national of Roma origin who was born in 1989 and lives in Ostrava-Přívoz;
2. Ms S.H. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava-Přívoz;
3. Mr L.B. is a Czech national of Roma origin who was born in 1985 and lives in Ostrava-Fifejdy;
4. Mr M.P. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava-Přívoz;
5. Mr J.M. is a Czech national of Roma origin who was born in 1988 and lives in Ostrava-Radvanice;
6. Ms N.P. is a Czech national of Roma origin who was born in 1989 and lives in Ostrava;
7. Ms D.B. is a Czech national of Roma origin who was born in 1988 and lives in Ostrava-Heřmanice;
8. Ms A.B. is a Czech national of Roma origin who was born in 1989 and lives in Ostrava-Heřmanice;
9. Mr R.S. is a Czech national of Roma origin who was born in 1985 and lives in Ostrava-Kunčičky;
10. Ms K.R. is a Czech national of Roma origin who was born in 1989 and lives in Ostrava-Mariánské Hory;
11. Ms Z.V. is a Czech national of Roma origin who was born in 1990 and lives in Ostrava-Hrušov;
12. Ms H.K. is a Czech national of Roma origin who was born in 1990 and lives in Ostrava-Vítkovice;
13. Mr P.D. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava;
14. Ms M.P. is a Czech national of Roma origin who was born in 1990 and lives in Ostrava-Hrušov;
15. Ms D.M. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava-Hrušov;
16. Ms M.B. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava 1;
17. Ms K.D. is a Czech national of Roma origin who was born in 1991 and lives in Ostrava-Hrušov;
18. Ms V.Š. is a Czech national of Roma origin who was born in 1990 and lives in Ostrava-Vítkovice.

United Nations CRPD/C/9/D/1/2010

Convention on the Rights of Persons with Disabilities

Distr.: General
23 April 2013

Original: English

Advance unedited version

Committee on the Rights of Persons with Disabilities

Communication No. 1/2010

Views adopted by the Committee at its 9th session, 15 to 19 April 2013

Submitted by:	Szilvia Nyusti and Péter Takács (represented by counsel, Tamás Fazekas, Hungarian Helsinki Committee)
Alleged victims:	The authors
State party:	Hungary
Date of communication:	11 March 2010 (initial submission)
Document references:	Special Rapporteur's rule 70 decision, transmitted to the State party on 20 September 2010 (not issued in document form)
Date of adoption of Views:	16 April 2013
Subject matter:	Failure by the State party's authorities to eliminate discrimination on the ground of disability by a private credit institution and to ensure that persons with visual impairments have an unimpeded access to the services provided by the ATMs on the equal basis with the other clients
Substantive issues:	Equal and effective legal protection against discrimination on the ground of disability, reasonable accommodation; accessibility of information; right to control one's own financial affairs
Procedural issues:	Level of substantiation of a claim; *ratione temporis*
Articles of the Convention:	5, paragraphs 2 and 3; 9 and 12, paragraph 5
Articles of the Optional Protocol:	2 (e) and (f)
	[Annex]

Annex

Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (ninth session)

concerning

Communication No. 1/2010*

Submitted by:	Szilvia Nyusti and Péter Takács (represented by counsel, Tamás Fazekas, Hungarian Helsinki Committee)
Alleged victims:	The authors
State party:	Hungary
Date of communication:	11 March 2010 (initial submission)

The Committee on the Rights of Persons with Disabilities, established under article 34 of the Convention on the Rights of Persons with Disabilities,

Meeting on 16 April 2013,

Having concluded its consideration of communication No. 1/2010, submitted to the Committee on the Rights of Persons with Disabilities by Szilvia Nyusti and Péter Takács under the Optional Protocol to the Convention on the Rights of Persons with Disabilities,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

Views under article 5 of the Optional Protocol

1. The authors of the communication are Szilvia Nyusti, a Hungarian national born on 8 May 1979 (the first author), and Péter Takács, a Hungarian national born on 31 May 1977 (the second author). The authors claim to be victims of a violation by Hungary of their rights under article 5, paragraphs 2 and 3; article 9 and article 12, paragraph 5, of the Convention on the Rights for Persons with Disabilities (the Convention). The Optional Protocol to the Convention entered into force for the State party on 3 May 2008. The authors are represented by counsel, Tamás Fazekas, Hungarian Helsinki Committee.

* The following members of the Committee participated in the examination of the present communication: Mr. Mohammed Al-Tarawneh, Mr. Munthian Buntan, Ms. Maria Soledad Cisternas Reyes, Ms. Theresia Degener, Mr. Hyung Shik Kim, Mr. Lofti ben Lallahom, Mr. Stig Langvald, Ms. Edah Wangechi Maina, Mr. Ronald McCallum, Ms. Diane Mulligan, Mr. Martin Babu Mwesigwa, Ms. Safak Pavey, Ms. Ana Pelaez Narvaez, Ms. Silvia Judith Quan-Chang, Mr. Carlos Rios Espinosa, Mr. Damjan Tatic and Mr. Germán Xavier Torres Correa.
Pursuant to rule 60 of the Committee's rules of procedure, Committee member Mr. László Gábor Lovászy, did not participate in the adoption of the present Views.

Factual background

2.1 Both authors are persons with severe visual impairments. Independently from each other they concluded contracts[1] for private current account services with the OTP Bank Zrt. credit institution (the OTP), according to which they are entitled to use banking cards. Nevertheless, the authors are unable to use automatic teller machines (the ATMs) without assistance, as the keyboards of the ATMs operated by the OTP are not marked with Braille fonts, and the ATMs do not provide audible instructions and voice assistance for banking card operations. The authors pay annual fees for banking card services and transactions equal to those fees paid by other clients. However, they are unable to use the services provided by these ATMs on the same level as sighted clients and, thus, receive lesser services for the same fees.

2.2 On 11 April 2005, the authors' legal representative lodged a complaint with the OTP, requesting changes to be made to the ATMs in the proximity of his clients' homes.[2] The claim was based on Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (the Equal Treatment Act), and asserted that after the entry into force of this Act, the OTP was obliged to comply with the requirement of equal treatment, and to provide services of equal quality to its clients. The complaint was rejected by the OTP on 16 June 2005.

2.3 On 5 August 2005, the authors brought a civil action under articles 76 and 84 of Act IV of the 1959 Civil Code (the Civil Code) to the Metropolitan Court. In their action, they asked the court to recognize that the OTP violated their personal rights, namely the right to equal treatment. They explained that the OTP directly discriminated against them, because due to their disability, they receive services of a lesser quality in comparison to other clients of the OTP, despite the fact that they paid exactly the same fees. The authors claimed that, according to article 84(1)(d) of the Civil Code, the OTP was obliged to bring this infringement to an end by retrofitting all the ATMs operated by the OTP. In case this relief could not be granted, the authors requested the Metropolitan Court to order the retrofitting of the ATMs operated by the OTP throughout the country on an equal basis and on the basis of balanced territorial distribution.[3] The authors sought non-pecuniary damages of 300'000 Hungarian forints each pursuant to article 84(1)(e) of the Civil Code, due to harm suffered to their human dignity.

2.4 In their initial civil action, the authors referred to articles 8 and 30(1)(b) of the Equal Treatment Act, to Act XXVI of 1998 on Securing the Rights and Equal Opportunities of Persons with Disabilities (the Disabilities Act), and to the provisions regarding accessibility of Act LXXVIII of 1997 on the Formation and Protection of Built Environment (the Built Environment Act). According to the Built Environment Act, the ATM is a part of a building, and therefore the accessibility requirements apply to it.

2.5 On 3 October 2005, the OTP requested that the authors' civil action be dismissed. In its opinion, the extra services demanded by the authors would constitute positive

[1] The contract between the first author and the OTP was concluded on 1 November 1996 and was renewed on 1 January 2006. The second author concluded the contract with the OTP on 23 December 2003.

[2] The complaint of 11 April 2005 reads in relevant part as follows: "Please kindly inform me in writing which ATMs of the OTP, in Budapest near my clients' home address, are suitable for their unrestricted use. If you do not have such ATMs, please retrofit them as necessary within 15 days and kindly inform me about this".

[3] The civil action of 5 August 2005 reads in relevant part as follows: "We request that the […] Court obliges [the OTP] […] to cease the situation of infringement and to retrofit a part of its ATMs to ensure their accessibility".

discrimination, which could only be prescribed by law. Consequently, a court could not impose an obligation on the OTP to undertake such measures. The OTP further claimed that it was primarily a governmental obligation to ensure unimpeded access to buildings for persons with disabilities and that the ATMs operated by the OTP were not "buildings" from the standpoint of the Built Environment Act. For these reasons, the accessibility requirements of the Built Environment Act did not apply to the OTP. The OTP also claimed that since both contracts were concluded by the authors prior to the entry into force of the Equal Treatment Act, the latter was inapplicable to the legal relationship in question. Moreover, according to article 5(b) of the Equal Treatment Act, the ATMs did not fall within the definition of "places open to the public for provision of services and products".

2.6 The OTP further explained that, by providing banking card services, it did not discriminate against the authors either directly or indirectly, since the OTP's relations with them within the framework of the execution of the contracts did not constitute an "active behaviour" for the purposes of the Equal Treatment Act. With reference to article 7(2) of the Equal Treatment Act, the OTP also argued that the adjustment of ATMs would create increased banking security risks for visually impaired clients "due to their special situation". Furthermore, such adjustment would impose an unexpected financial burden on the OTP. The OTP also asserted that some of the ATMs could not be retrofitted. Finally, the OTP claimed that, by imposing on it an obligation to provide the services requested by the authors, the court would interfere into the contractual relationships between the parties and thus violate the OTP's constitutional right to freedom of contract.

2.7 On 14 May 2007, the Metropolitan Court ruled that the OTP has violated the authors' right to human dignity and to equal treatment. The Court concluded that the OTP's behaviour resulted in direct discrimination, because due to the authors' visual impairments they could not use the services provided by the ATMs to the same extent as the other clients, despite paying the same fees.[4] The Court held that the services requested by the authors could not be considered as positive discrimination and emphasised the difference between the right to equality and equality of chances. Whereas the right to equality imposes on service providers an obligation to provide equal services for equal fees, it does not necessarily mean that the services have to be provided to every client in the identical manner. Rather, a different way of providing services is required to ensure that clients with visual impairments can access the ATMs on their own and at any time, just like any other clients who pay the same fees.

2.8 The Metropolitan Court held that the OTP had to ensure that its clients with visual impairment could access information necessary for using the ATMs. It found, therefore, that the OTP was responsible for not retrofitting its ATMs since 27 January 2004, when the Equal Treatment Act entered into force. The Court ordered the OTP to retrofit within 120 days at least one of its ATMs in the capital towns of each county, one in each district of Budapest, and four further ATMs in the districts where the authors reside. The Court took into account that the retrofitting of the ATMs could be carried out alongside the annual maintenance services, and that the costs incurred must be calculated per ATM type, and not per ATM. The Court also took into account that approximately one-third of the 1800 ATMs in question could not be retrofitted, and that the purchase of replacement ATMs would constitute a significant financial burden for the OTP.

2.9 In response to the arguments put forward by the OTP, the Metropolitan Court held that article 5 of the Equal Treatment Act extended the scope of its application to all civil

[4] Reference is made to article 8(g) of the Equal Treatment Act, according to which "a provision constitutes direct discrimination if it results in less favourable treatment of a person or a group than comparable persons or group solely because of their perceived or actual disability".

relations, irrespective of whether the parties thereto were public or civil sector operators, where services were provided to numerous clients. The Court also established that even contract offers made prior to the entry into force of the Equal Treatment Act would be covered by its provisions, since the aim of the Act was to make the principle of non-discrimination applicable to any relationship where a larger number of clients could be involved.

2.10 The Metropolitan Court also granted pecuniary damages in the amount of 200'000 Hungarian forints to each of the authors. In establishing the amount of pecuniary damages, it took into consideration, *inter alia*, that the OTP had recently purchased new ATMs that could not be retrofitted and had not taken any measures to facilitate the authors' access to the services provided by the ATMs, even after the entry into force of the Equal Treatment Act. Moreover, the OTP proposed to terminate the authors' contracts, referring the increased security risks.

2.11 On 2 July 2007, the authors appealed against the first instance decision to the Metropolitan Court of Appeal, requesting that all ATMs be made accessible,[5] and that the amount of compensation be raised to 300'000 Hungarian forints. The authors asserted that their activities should not be limited only to those cities where the ATMs were to be made accessible further to the decision of the Metropolitan Court, as they were entitled to freedom of movement and the right to choose their place of residence. The aim of the litigation was to put an end to the discrimination fully, and not only partially. Therefore, in the authors' opinion, the 120 days set out by the Metropolitan Court would be insufficient to make all the ATMs accessible. In their view, the objective could be achieved if a gradual course of action were taken, with a series of appropriate deadlines. Finally, the authors argued that the cost of retrofitting amounts to only 0.12% of the yearly net income of the OTP in 2006, which may not be considered as a disproportionate burden.

2.12 The OTP submitted its appeal against the first instance decision on 13 July 2007, reiterating its request that the authors' civil action be dismissed. The OTP emphasized that the Metropolitan Court did not specifically indicate the legal provision that would require it to retrofit the ATMs after 27 January 2004 and that would result in a violation of human rights, should the OTP fail to comply with this obligation. The number and location of the ATMs was determined in a "broad spectrum" that could not be justified and could not be identified as an essential need of the authors, being residents of Budapest. The OTP further argued that the retrofitting would "motivate blind or visually impaired persons to use the ATMs without help, which would endanger not only the security of property but also personal safety of blind or visually impaired clients of the OTP". The OTP also denied the allegations made by the authors that it had threatened to close down their accounts and that it had purchased new ATMs that could not be retrofitted. The OTP also claimed that the retrofitting of the ATMs would infringe upon the freedom of contract, as intervention into contractual legal relationships was possible solely on the basis of expressed and clear authorization by a legal statute. As to the authors' claim for pecuniary damages, the OTP argued that the fact that blind or visually impaired persons had to be assisted in using the ATMs did not infringe upon their human dignity. Therefore, in the absence of any specific harm, the authors' claim for pecuniary damages was groundless.

2.13 On 10 January 2008, the Metropolitan Court of Appeal rejected the authors' appeal. It held that the Metropolitan Court was right in concluding that the provisions of the

[5] The appeal of 2 July 2007 against the judgment of the Metropolitan Court reads in relevant part as follows: "We request the […] Metropolitan Court of Appeal to require [the OTP] […] to retrofit all of it ATMs into accessible ATMs (that is, exceeding the level defined in the judgment of the first instance [court] in a manner defined in [that] judgment".

Disabilities Act were inapplicable to the legal dispute in question, because the provisions of the said Act applied to the removal of barriers with regard to the built environment, whereas the authors' civil action was related to the baking card services provided by the ATMs and, thus was outside of the scope of the Disabilities Act. Moreover, the Act in question imposed an obligation on the State to enforce the rights of persons with disabilities but made it dependent on the "strength of the national economy". The Metropolitan Court of Appeal therefore held that the Disabilities Act did not contain any provisions that would be applicable to the parties in relation to the authors' civil action, and the provisions of the Constitution, the Civil Code and the Equal Treatment Act should be applied instead. The Metropolitan Court of Appeal further declared that the first instance court was also correct in concluding that the legal relationship at issue fell within the personal and temporal scope of the Equal Treatment Act. Otherwise, the Metropolitan Court of Appeal reached a decision differing from the decision of the first instance court for the following reasons. The Metropolitan Court of Appeal held that there was an indirect discrimination in the authors' case, rather than a direct discrimination.[6] The Court also concluded that the mere fact that the authors needed or might need assistance from other members of the society due to their disability did not violate their human dignity and that, therefore, it may not be considered as a humiliation to the authors as human beings. The Court further established that the OTP was entitled to the freedom of concluding contracts, and this freedom must be respected not only when signing a contract, but also when amending it. Thus, the Court may not, upon request by one party to a contract, intervene into a longstanding contractual relationship and oblige the OTP to fulfil an obligation which did not constitute a part of the contractual agreement. The Court also accepted the argument of the OTP that, due to the increased personal safety risks, the retrofitting would not ensure that the authors could use the ATMs on their own. Finally, the Court found that the authors were not entitled to request the retrofitting of all the ATMs operated by the OTP in Hungary. It held that this kind of request would not be justified by the constitutional principle of freedom to choose one's place of residence. The Metropolitan Court of Appeal concluded, therefore, that the OTP was exempted from the obligation to provide for equal treatment under the Equal Treatment Act.

2.14 On 14 April 2008, the authors submitted a request for an extraordinary judicial review at the Supreme Court, in which they asked the Court to alter the decision of the Metropolitan Court of Appeal.[7] In addition to their initial arguments, the authors asserted that the qualification of discrimination as being direct or indirect was irrelevant to the legal dispute, since the rules regarding exemption from the obligations of equal treatment were the same in both cases. The authors referred to the opinion of the Equal Treatment Advisory Board,[8] according to which the failure to comply with the accessibility requirement of the Disabilities Act qualified as an indirect negative discrimination, since disabled persons received a less favourable treatment than non-disabled persons, as their movement and access to services were impeded and restricted. The authors also argued that freedom of contract was not a basis for exemption from the obligation to apply the Equal Treatment Act, because freedom of contract may not be regarded as a constitutional

[6] The Metropolitan Court of Appeal found that, although everyone may use the ATMs under the same conditions, the authors were put in a less favourable situation compared to the other clients due to their disability.

[7] The appeal of 14 April 2008 against the judgment of the Metropolitan Court of Appeal reads in relevant part as follows: "We are requesting the […] Supreme Court […] to require [the OTP] to retrofit all of it ATMs to ensure their accessibility".

[8] Reference is made to the opinion of the Equal Treatment Advisory Board, 10.007/3/2006.TT.

fundamental right.[9] The authors challenged the assessment of the Metropolitan Court of Appeal that the reliance by persons with disabilities on the assistance of other members of the society did not violate their human dignity, and argued that such approach contradicted the requirement of equal treatment and article 70/A of the Constitution.

2.15 The OTP requested the Supreme Court to uphold the decision of the Metropolitan Court of Appeal and reiterated its arguments concerning the freedom of contract. According to the OTP, the authors concluded their respective contracts of their own free will and with the full knowledge and acceptance of the conditions in relation to the services provided by the OTP.

2.16 The Supreme Court delivered its decision on 4 February 2009, rejecting both the request for a judicial review by the authors, and the request for judicial review by the OTP. The Supreme Court shared the opinion of the Metropolitan Court of Appeal that the ATMs designed for sighted persons put blind or visually impaired persons in a disadvantageous situation, even though it seemed that they may use the ATMs under the same conditions as everybody else. The disadvantageous situation was induced by the fact that no Braille fonts may be found on the ATMs, and the owner of the banking card did not have a voice assistance support when using the machines. The Supreme Court also agreed with the arguments of the second instance court with regard to the exemption of the OTP from the obligation to provide for equal treatment under the Equal Treatment Act. Furthermore, the Supreme Court asserted that the parties concluded a contract for private current account services, the content of which may be freely established by the parties. The Court stated that the authors took note of the contractual terms, including the facility of limited use and, by signing the contract, they agreed to their disadvantaged situation through implied conduct.

2.17 The authors submit that they have exhausted all effective domestic remedies and that this matter has not been and is not currently being examined under any other procedure of international investigation or settlement. With reference to article 2, paragraph (f), of the Optional Protocol, which renders inadmissible any communication when the facts thereof occurred prior to the entry into force of the Optional Protocol for the State party concerned unless those facts continued after that date, the authors argue that the Committee is not precluded from the examination of their communication. They submit that the relevant facts have continued after the entry into force of the Optional Protocol and that the last decision in relation to the present communication was adopted after the entry into force of the Optional Protocol for the State party.

The complaint

3.1 The authors submit that the State party has enacted norms prohibiting discrimination against persons with disabilities, and has included remedies for the violation of these provisions. However, Hungary does not entirely fulfil its obligations by mere enactment of these norms. It is up to the relevant authorities who act on behalf of the State to apply and interpret these norms in such a manner so as to ensure efficient accessibility. The authors submit that the reasoning of the Metropolitan Court shows that it is possible to interpret the State party's legal framework in accordance with the Convention, thus ensuring the protection specified within it. Nevertheless, the Metropolitan Court of Appeal and the Supreme Court interpreted the laws contrary to the Convention, so the protection afforded by the State cannot be considered sufficient, or efficient. The authors claim, therefore, that

[9] Reference is made to the decisions of the Constitutional Court, 229/B/1998 and 61/1992 (XI.20). The authors also make a distinction between the "freedom of contract" and the "freedom to enter into contracts".

by misinterpreting the law, the authorities acting on behalf of the State party did not ensure their rights as provided for in the Convention.

3.2 The authors argue that, due to their disability, they have suffered direct discrimination in accessing the services provided by the ATMs compared to sighted clients of the OTP. They submit that, in defining discrimination, both the Metropolitan Court of Appeal and the Supreme Court ignored the opinion of the Equal Treatment Advisory Board, according to which "[…] failure to ensure accessibility for the disabled constitutes a violation of equal treatment, thus failure to ensure unimpeded access falls within the scope of the Equal Treatment Act. […] Dereliction of the duty to ensure accessibility constitutes direct discrimination, since it means that persons with disabilities are treated less favourably in accessing services when compared to persons without disabilities […]."[10] Furthermore, only the Metropolitan Court has correctly applied the reasonableness test in deciding whether the necessary adjustments of the ATMs would impose a disproportionate financial burden on the OTP (see, paragraph 2.8 above). The criterion of "human dignity" used by the Metropolitan Court of Appeal in applying the reasonableness test (see, paragraph 2.14 above), however, is not only irrelevant in deciding whether there were reasonable grounds for differentiation in treatment but it also runs counter to the primary goals of the Convention, such as respect for inherent dignity, individual autonomy of persons with disabilities and their inclusion in society.

3.3 The authors submit that, by not intervening into a long-term contractual relationship between them and the OTP on their request in order to impose on the OTP an obligation of equal treatment, which had not been included in the contract, the Metropolitan Court of Appeal and the Supreme Court have violated the State party's obligations under article 5, paragraph 2, of the Convention to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

3.4 In light of the above, the authors conclude that they are victims of a violation by the State party of their rights under article 5, paragraphs 2 and 3; article 9 and article 12, paragraph 5, of the Convention, and are, therefore, entitled to a just compensation.

The State party's observations on the admissibility and merits

4.1 22 November 2010, the State party informed that Committee that it would not challenge the admissibility of the present communication.

4.2 On 21 March 2011, the State party submitted its observations on the merits of the communication. It states that, based on the Hungarian regulations in force, the judgment of the Supreme Court of 4 February 2009 was sound but adds that the problem outlined in the communication is real and requires a fair settlement.

4.3 The State party puts forward three aspects in order for a solution acceptable to all parties to be found. Firstly, steps are to be taken for changing the accessibility of the ATMs and other banking services, including accessibility not only for the blind but also for persons with other disabilities. Secondly, given the related costs and technical viability, the above target can be achieved only gradually, by procuring and installing new ATMs facilitating physical and info-communication accessibility as a basic condition. Finally, although the communication concerns the services provided by a specific bank, the above-mentioned requirements would have to be met by each and every Hungarian financial institution.

[10] http://www.egyenlobanasmod.hu/index.php?g=hirek/TTaf 200610.htm

4.4 Based on the above considerations, the State Secretary for Social, Family and Youth Affairs of the Ministry of National Resources sent a letter to the President-CEO of the OTP on 18 March 2011, asking him to provide information on their possible plans and commitments related to the ATMs operated by the bank. The State Secretary suggested that in the future the OTP give priority to the accessibility of the machines when new ATMs are procured.

4.5 Taking into account that ensuring accessibility should not be the duty of one bank only, the State Secretary has contacted the President of the Hungarian Financial Supervisory Authority with the request to identify possible regulatory tools and incentives for all financial institutions.

The authors' comments on the State party's observations

5.1 On 19 December 2011, the authors provided their comments on the State party's observations. The authors submit that they welcome the fact that the State Secretary for Social, Family and Youth Affairs has contacted the OTP and the Hungarian Financial Supervisory Authority in relation to their communication. They consider, however, that his official response to the Committee is contradictory. The State Secretary argues on the one hand that the Supreme Court's reasoning on the authors' case is sound while admitting on the other that there exists a "real" problem requiring "fair settlement". In the authors' opinion, the Supreme Court decided their case in a manner that failed to "fairly settle this real problem", although in the earlier decision on the same case the Metropolitan Court interpreted the State party's legal framework in compliance with the Convention.

5.2 The authors argue that if, in the opinion of the State Secretary, the Supreme Court's decision is in full compliance with the State party's law then Hungary has violated the Convention by not adopting the necessary legislative measures for its implementation at the national level. They specifically refer to the State party's obligations under articles 4 and 5 of the Convention. If, however, the State Secretary is wrong in his assessment and the State party's law can be interpreted in compliance with the Convention – a position the authors take – then Hungary has violated the Convention due to the Supreme Court's failure to uphold the appropriate interpretation. The said failure is attributable to the State party, as it bears responsibility for ensuring judicial protection of the rights of persons with disabilities and correct interpretation of the law by the judiciary in a manner consistent with the State party's obligations under the Convention.

5.3 The authors maintain that the Metropolitan Court of Appeal and the Supreme Court ruled contrary to the spirit of the Convention, thus violating their rights guaranteed under the provisions invoked in the authors' initial submission to the Committee. Furthermore, the Metropolitan Court of Appeal and the Supreme Court also violated their obligation to interpret the State party's law in a way that is compliant with the Convention. The authors also maintain that these courts have misinterpreted and misapplied the Equal Treatment Act, as well as the international directives relevant to their communication and, in particular, provisions thereof which relate to the definition of discrimination and to exoneration. According to them, the fact that the Metropolitan Court interpreted the State party's legal framework in compliance with the said directives makes the failure of the Metropolitan Court of Appeal and the Supreme Court to do the same even more conspicuous.

5.4 The authors recall that the State Secretary outlines three aspects of the ATMs accessibility in his response, arguing that these are important for ensuring a "solution acceptable to everybody". First, "steps are to be taken for changing the accessibility of the ATMs". Second, this change can only be achieved gradually due to the costs involved. Third, the change would create obligations for every bank in Hungary. The authors submit in this regard that while it is unlikely that every single ATM in Hungary would become

accessible within a short period of time, their own situation and that of the other persons with visual impairments remains unchanged due to the Supreme Court's failure to give effect to their rights. The authors add that the attitude of the OTP towards the special needs of the persons with disabilities is illustrated by the fact that it had bought 384 new ATMs while the court proceedings at the national level were still on-going, although 300 of them could not be retrofitted to make them accessible for persons with disabilities. The OTP went as far as to offer the authors to close down their accounts in order to put an end to their contractual relationship.

5.5 The authors state that, having considered the costs associated with the retrofitting and installation of the ATMs which are accessible for persons with disabilities, the Metropolitan Court in its decision ordered a few moderate steps towards the integration of the persons with disabilities into the society. This decision, however, was appealed by the OTP. The authors submit in this regard that the financial burden of defending itself against continued lawsuits for the OTP will soon overweigh the costs of making the ATMs accessible for persons with disabilities.

5.6 The authors express their agreement with the State Secretary in that the obligation to provide equal access to services for persons with disabilities would need to be extended to all financial institutions operating on the State party's territory in order to ensure these persons' integration into the society. They note that other banks in Hungary, unlike the OTP, have already made efforts to install ATMs that are accessible for persons with disabilities. The authors submit, therefore, that a failure of the largest financial institution in Hungary – the OTP – to provide services to persons with disabilities could have a negative impact on the rate of installation of the disability compliant ATMs by other banks.

5.7 The authors conclude by saying that together with the other persons who have visual impairments, they continue to face discriminatory treatment by the OTP due to the failure of the Supreme Court to give effect to their rights provided for in the international treaties ratified by Hungary. In particular, they are requested to pay the same amount of fees as non-disabled clients without, however, being able to receive the same level of services. This discriminatory treatment prevents persons with visual impairments in Hungary from achieving independence and full integration into the society thus violating their human dignity. According to the authors, the State party's courts have failed to protect their rights under the Convention and this failure cannot be rectified by mere sending of letters to the OTP and the Hungarian Financial Supervisory Authority, as they do not create legal obligations.

5.8 The authors, therefore, maintain their initial claims and request the Committee to establish that the State party has violated its obligations under the Convention.

The State party's further observations

6.1 On 12 March 2012, the State party submitted its observations on the authors' comments. It points out that it concurs with the decision of the Supreme Court in the authors' case and fully accepts it. It adds that due to the principles of the rule of law and the separation of powers, the State party cannot reassess the final decision made by an independent judicial body or the reasoning thereof.

6.2 The State party recalls that, further to the submission of the present communication to the Committee, the State Secretary for Social, Family and Youth Affairs sent a letter to the President-CEO of the OTP, requesting him to provide information on the possible plans and commitments related to the accessibility of the ATMs operated by the bank. The State Secretary specifically suggested that the accessibility of the ATMs be treated as high priority throughout the bank's future procurements.

6.3 In his response of 11 April 2011, the President-CEO of the OTP first indicated that the bank had placed great emphasis on the physical accessibility of the ATMs, as a result of which 90% of its branches and thus the ATMs located there were made accessible for persons with limited mobility. The President-CEO also underlined that the bank could first and foremost take responsibility for the accessibility of the ATMs located in the premises of its own branches. In the case of the ATMs located outside of such premises, it was often impossible to ensure full accessibility due to the "features of the environment". In many cases, the lessor of the building accommodating the ATM was not open towards performing the necessary adjustments. Nevertheless, the OTP committed itself to retrofitting all of its ATMs within the framework of a four-year programme in order to make them suitable for an independent use by persons with visual impairments. In the State party's view, this commitment, which is in line with the principle of reasonable accommodation enshrined in the Convention, may bring along a notable and substantive development in the circumstances of the present communication.

6.4 The State party further recalls that the State Secretary for Social, Family and Youth Affairs had sent a letter to the President of the Hungarian Financial Supervisory Authority (HFSA) dated 18 March 2011, requesting him to review regulatory instruments and incentives that would apply to all financial institutions. In his response of 26 April 2011, the President of the HFSA stated that several steps had already been taken in order to improve the situation of persons with disabilities. The President of the HFSA has issued a Recommendation No. 1/2011 (IV. 29) "On the principles of consumer protection expected from financial institutions". It establishes the following under III. 3: "The HFSA considers it best practice for financial institutions to pay extra attention to those consumers with limited ability to represent their own interests, such as minors, the elderly, the disabled and the seriously ill, as well as those who struggle with comprehension of complex terms and information."[11] The State party submits that the significance of the said recommendation lies in its applicability to all financial institutions. Moreover, its implementation is monitored by the HFSA. The President of the HFSA also expressed his readiness to work out further directives in cooperation with the organizations representing the interests of the blind and partially sighted in order to ensure the independent use of banking services by as many persons with visual impairments as possible.

6.5 The State party concludes that the positive feedback received from the President-CEO of the OTP and the President of the HFSA will in the long term promote the equal access of persons with disabilities to banking services.

The authors' further comments on the State party's further observations

7.1 On 31 May 2012, the authors recall that, according to the State party, the decision of the Supreme Court was in full compliance with the State party's law. In this connection, the authors reiterate their earlier line of argument (see, paragraph 5.2 above). They agree that the State party cannot reassess the final decision made by an independent judicial body or the reasoning thereof. They submit, however, that the State's obligation is not to reassess a court decision but to ensure (judicial) protection of the rights of persons with disabilities. If the court has failed to provide the necessary protection, then the State party is obliged to take responsibility for this failure. In the current context, the Ministry of National Resources' acknowledgment of an erroneous application of the otherwise Convention compliant law would not be a violation of the separation of powers principle; otherwise the States Parties could never be called to account for judicial decisions that are contrary to the Convention.

[11] The English translation of the relevant excerpt is provided by the State party.

7.2 While the authors welcome the State party's aspirational statement affirming the importance of ensuring accessibility of the ATMs in future procurements, they point out that the Government has yet to take a legally-binding action to this effect, despite having all necessary means available at its disposal for doing so. With reference to article 4, paragraph 1(a), of the Convention, the authors submit that sending a legally non-binding letter does not meet this burden.

7.3 The authors applaud the OTP's efforts to ensure physical accessibility of its branches. They recall, however, that under article 9 of the Convention, "accessibility" is not limited to removing physical barriers but also includes eliminating obstacles to information, communications and other services. The authors note the acknowledgement made by the OTP itself that its accessibility efforts have been concentrated on persons with limited mobility and not on persons with visual impairments, although the present communication concerns the latter group.

7.4 The authors maintain that the State party has failed to take appropriate measures to ensure and promote "the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination", as set out in article 4 of the Convention. They add that the deadlines defined in the Disabilities Act for the implementation of accessibility measures are systematically disregarded and no national accessibility plan has been elaborated. According to them, it is particularly distressing that the State party's law does not define any concrete and enforceable measures in connection with the accessibility of information and communications.

7.5 The authors conclude that the broader definition of discrimination embodied in the concept of reasonable accommodation as set out in article 2 of the Convention, has yet to be introduced into the State party's law. If the State party fails to honor its obligation to provide legal remedies for discrimination to the full extent required by the Convention, the rights of persons with disabilities will continue to be infringed upon. The authors, therefore, maintain their initial claims and request the Committee to establish that the State party has violated its obligations under the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Committee on the Rights of Persons with Disabilities must, in accordance with article 2 of the Optional Protocol and rule 65 of the Committee's rules of procedure, decide whether or not it is admissible under the Optional Protocol.

8.2 The Committee notes that the Optional Protocol entered into force for the State party on 3 May 2008 and that the judgment of the Supreme Court dated 4 February 2009 was delivered after that date. The Committee also notes that the State party does not challenge the admissibility of the present communication and that the relevant facts, which are the subject of the communication – inaccessibility of the banking card services provided by the ATMs operated by the OTP to the authors, – continued after the entry into force of the Optional Protocol for the State party. Accordingly, the Committee considers that it is not precluded, by article 2, paragraph (f), of the Optional Protocol, from examining the communication.

8.3 The Committee further notes that the authors have invoked a violation of article 12, paragraph 5, of the Convention, without however providing further substantiation as to how this provision may have been violated, given that according to the information before the Committee, their legal capacity to control their own financial affairs has not been restricted. Therefore, the Committee considers that this part of the communication is insufficiently

substantiated, for purposes of admissibility, and is thus inadmissible under article 2, paragraph (e), of the Optional Protocol.

8.4 The Committee considers that the authors have sufficiently substantiated, for purposes of admissibility, their claims under article 5, paragraphs 2 and 3, and article 9 of the Convention. In the absence of other impediments to the admissibility of the communication, the Committee declares these claims admissible and proceeds to their examination on the merits.

Consideration of the merits

9.1 The Committee on the Rights of Persons with Disabilities has considered this communication in the light of all the information received, in accordance with article 5, of the Optional Protocol and rule 73, paragraph 1, of the Committee's rules of procedure.

9.2 The Committee notes that the authors' initial complaint to the OTP focused on the lack of reasonable accommodation, i.e. the failure by the OTP to provide for individual measures by retrofitting some of its ATMs in the proximity of the authors' homes in order to adjust the banking card services provided by these ATMs to the authors' specific needs so that they become accessible for persons with visual impairments. The Committee further notes that the authors' civil action before the Metropolitan Court and their appeals before the Metropolitan Court of Appeal and the Supreme Court, as well as their communication before the Committee go further and raise a broader claim, i.e. the lack of accessibility for persons with visual impairments to the entire network of the ATMs operated by the OTP. In light of the fact that the authors opted to frame their communication before the Committee under this broader claim – whether the State party has taken appropriate measures to ensure the accessibility of the banking card services provided by the entire network of the ATMs operated by the OTP for persons with visual impairments – the Committee considers that, in the circumstances of the present communication, the totality of the authors' claims should be examined under article 9 of the Convention and that it is therefore unnecessary for it to separately assess whether the State party's obligations under article 5, paragraphs 2 and 3, of the Convention have been fulfilled.

9.3 As to the authors' claim under article 9 of the Convention that the State party has failed to fulfil its obligations by not ensuring accessibility of the banking card services provided by the ATMs operated by the OTP for persons with visual impairments on the equal basis with others, the Committee notes the State party's assertion that the judgment of the Supreme Court of 4 February 2009 was "sound" (see, paragraph 4.2 above) and that the State party "concurs with" and "fully accepts" it (see, paragraph 6.1 above). In the Committee's view, the State party thus effectively takes a position that under its existing legal framework, the obligation to provide for accessibility of information, communications and other services for persons with visual impairments on an equal basis with others does not apply to private entities, such as the OTP, and does not affect contractual relationships.

9.4 In this regard, the Committee recalls that under article 4, paragraph 1(e), of the Convention, States Parties undertake "to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise". To this end, States Parties are required pursuant to article 9 of the Convention to take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to, *inter alia*, information, communications and other services, including electronic services, by identifying and eliminating obstacles and barriers to accessibility. States Parties should, in particular, take appropriate measures 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 (article 9, paragraph 2(a), of the Convention), and 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 (article 9, paragraph 2(b)).

9.5 In the present communication, the Committee notes, firstly, that the State party has acknowledged the fact that the accessibility of the ATMs and other banking services for persons with visual and other types of impairments was a real problem that required a solution acceptable to all parties involved (see, paragraphs 4.2 and 4.3 above). It further notes that the State party has already identified the three aspects to achieve this objective, namely (1) the accessibility of the ATMs and other banking services by all persons with disabilities, (2) the gradual achievability of such comprehensive accessibility due to costs involved, and (3) the accessibility of the ATMs and other banking services provided by all financial institutions operating on the State party's territory and not only by the OTP. The Committee also notes that the State Secretary for Social, Family and Youth Affairs of the Ministry of National Resources suggested to the President-CEO of the OTP that the OTP give priority in the future to the accessibility of newly procured ATMs and that the latter had promised to retrofit the entire network of its ATMs within four years on a voluntary basis. Finally, the Committee notes that the State Secretary has also requested the President of the Hungarian Financial Supervisory Authority to identify possible regulatory tools and incentives applicable to all financial institutions to ensure accessibility to their services for persons with disabilities and that the latter had issued a Recommendation "On the principles of consumer protection expected from financial institutions" (see, paragraph 6.4 above).

9.6 While giving due regard to the measures taken by the State party to enhance the accessibility of the ATMs operated by the OTP and other financial institutions for persons with visual and other types of impairments, the Committee observes that none of these measures have ensured the accessibility to the banking card services provided by the ATMs operated by the OTP for the authors or other persons in a similar situation. The Committee finds accordingly that the State party has failed to comply with its obligations under article 9, paragraph 2(b), of the Convention.

10. The Committee on the Rights of Persons with Disabilities, acting under article 5 of the Optional Protocol to the Convention, is of the view that the State party has failed to fulfil its obligations under article 9, paragraph 2(b), of the Convention. The Committee therefore makes the following recommendations to the State party:

1. Concerning the authors: the State party is under an obligation to remedy the lack of accessibility for the authors to the banking card services provided by the ATMs operated by the OTP. The State party should also provide adequate compensation to the authors for the legal costs incurred during domestic proceedings and costs incurred in filing this communication;

2. General: the State party is under an obligation to take measures to prevent similar violations in the future, including by:

(a) Establishing minimum standards for the accessibility of banking services provided by private financial institutions for persons with visual and other types of impairments. The Committee recommends the State party to create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones. The State party should also ensure that all newly procured ATMs and other banking services are fully accessible for persons with disabilities;

(b) Providing for appropriate and regular training on the scope of the Convention and its Optional Protocol to judges and other judicial officials in order for them to adjudicate cases in a disability-sensitive manner;

(c) Ensuring that its legislation and the manner in which it is applied by domestic courts is consistent with the State party's obligations to ensure that legislation does not have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of any right for persons with disabilities on an equal basis with others.

11. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the Views and recommendations of the Committee. The State party is also requested to publish the Committee's Views, to have them translated into the official language of the State party, and circulate them widely, in accessible formats, in order to reach all sectors of the population.

[Adopted in English, French, Spanish and Arabic, the English text being the original version. Subsequently to be issued also in Chinese and Russian as part of the Committee's biannual report to the General Assembly.]

United Nations CRPD/C/7/D/3/2011

Convention on the Rights of Persons with Disabilities

Distr.: General
21 May 2012

Original: English

Committee on the Rights of Persons with Disabilities

Communication No. 3/2011

Views adopted by the Committee at its 7th session, 16 to 27 April 2012

Submitted by:	H.M. (represented by Mr. H-E.G. and Mrs. B.G.)
Alleged victim:	The author
State Party:	Sweden
Date of communication:	6 December 2010 (initial submission)
Document references:	Special Rapporteur's rule 70 decision, transmitted to the State party on 9 February 2011 (not issued in document form)
Date of adoption of Views:	19 April 2012
Subject matter:	Refusal to grant building permission for the construction of a hydrotherapy pool for the rehabilitation of a person with a physical disability on grounds of incompatibility of the extension in question with the city development plan
Procedural issues:	Non-substantiation of claims;
Substantive issues:	Purpose of the Convention; discrimination on the basis of disability; reasonable accommodation; general principles enshrined in the Convention; general obligations under the Convention; equality and non-discrimination; accessibility; right to life; liberty and security of the person; living independently and being included in the community; personal mobility; health; habilitation and rehabilitation; adequate standard of living and social protection
Articles of the Convention:	1; 2; 3; 4; 5; 9; 10; 14; 19; 20; 25; 26 and 28
Articles of the Optional Protocol:	2(e)

[Annex]

Annex

Views of the Committee on the Rights of Persons with Disabilities under article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities (7th session)

concerning

Communication No. 3/2011*

Submitted by:	H.M. (represented by Mr. H-E.G. and Mrs. B.G.)
Alleged victim:	The author
State Party:	Sweden
Date of communication:	6 December 2010 (initial submission)

The Committee on the Rights of Persons with Disabilities, established under article 34 of the Convention on the Rights of Persons with Disabilities,

Meeting on 19 April 2012,

Having concluded its consideration of communication No. 3/2011, submitted to the Committee on the Rights of Persons with Disabilities by Ms. H.M. under the Optional Protocol to the Convention on the Rights of Persons with Disabilities,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, of the Optional Protocol

1. The author of the communication, dated 6 December 2010, is Ms. H. M., a Swedish national born in 1978. The author claims to be a victim of a violation by Sweden of her rights under articles 1, 2, 3, 4, 5, 9, 10, 14, 19, 20, 25, 26 and 28 of the Convention on the Rights for Persons with Disabilities. The Optional Protocol to the Convention entered into force for Sweden on 15 January 2009. The author is represented by Mr. H-E.G. and Mrs. B.G..

* The following members of the Committee participated in the examination of the present communication: Amna Ali Al-Suwaidi, Mohammed Al-Tarawneh, Monsur Ahmed Chowdhury, Maria Soledad Cisternas Reyes, Theresia Degener, Gábor Gombos, Fatiha Hadj-Salah, Hyung Shik Kim, Lofti ben Lallahom, Stig Langvald, Edah Wangechi Maina, Ronald McCallum, Ana Pelaez Narvaez, Silvia Judith Quan-Chang, Carlos Rios Espinosa, Damjan Tatic, Germán Xavier Torres Correa and Jia Yang.

The facts as presented by the author

2.1 The author has a chronic connective tissue disorder, Ehlers-Danlos Syndrome (EDS), which has led to hypermobility (excessive over-flexibility of joints), severe luxations and sub-luxations (dislocation of joints), fragile and easily damaged blood vessels, weak muscles and severe chronic neuralgia. She has not been able to walk or stand for the last eight years, and she has difficulty sitting and lying down. Her impairment has resulted in her being bedridden for the last two years, which has weakened her even further. The author cannot take medicines, since she also has atypical hypersensitivity to medicines.

2.2 The author can no longer leave her house or be transported to hospital or rehabilitation care because of the increased risk of injuries that may be incurred due to her impairment. The destructive course of the impairment is still continuing and the only type of rehabilitation that could stop its progress is hydrotherapy, which in the author's circumstances would only be practicable in an indoor pool in her house. Water therapy is recommended for Ehlers-Danlos Syndrome by specialists. In the author's case, it would improve her quality of life as, for example, her joints would become more stable, she would build more muscle, her blood circulation would improve and her pain and suffering would be alleviated.

2.3 On 7 December 2009, the author applied for planning permission for an extension of approximately 63 square metres to the house on her privately owned piece of land. The extension would to a large extent (approximately 45 square metres)[1] be on land where building is not permitted.

2.4 On 17 December 2009, the request for building permission was rejected by the Örebo Local Housing Committee. The author appealed the decision of the Local Housing Committee to the Örebro County Council. The appeal was rejected on 3 March 2010. This decision was appealed to the Karlstad Administrative Court. On 28 April 2010, the Administrative Court granted the appeal and referred the author's application for planning permission back to the Örebro Local Housing Committee for a new hearing of the case.

2.5 The Administrative Court stated, in particular, the following:

"*Against the background of the fact that the major part of the remaining plot of land must not be built on, an alternative placement according to the plan is not possible. […] It has not been stated that H. M. could meet the need for an exercise pool with a smaller extension in closer accordance with the plan. As far as the documents of this case go, it is not a realistic alternative to move to another house where her need for an exercise pool can be met, or to move to another suitable institution. Furthermore it is evident from the medical documents that an exercise pool would be of particularly great importance to the life situation and life quality of H. M. and that it would also be cost saving for her future care and attention. With reference to what has now been stated, the Administrative Court, in a balance of interests in accordance with Chapter 1, § 5 of the Planning and Building Act, finds that the interests of H. M. to use the land for the extension in question should have preference over the general public interest to preserve the area in complete compliance with the detail plan. Against the background of the extraordinary cause which is the basis for this evaluation, the Administrative Court cannot see a risk that an approval would lead*

[1] The Administrative Court of Appeal in its decision of 1 July 2010 refers to 48 square metres (see para. 2.6).

to similar applications for the approval of similar measures on other properties in the area. Consequently, the grounds referred to by the Local Housing Committee do not constitute a reason for refusing a building permission."[2]

2.6 The Municipality of Örebro appealed the decision of the Administrative Court to the Administrative Court of Appeal (Gothenburg) and, on 1 July 2010, the Administrative Court of Appeal refused the author's application for planning permission. It stated, in particular, the following:

"*The building permission that H. M. has applied for goes against the regulations of the detail plan in the sense that the proposed construction to a large extent (approximately 48 square meters) will be placed on the so-called "dotted land", which means on land where, according to the plan, it is not allowed to build. Like the County Council has stated, such a construction cannot be permitted to be built even as a minor divergence from the detail plan with regard to what is stated in Chapter 8, § 11 of the Planning and Building Act*."[3]

2.7 The author petitioned the Supreme Administrative Court (Stockholm) for leave to appeal the decision of the Administrative Court of Appeal. The author's petition was refused on 5 August 2010.

The complaint

3.1 The author claims that she has been discriminated against by the decisions of the State party's administrative bodies and courts, since they have failed to take into account her rights to equal opportunity for rehabilitation and improved health. She has thereby been refused her right to a worthwhile quality of life. The refusals are based merely on public interest to preserve the development plan and have become more of a matter of principle, which has a severe impact on the living conditions of a person with disability. Furthermore, her house has previously been adapted to her disability-related needs at a cost of EUR 42,000. The new extension would not be visible from the street, and the land parcel behind her house, for which the planning permission has been applied, is thickly wooded, with many bushes and clumps of trees. The neighbours have also given their consent to the extension. The author argues that a single departure from the development plan, should the application be approved, would not be detrimental to the surroundings. Given the exceptional nature of her case, there would be no risk of repeated similar requests.

3.2 The author maintains that the only hope of rehabilitation is hydrotherapy at home, any other options being excluded, and encloses two medical certificates dated 29 September 2009 and 28 June 2010 as documentary evidence that, for her rehabilitation, no alternative to hydrotherapy at home exists. The author also considers that the health, interest and well-being of a person with disability come above the public interest of not allowing any buildings on land that has been marked out as areas which should not be built on. She also recalls that she is an owner of the piece of land for which the building permission in question was requested.

3.3 The consequences of planning permission not being granted would result in a significant risk for the author of becoming bedridden for an indefinite period of time, with severe muscular atrophy, stretched ligaments, severe dislocations with, inter alia, reduced

[2] Translation provided by the author.
[3] Translation provided by the author.

chest expansion, which would impede full inhalation and cause acute pain. In the absence of rehabilitation, the author runs the risk of eventually having to enter a care institution.

3.4 The author requests the Committee to determine whether the Convention has priority over the decision of the Local Housing Committee, which was based on the State party's Planning and Building Act. In other words, the Committee is requested to decide on whether the author's needs for rehabilitation and care due to her disability are of primary consideration over the public interest as protected by the Local Housing Committee.

State party's observations on admissibility and merits

4.1 On 5 September 2011, the State party provided its observations on the admissibility and merits of the author's communication. It submits that the Planning and Building Act contains provisions concerning the planning of land and water areas and concerning building. Municipalities regulate the use and development of land via a detailed development plan. Both public and private interests are to be considered when issues are addressed under the Act. A building permit is required for most new buildings and extensions. In order for a building permit to be granted within an area covered by a detailed development plan, the planned measures must not contravene the detailed development plan.

4.2 A building permit may be granted for a measure that involves a minor departure from the development plan, if the departure is compatible with the purpose of the plan. Examples of what constitutes a minor departure include a construction that encroaches on protected land by just a few metres, or that exceeds the maximum building height for structural reasons. The Supreme Administrative Court considered, in a judgement delivered in 1990, that a measure which involved construction on 125 square metres of protected land did not constitute a minor departure. When an authority or court assesses whether a certain measure which departs from the detailed development plan could be considered a minor departure, both private and public interests should be taken into account. The author has not claimed that the measure for which she has applied for a building permit constitutes a minor departure from the detailed development plan in force. Under such circumstances, the granting of a building permit is not possible under the Planning and Building Act.

4.3 According to the Health and Medical Services Act, the obligation to offer good health and medical services is incumbent on county councils. The obligation includes, inter alia, offering rehabilitation and supplying assistive devices for persons with disabilities. These measures should be planned in consultation with the individual. A patient should always be offered treatment, where a scientifically proven, tried and tested treatment is available. When several treatment options are available, the patient should be given the option of choosing the treatment he or she prefers. However, in the case of multiple treatment options, the benefits of a certain treatment must be weighed against its cost. The Discrimination Act contains provisions concerning the prohibition of discrimination connected with disabilities.

4.4 The State party states that in November 2009, the author applied to Örebro Municipality for a building permit to build an extension on land of which large parts are protected under the detailed development plan. The extension would cover approximately 65 square metres (45 square metres of which on protected land) and contain a hydrotherapy pool for rehabilitation. She requested an exemption from the prohibition on building under the applicable development plan, with reference to her complicated health situation. She

submitted medical certificates from a doctor for the purpose of corroborating her need for a hydrotherapy pool. The doctor in question does not work for the county council. In a supplementary document to her application for a building permit, she stated that the proposed location of the planned extension was the only possible location on the property, primarily for functional reasons.

4.5 In December 2009, the Municipality rejected the author's request, considering that the extension would not constitute a minor departure from the development plan. In January 2010, the author filed an appeal to the County Administrative Board, arguing that there were exceptional grounds for granting a building permit, given her health problems, and referred to documentation submitted previously. The documents stated that a pool of the specified size is necessary for the alleviation of her symptoms and rehabilitation. The author also submitted that she has practically no opportunity to leave the property due to the high risk of infection and mobility problems. In March 2010, the County Administrative Board rejected her appeal on the grounds that the measure contravenes the provisions of the development plan and the departure from the plan is of a type and size that cannot be considered minor.

4.6 The author appealed against this decision to the Administrative Court in Karlstad, maintaining that hydrotherapy in a pool in her home environment is the only possibility of improving her situation. She claimed that transportation by ambulance to other hydrotherapy facilities is not an option, as ambulance staff are unwilling to transport her due to her fragile condition; nor can she move out, since she is dependent on her parents, who live nearby. She added that the extension would not be visible from the street, affect the overall appearance of the area or alter its character. In April 2010, the Administrative Court overturned the decision of the municipality, and the case was referred back to the municipality for new consideration. The Court found that the author's interest in using the land for the extension in question should take precedence over the public interest in maintaining the area entirely in accordance with the development plan. The judgement was not unanimous.

4.7 In May 2010, Örebro Municipality appealed against the judgement to the Administrative Court of Appeal in Gothenburg. In July 2010, the Administrative Court of Appeal overturned the judgement of the Administrative Court, and upheld the decision of the Municipality and the County Administrative Board, stating that the decision-making authorities and courts cannot disregard existing legislation and other provisions when assessing a building permit matter, that the building permit for which the author had applied contravenes the development plan and that such a measure cannot be considered a minor departure from the plan. The judgement was adopted unanimously.

4.8 In July 2010, the author appealed against the decision of the Administrative Court of Appeal to the Supreme Administrative Court, claiming that the decision to reject her application was not reasonable or proportionate to the damage caused to her. She maintained that her need for a hydrotherapy pool outweighs the interest of following the existing development plan. On 5 August 2010, the Supreme Administrative Court decided not to grant leave to appeal, whereby the decision to reject the author's application became final and not subject to further appeal.

4.9 With regard to the admissibility of the communication, the State party submits that it is not aware of the present matter having been or being examined under another procedure of international investigation or settlement and acknowledges that all domestic remedies

have been exhausted, as required by article 2(c) and 2(d) of the Optional Protocol. However, it maintains that the author's claims fail to rise to the basic level of substantiation required for purposes of admissibility and should be declared inadmissible pursuant to article 2(e) of the Optional Protocol.

4.10 On the merits, the State party notes the author's claims that she has been discriminated against as a result of negative decisions adopted by the Swedish authorities and courts because her right to rehabilitation and good health has not been taken into consideration, and the principle of proportionality has not been applied. The State party further submits that the burden of proof for an alleged violation of the Convention, at least initially, rests with the author. This includes the onus of demonstrating the existence of the circumstances invoked in support of the complaint. It also points out, with reference to the request that the author be granted a building permit, that the Committee does not have the authority to overturn a judgement by a Swedish Court or a decision by a Swedish authority. Nor does it have the power to replace the domestic judgement or decision with a decision of its own. The Committee can only conclude either that the circumstances of the case reveal a violation of the Convention or that there has been no such violation.

4.11 The State party maintains that the author has merely referred to a number of articles of the Convention without advancing grounds for how her rights under these articles have been violated. Therefore, it can only explain in general terms how Swedish legislation relates to and fulfils the requirements contained in the articles that may be relevant in this case. Other articles referred to by the author do not have a bearing on the present case and the State party would not submit any comments with regard to them.

4.12 Article 5 of the Convention prescribes that all persons are equal before and under the law and prohibits any discrimination on grounds of disability. This is a fundamental and clear premise in Swedish legislation and follows from the Swedish Constitution. The relevant Act in this case, the Planning and Building Act, is applied in the same way to all, whether they have disabilities or not. Nor are there any clauses in the Act that might lead indirectly to discrimination against persons with disabilities. The rejection of the application for a building permit in this case is in no way due to the author's disability, but rather consistent with practice that applies equally to all.

4.13 As to the author's claim under article 19 of the Convention, there is nothing in Swedish legislation to prevent persons with disabilities from choosing their place of residence or way of life. All measures offered at municipal level, e.g. service accommodation, are non-compulsory for individuals. A number of alternative measures are available from municipalities in order to make it easier for individuals with specific needs to live in their own homes, e.g. contribution to home adaptation, personal assistance and home help.

4.14 With regard to the claims under articles 25 and 26 of the Convention, the State party recalls that in Sweden county councils have the obligation to provide health and medical services, including rehabilitation, to everyone who is resident in the county council area. Accordingly, it is not the application of the Planning and Building Act that should secure the author's rights in accordance with articles 25 and 26 of the Convention. Instead, these rights should be fulfilled by way of the county council carrying out its obligations according to the Health and Medical Services Act. The State party maintains that it must be up to the author to account for her contacts with the county council and for the treatment she has been offered, for example by submitting relevant medical documentation. However,

she has not made any such submissions in this regard. In the absence of an account by the applicant on this issue, the State party assumes that the author has been offered treatment in accordance with her needs. The author has not substantiated her allegation that she cannot obtain adequate care if she is not allowed to build a hydrotherapy pool in accordance with her request for a building permit.

4.15 In the light of the foregoing, the laws applied in the present case are not discriminatory. The decisions and judgements delivered by domestic authorities were not motivated by the author's disability and are therefore not discriminatory within the meaning of article 5 of the Convention. Moreover, none of these decisions violates article 5 or any other provisions of the Convention in any other way.

4.16 In conclusion, the State party submits that the present communication does not reveal a violation of the Convention. Since the author's claims under various articles of the Convention fail to rise to the basic level of substantiation, the communication should be declared inadmissible for lack of substantiation.

Author's comments on the State party's observations

5.1 On 14 November 2011, the author provided her comments on the State party's observations on admissibility and merits.

5.2 The author claims that the refusal to issue building permission amounts to discrimination, since all possible avenues of recourse that might ensure her rehabilitation, as a "functionally disabled person", have been exhausted. The opposition to the construction of a hydrotherapy pool in connection with the adapted accommodation in her home would deprive her of treatment absolutely necessary for her health condition. She submits that the application of laws and regulations which appear to be neutral has proved to be unfair towards her and will have an indirect effect of discrimination. The fact that a Swedish "functionally disabled citizen" cannot obtain the lawful right to adequate rehabilitation, through an application for building permission for special adaptation of her home, will amount to a violation of the Convention.

5.3 The author notes that the State party in its observations contends that no violation of the Convention has taken place, and refers to a building permission case from 1990 which received a negative decision against a departure from the plan of an area of 125 square metres – a considerably larger area than the building extension of 45 square metres requested by her. The author questions the relevance of the reference to a case dating from 1990, on a matter of a completely different kind. She claims that, in her case, a restrictive interpretation of the Building Act of 1987 regarding protected land has been applied.

5.4 The author further notes that, notwithstanding the magnitude of the departure from the plan in the building permission, there is still a requirement for life-enhancing circumstances for a "functionally disabled person" with a rightful claim to equality with regard to quality of life. Claims for the applicability of the principle of proportionality can be made in a case where the purpose and interest of the individual would strongly outweigh the interests of society at large. A nominally larger departure from the Planning and Building Act can probably be regarded as relatively small from the point of view of society, while it would be of vital importance in ensuring her quality of life, including her right to good health.

5.5 It is right that both the Planning and Building Act and the Health Act are stipulated, to uphold the building regulations and health rights relating to citizens with regard both to building norms and health laws. However, the author claims that her rights as a "functionally disabled person" cannot be accommodated via the national health laws. Since a departure from the Planning and Building Act is not permitted for the specific purpose, a disabled person is not being provided with proper health care appropriate to his/her condition. As a result, the "functionally disabled person" in question is exposed to discrimination, since no measures have been taken in order to comply with her right to good health care.

5.6 According to the author, due to the degree of disability and the state of her health, her right to rehabilitation, as set out in articles 25 and 26 of the Convention, can only be secured by way of an application for building permission. In the author's opinion, the extent of the State party's reliance on the national health laws is of little concern when the obvious need of a person with a disability cannot be met through the interpretation and application of these laws.

5.7 With regard to the State party's argument that everyone is equal before the law, the author submits that it must be possible to apply the law in such a manner that no one in society suffers. She claims that, by ratifying the Convention, the State party has undertaken to provide for the rights of persons with disabilities.

5.8 As to her health situation, the author submits that the doctor who issued the certificate has his own practice and is connected to the County Council. She further claims that relevant medical documentation was supplied with the application for the building permission. This doctor visits her regularly since she is no longer able to go to the County Council's institutions for health care and rehabilitation due to her seriously reduced functional ability. Information as to her psychological condition, as well as the medical measures warranted, was provided with the application for building permission and with the subsequent appeals. The national health laws referred to by the State party cannot be claimed to apply to the author's case.

5.9 The author has also provided a supplementary medical report issued by the Head of the Neurology Clinic of the Örebro University Hospital on 24 October 2007. According to the report, the author's "condition is hereditary and medically untreatable. Different types of aids can be offered but they must always be adapted to the situation of the patient […] Treatment is also often required in the home since the patient cannot be moved to different institutions for treatment. This leads to higher costs of living and handicap compensation can therefore come into question when an assessment has been completed".[4] The author concludes that treatment at home was previously prescribed in 2007 and that, in order to maintain the muscular structure, protect the connective tissue and reduce the pain which cannot be treated with medicine, her last resort is rehabilitative hydrotherapy at home. Her already limited anatomical ability would not allow for any other form of treatment. The right to the claims of the National Health law can only be fulfilled by allowing a specific departure from the plan in the building permission for her special needs.

[4] Translation provided by the author.

State party's further observations

6. On 10 January 2012, the State party informed the Committee that it maintains its observations on admissibility and merits of the communication, as submitted to the Committee on 5 September 2011.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Committee on the Rights of Persons with Disabilities must, in accordance with rule 65 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Convention.

7.2 The Committee has ascertained, as required under article 2(c) of the Optional Protocol, that the same matter has not already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement. The Committee notes that no objection has been raised by the State party in connection with the exhaustion of domestic remedies and considers that the requirements of article 2(d) of the Optional Protocol have been met.

7.3 The Committee considers that articles 1 and 2 of the Convention, in view of their general character, do not in principle give rise to free-standing claims under the Convention, and therefore can be invoked in the framework of individual communications under the Optional Protocol only in conjunction with other substantive rights guaranteed under the Convention. In the circumstances of the present communication, the Committee considers that this part of the communication is inadmissible under article 2(e) of the Optional Protocol.

7.4 The Committee notes that the author has invoked a violation of article 9 of the Convention (accessibility), 10 (right to life), 14 (liberty and security of the person), 20 (personal mobility), without however providing further substantiation as to how these provisions may have been violated. Therefore, the Committee considers that these claims are insufficiently substantiated, for purposes of admissibility, and are thus inadmissible under article 2(e), of the Optional Protocol.

7.5 The Committee considers that the author's remaining allegations under articles 3, 4, 5, 19, 25, 26 and 28, of the Convention, have been sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

8.1 The Committee on the Rights of Persons with Disabilities has considered this communication in the light of all the information received, in accordance with article 5 of the Optional Protocol and rule 73, paragraph 1, of the Committee's rules of procedure.

8.2 The Committee takes note of the author's allegations of discrimination in view of the fact that the State party's competent authorities, when considering her application for permission to build a hydrotherapy pool that would meet her rehabilitation needs, failed to apply the principle of proportionality and weigh her interests in using the plot of land that she owns for the construction of the hydrotherapy pool against the general interest in preserving the area in question in strict compliance with the development plan. It further

notes the State party's argument that the Planning and Building Act is applied equally to all, whether the person has a disability or not, and that the Act contains no clauses that would indirectly lead to discrimination against persons with disabilities.

8.3 The Committee recalls, with reference to article 2, paragraph 3, of the Convention, that "'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." The Committee observes that a law which is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly different.

8.4 The definition of discrimination on the basis of disability in article 2, paragraph 3, of the Convention explicitly states that "it includes all forms of discrimination, including denial of reasonable accommodation". Additionally, article 2, paragraph 4, defines reasonable accommodation as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".

8.5 In the present case, the information before the Committee shows that the author's health condition is critical and access to a hydrotherapy pool at home is essential and an effective – in this case the only effective – means to meet her health needs. Appropriate modification and adjustments would thus require a departure from the development plan, in order to allow the building of a hydrotherapy pool. The Committee notes that the State party has not indicated that this departure would impose a "disproportionate or undue burden". In this connection, the Committee notes that the Planning and Building Act allows for departure from the development plan, and that it can thus accommodate, when necessary in a particular case, an application for reasonable accommodation aimed at ensuring to persons with disabilities the enjoyment or exercise of all human rights on an equal basis with others and without any discrimination. On the basis of the information before it, the Committee therefore cannot conclude that the approval of a departure from the development plan in the author's case would impose a "disproportionate or undue burden" on the State party.

8.6 The Committee recalls that article 25 of the Convention, when referring to the right to health, stipulates that "States Parties recognize 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".

8.7 At the same time, the Convention refers to habilitation and rehabilitation in article 26, and states that "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", through comprehensive habilitation and rehabilitation

services and programmes, in such a way that these services and programmes "begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths".

8.8 In this regard, the Committee notes that the State party, when rejecting the author's application for a building permit, did not address the specific circumstances of her case and her particular disability-related needs. The Committee therefore considers that the decisions of the domestic authorities to refuse a departure from the development plan in order to allow the building of the hydrotherapy pool were disproportionate and produced a discriminatory effect that adversely affected the author's access, as a person with disability, to the health care and rehabilitation required for her specific health condition. Accordingly, the Committee concludes that the author's rights under articles 5(1), 5(3), 25 and the State Party's obligations under article 26 of the Convention, read alone and in conjunction with articles 3 (b), (d), and (e), and 4(1) (d) of the Convention, have been violated.

8.9 The Committee further notes the author's claim that, in the absence of an indoor hydrotherapy pool at home, she will eventually have to enter a specialized health-care institution, and that the State party did not refute the author's allegations. In this regard, the Committee recalls the provision in article 19(b) of the Convention, which requires States parties to take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of their equal right to live and participate in their communities by ensuring that 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". The rejection of the author's application for a building permit has deprived her of access to hydrotherapy, the only option that could support her living and inclusion in the community. The Committee therefore concludes that the author's rights under article 19(b) of the Convention, have been violated.

8.10 Having reached this conclusion, the Committee does not consider it necessary to address the author's claims under article 28 of the Convention.

9. Acting under article 5 of the Optional Protocol to the Convention, and in the light of all the above considerations, the Committee is of the view that the State party has failed to fulfil its obligations under articles 5(1), 5(3), 19(b), 25 and 26, read alone and in conjunction with articles 3 (b), (d) and (e), and 4(1) (d), of the Convention. The Committee therefore makes the following recommendations to the State party:

1. Concerning the author: The State party is under an obligation to remedy the violation of the author's rights under the Convention, including by reconsidering her application for a building permit for a hydrotherapy pool, taking into account the Committee's Views. The State party should also provide adequate compensation to the author for the costs incurred in filing this communication;

2. General: the State party is under an obligation to take steps to prevent similar violations in the future, including by ensuring that its legislation and the manner in which it is applied by domestic courts is consistent with the State party's obligations to ensure that legislation does not have the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of any right for persons with disabilities on an equal basis with others.

10. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the Views and recommendations of the Committee. The State party is also requested to publish the Committee's Views, to have them translated into the official language of the State party, and circulate them widely, in accessible formats, in order to reach all sectors of the population.

[Adopted in English, French, Spanish, Arabic and Chinese, the English text being the original version. Subsequently to be issued also in Russian as part of the Committee's annual report to the General Assembly.]

Neutral Citation Number: [2012] EWCA Civ 629
Case No: C3/2011/1580; C3/2011/1724; C3/2011/2572

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)
Judge Howell QC [2011] UKUT 23 (AAC),
Judge Jacobs [2011] UKUT 172 (AAC) and
Judge Turnbull [2011] UKUT 198 (AAC)
CH/2823/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2012

Before :

LORD JUSTICE MAURICE KAY,
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE HOOPER
and
MR JUSTICE HENDERSON

- -

Between :

IAN BURNIP	**1st Appellant**
- and -	
(1) BIRMINGHAM CITY COUNCIL **(2) SECRETARY OF STATE FOR WORK AND PENSIONS**	**Respondent**
REBECCA TRENGOVE (AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LUCY TRENGOVE	**2nd Appellant**
- and -	
(1) WALSALL METROPOLITAN COUNCIL **(2) SECRETARY OF STATE FOR WORK AND PENSIONS**	**Respondent**
RICHARD GORRY	**3rd Appellant**
- and -	
(1) WILTSHIRE COUNCIL **(2) SECRETARY OF STATE FOR WORK AND PENSIONS**	**Respondent**
EQUALITY AND HUMAN RIGHTS COMMISSION	**Intervener**

- -
- -

Mr Richard Drabble QC and **Mr Tim Buley** and (instructed by **Irwin Mitchell Solicitors**) for the **First Appellant**
Mr Richard Drabble QC and **Mr Desmond Rutledge (**instructed by **Birmingham Law Centre)** for the **Second Appellant**
Mr Richard Drabble QC and **Mr Tim Buley (**instructed by the **Child Poverty Action Group)**) for the **Third Appellant**

Mr Tim Eicke QC and **Mr Edward Brown (**instructed by **Department of Work and Pensions)** for the **Respondent**
Ms Helen Mountfield QC for the **Intervener**

Hearing dates : 21, 22 March 2012

- -

Judgment

Lord Justice Maurice Kay :

1. Disability can be expensive. It can give rise to needs which do not attach to the able-bodied. Ian Burnip and the late Lucy Trengove provide stark examples. Because of their severe disabilities they were assessed as needing the presence of carers throughout the night in rented flats in which they lived. For this reason they needed two-bedroom flats. In each case they were entitled to and received housing benefit (HB) but Birmingham City Council (in Mr Burnip's case) and Walsall Metropolitan Borough Council (in Ms Trengove's case) quantified it by reference to the one-bedroom rate which would apply to able-bodied tenants. The issue in their cases is whether this amounted to unlawful discrimination pursuant to Article 14 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Richard Gorry's case is somewhat different. He, his wife and their three children live in a four-bedroom rented house. Two of the children are girls who, at the material time, were aged 10 and 8. Both are disabled – one by Down's Syndrome, the other by Spina Bifida. For this reason it is inappropriate for them to share a bedroom in the way in which able-bodied sisters of those ages would be expected to do. The house is a four-bedroomed house but HB is provided by Wiltshire County Council by reference to the three-bedroomed rate which would apply to the family if the girls were not disabled. The same issue arises under Article 14. In all three cases, the properties in question are in the private rented sector. Different criteria would have applied in the social rented sector.

2. The three cases came to this Court by way of appeals from the Upper Tribunal. Sadly, Lucy Trengove died on 28 December 2011 but her case is being pursued by her estate in relation to the quantification of HB for the period prior to her death. The three cases were heard separately in the Upper Tribunal by different judges. The Burnip case was heard by Judge Howell QC who held that there was no contravention of Article 14: [2011] UKUT 23 (AAC). His decision was followed by Judge Jacobs in the Trengove case and by Judge Turnbull in the Gorry case.

The basic statutory provisions

3. Where a claimant has a local authority landlord, HB is paid by way of a rent rebate pursuant to section 134(1A) of the Social Security Administration Act 1992. In the private sector, however, HB is paid by way of a rent allowance. Section 134(1B) provides:

> "In any other case [*ie* in private rented accommodation] housing benefit shall take the form of a rent allowance funded and administered by the local authority for the area in which the dwelling is situated … "

This form of HB is calculated by reference to the number of bedrooms which the claimant and his or her family are deemed to need. The Housing Benefit Regulations 2006 are concerned with the number of "occupiers", who are defined by regulation 13 D(12) as:

> "the persons whom the relevant authority is satisfied occupy as their home the dwelling to which the claim or award relates

> except for any joint tenant who is not a member of the claimant's household."

4. The crucial provision is regulation 13 D(3):

> "The claimant shall be entitled to one bedroom for each of the following categories of occupier (and each occupier shall come within the first category only which applies to him) –
>
> (a) a couple (within the meaning of Part 7 of the Act);
>
> (b) a person who is not a child;
>
> (c) two children of the same sex;
>
> (d) two children who are less than 10 years old;
>
> (e) a child."

It follows from these provisions that the overnight carers in the Burnip and Trengove cases did not qualify as "occupiers". The accommodation was not their "home" within the meaning of regulation 13 D(12) because they lived elsewhere and only stayed overnight when working on rota. The Gorry sisters fell within regulation 13 D (3)(c) as "two children of the same sex", for whom one bedroom was the prescribed provision.

5. Although it came too late to affect this case, the circumstances in the Burnip and Trengove cases (but not the Gorry case) are now governed by an amendment which, from 1 April 2011, provides for "one additional bedroom in any case where the claimant or the claimant's partner is a person who requires overnight care (or in any case where both of them are)."

6. As I have said, regulation 13 D does not apply where a local authority is the landlord. In such a case, persons are allocated property in the public sector on the basis of their assessed housing needs, including needs resulting from disability.

Article 14

7. Domestic disability discrimination legislation – in particular the Disability Discrimination Act 1995 – does not feature in this case. The appellants rely entirely on Article 14 of the ECHR which provides:

> "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

8. There are two important matters of common ground. First, disability is within the concluding words "or other status": see *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634. Secondly, HB falls within the ambit of Article 1 of the First Protocol as a "possession": *Reg (RJM) v Secretary of State for Work and Pensions*

[2009] 1 AC 311. Accordingly, entitlement is covered by the opening words of Article 14: "The enjoyment of the rights … set forth in the Convention …". In these circumstances, it is not necessary to consider the appellants' alternative submission that they are covered by Article 14 when read with Article 8 which is concerned with the right to respect for a person's "private and family life, his home and his correspondence". We received no oral submissions on this alternative basis in view of the common ground about Article 1 of the First Protocol.

9. In view of the common ground, one can therefore proceed to the real issues which concern (1) whether there was discrimination on the ground of disability; and, if so, (2) whether any such discrimination (or difference in treatment) was justified. As the Grand Chamber stated in *Stec v United Kingdom* (2006) 43 EHRR 47 (at paragraph 51):

> "A difference in treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."

Discrimination

10. The case for the appellants is not that the statutory criteria amount to indirect discrimination against the disabled. It is that, in one way or another, they have a disparate adverse impact on the disabled or fail to take account of the differences between the disabled and the able-bodied. In their skeleton argument and oral submissions, counsel for the appellants describe these ways of putting their case as "complementary and overlapping" rather than mutually exclusive.

11. That Article 14 embraces a form of discrimination akin to indirect discrimination in domestic law is well-known. Thus, in *DH v Czech Republic* (2008) 47 EHRR 3, the Strasbourg Court stated (at paragraph 175):

> "… a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group."

The submission here is that, whilst the statutory criteria provided for an able-bodied person to be given HB which would be an adequate contribution towards his accommodation needs, they failed to make equivalent provision in relation to the severely disabled, whose needs are more costly. Although neither group was provided with a benefit which would amount to a complete subsidy, the shortfall in relation to those such as the appellants was significantly greater because their HB was geared to one room fewer than their objective needs.

12. The answer of the Secretary of State to this analysis is that it is flawed because it does not identify correct comparators. Drawing on the domestic case of *Lewisham*

Borough Council v Malcolm [2008] 1 AC 1399, it is suggested that the appropriate comparator is an able-bodied person who is in an otherwise identical position – for example, (in relation to the Burnip and Trengove cases) someone who needs an overnight carer during an unexpected but finite period of ill-health.

13. I do not accept that *Malcolm* provides the correct approach in the present context. It turned on the construction of section 24 of the Disability Discrimination Act 1995. The narrower construction favoured by the majority (Lords Bingham, Scott, Brown and Neuberger) was reached "not without misgiving" (Lord Bingham at paragraph 16) and "not without considerable misgivings" (Lord Neuberger at paragraph 139). It was understood by their Lordships to have a very limiting effect on the scope of the domestic statutory protection: see for example, Lord Brown (at paragraph 114) and Lord Neuberger (at paragraph 142), which unwanted damage has now resulted in amending legislation: see Equality Act 2010, section 15. It would be quite wrong to resort to *Malcolm* so as to produce a restrictive approach to Article 14. Indeed, one of the attractions of Article 14 is that its relatively non-technical drafting avoids some of the legalism that has affected domestic discrimination law. This was recognised by Baroness Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, at paragraphs 20-25, where she particularly identified the less complicated approach to comparators in Convention law. On the same basis, I would reject the attempt on behalf of the Secretary of State to criticise the appellants' case for not being founded on statistical evidence. Whilst such evidence can be important in an Article 14 case (see, for example, *Hoogendjik v Netherlands* (2005) 40 EHRR SE 22, at page 207), it is not a prerequisite. Where, as in the present case, a group recognised as being in need of protection against discrimination – the severely disabled – is significantly disadvantaged by the application of ostensibly neutral criteria, discrimination is established, subject to justification.

14. The appellants' alternative basis derives from *Thlimmenos v Greece* (2001) 31 EHRR 15, where the Strasbourg Court stated (at paragraph 44):

> "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." (Emphasis added)

15. This imposes a positive obligation on the State to make provision to cater for the significant difference. In *AM (Somalia)*, above, such a positive obligation was in play in relation to the disabled but, in the event, the Secretary of State was able to establish justification (the subsequent appeal to the Supreme Court was on a different issue).

16. The skeleton argument on behalf of the appellants puts this aspect of their case as follows:

> "The difference between a disabled person such as the [appellant] and a non-disabled person is that the disabled person has a level of need which is greater to enable him to live in a dignified manner in the community. The State's failure to recognise this difference by making adequate provision represents a breach of the *Thlimmenos* obligation to treat different cases in a different way."

Different treatment only arose on 1 April 2011, and then only in relation to the Burnip and Trengove cases, not the Gorry case.

17. On behalf of the Secretary of State, Mr Tim Eicke QC submits that the *Thlimmenos* principle is not as wide as is suggested. He submits that there is no example of the courts applying *Thlimmenos* so as to require a state to take positive steps to allocate a greater share of public resources to a particular person or group. The limited instances in which the principle has been invoked concern exclusionary rules (as in *Thlimmenos* itself and *AM (Somalia)*).

18. Whilst it is true that there has been a conspicuous lack of cases post- *Thlimmenos* in which a positive obligation to allocate resources has been established, I am not persuaded that it is because of a legal no-go area. I accept that it is incumbent upon a court to approach such an issue with caution and to consider with care any explanation which is proffered by the public authority for the discrimination. However, this arises more at the stage of justification than at the earlier stage of considering whether discrimination has been established. I can see no warrant for imposing a prior limitation on the *Thlimmenos* principle. To do so would be to depart from the emphasis in Article 14 cases which, as Baroness Hale demonstrated in *AL (Serbia)* (at paragraph 25), is "to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification". I would apply the same approach to a *Thlimmenos* failure to treat differently persons whose situations are significantly different.

19. It follows that, in my judgment, the appellants fall within Article 14, subject to justification. I feel able to reach this conclusion even without resort to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which is relied upon by Mr Richard Drabble QC and further expounded upon by Ms Helen Mountfield QC on behalf of the Equality and Human Rights Commission. Mr Eicke seeks to marginalise the CRPD for present purposes by relying on *Reg (NM) v London Borough of Islington* [2012] EWHC 414 (Admin), in which Sales J, *obiter*, was inclined to disregard the CRPD as an aid to ascertaining the scope of Article 14 (see paragraphs 99-108). However, in *AH v West London MHT* [2011] UKUT 74 (AAC), the Upper Tribunal, presided over by Carnwath LJ, had taken a more expansive view (at paragraphs 15 and 16):

> "The CRPD prohibits discrimination against people with disabilities and promotes the employment of fundamental rights for people with disabilities on an equal basis with others …
>
> The CRPD provides the framework for Member States to address the rights of persons with disabilities. It is a legally binding international treaty that comprehensively clarifies the

> human rights of persons with disabilities as well as corresponding obligations on state parties. By ratifying a Convention, a state undertakes that wherever possible its laws will conform to the norms and values that the Convention enshrines."

20. The CRPD was adopted by the General Assembly on 13 December 2006. It was ratified by the United Kingdom on 7 August 2009 and by the European Union on 23 December 2010. Article 4 obliges State Parties to:

> "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs or practices that constitute discrimination against persons with disabilities."

Article 5(3) provides that:

> "in order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided."

Article 19 provides:

> "State Parties … 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 engagement by persons with disabilities of this right and their full inclusion and participation in the community 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 are available on an equal basis to persons with disabilities and are responsive to their needs."

These provisions resonate in the present case, even though they do not refer specifically to the provision of a state subsidy such as HB.

21. In the recent past, the Strasbourg Court has shown an increased willingness to deploy other international instruments as aids to the construction of the ECHR. In *Demir and Baykara v Turkey* (2009) 48 EHRR 54, the Grand Chamber said (at paragraph 85) that

> "in defining the meaning of terms and notions in the text of the [ECHR], [it] can and must take into account elements of international law other than the [ECHR], the interpretation of such elements by competent organs and the practice of European States reflecting their common values."

There the Grand Chamber was construing Article 11 (freedom of association) by reference to International Labour Organisation Conventions and the European Social Charter. In the context of Article 14, in *Opuz v Turkey* (2010) 50 EHRR 28, the Court said (at paragraph 185):

> "… when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case-law … the Court has to have regard to provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women."

These cases do not appear to have been drawn to the attention of Sales J in *NM*.

22. The response of the Secretary of State is to seek to limit this approach by drawing fine distinctions as between different international instruments and in relation to their maturity or chronology. It seems to me, however, that such rearguard action is inappropriate. If the correct legal analysis of the meaning of Article 14 discrimination in the circumstances of these appeals had been elusive or uncertain (and I have held that it is not), I would have resorted to the CRDP and it would have resolved the uncertainty in favour of the appellants. It seems to me that it has the potential to illuminate our approach to both discrimination and justification.

23. As to justification, I have read in draft and completely agree with the judgment of Henderson J.

Conclusion

24. It follows from what I have said that (1) the appellants have established a *prima facie* case of discrimination pursuant to Article 14 and (2) for the reasons set out in the judgment of Henderson J, the Secretary of State has failed to establish objective and reasonable justification for the discriminatory effect of the statutory criteria. I would therefore allow the appeals from the Upper Tribunal. I would make a declaration to that effect. The question then arises as to whether any further relief is appropriate. In so far as the Burnip and Trengove cases are concerned, the Regulations have been amended as from 1 April 2011. Mr Eicke submits that we should go no further than to grant declaratory relief, leaving it to the Secretary of State as to how to deal with the rectification of the discrimination in all three cases. Such an approach accords with the course taken in *Francis v Secretary of State for Work and Pensions* [2006] 1 WLR 3202. I consider it particularly appropriate in a case in which the Secretary of State is responsible for the Regulations but local authorities (who are respondents to these appeals but have taken no part in them) are responsible for the provision of HB to claimants.

Lord Justice Hooper:

25. I have read the judgments of Maurice Kay LJ and Henderson J in draft. I agree with them and do not wish to add anything.

Mr Justice Henderson:

26. For the reasons given by Maurice Kay LJ, I agree that the appellants have established a *prima facie* case of discrimination pursuant to Article 14. It therefore remains to consider the question of justification. The test to apply for this purpose was stated by the Grand Chamber in *Stec v United Kingdom* at paragraph 51, cited by Maurice Kay LJ in paragraph 9 above. In short, the Secretary of State must establish that there was at the material time objective and reasonable justification for the discriminatory effect of the relevant HB criteria as they applied to the particular circumstances of the appellants. It is elementary that what has to be justified is not the scheme of HB as a whole, or the general policy of calculating HB in the private sector by reference to the number of bedrooms deemed to be needed by "occupiers", but rather the difference in treatment resulting from the application of those criteria which has been held to infringe Article 14: see *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, at paragraph 68 (per Lord Bingham) and *AL (Serbia) v Home Secretary* [2008] UKHL 42, [2008] 1 WLR 1434, at paragraph 38 (per Baroness Hale).

27. As the Grand Chamber explained in *Stec* at paragraph 51, a difference of treatment lacks objective and reasonable justification "if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised". With regard to the margin of appreciation enjoyed by a Contracting State, the Court went on to say at paragraph 52:

> "The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation"."

28. Relying on this and other similar statements of the Strasbourg court, and on the observations of Lord Walker in *Reg (RJM) v Work & Pensions Secretary* [2008] UKHL 63, [2009] 1 AC 311, at paragraph 5, Mr Drabble QC submitted for the appellants that "very weighty reasons" would be needed to justify discrimination on grounds of congenital disability, which (like a person's sex) is

an innate and largely immutable characteristic, closely connected with an individual's personality and life chances. While I would accept that congenital disabilities of the kind suffered by Mr Burnip, Ms Trengove and Mr Gorry's daughters may in principle fall within the category of grounds for discrimination which can be justified only by very weighty reasons, I would nevertheless reject this submission for the same reasons that a similar submission was rejected by this Court in *AM (Somalia)*: see paragraphs 15 to 16 of the judgment of Maurice Kay LJ, and paragraphs 61 to 62 of the judgment of Elias LJ. Weighty reasons may well be needed in a case of positive discrimination, but there is no good reason to impose a similarly high standard in cases of indirect discrimination, or cases where the discrimination lies in the failure to make an exception from a policy or criterion of general application, especially where questions of social policy are in issue. As in *AM (Somalia)*, therefore, the proportionality review applicable in the present case must be made by reference to the usual standard, not an enhanced one.

Housing benefit in context: the social security benefits available to the appellants

(a) Mr Burnip

29. In order to evaluate the Secretary of State's case on justification, it is first necessary to have a fuller understanding of the function, operation and interaction of the various social security benefits which were available to the appellants. Mr Eicke submitted on behalf of the Secretary of State that it would be wrong to view the HB paid to each appellant in isolation, and he relied in particular on the detailed analysis of the relevant benefits background contained in the decision of the Upper Tribunal in Mr Burnip's case. I agree that this is in principle the correct approach, and because we have the benefit of Judge Howell QC's helpful analysis in that case, it is convenient to begin with Mr Burnip.

30. At the relevant time in 2008, Mr Burnip had three sources of income apart from HB: incapacity benefit, disability living allowance and his student loan. Of these, the first two were directly related to his disability, while the third, his student loan, was of the normal type and amount for his course at the University of Aston and therefore needs no further comment.

31. Incapacity benefit is a contributory benefit, which was payable at the material time pursuant to sections 30A to 30E of the Social Security Contributions and Benefits Act 1992 ("SSCBA 1992") and regulations made thereunder. Incapacity benefit is either short-term (for periods of incapacity for work of up to 364 days) or long-term (for longer periods). In view of his permanent disability, Mr Burnip was entitled to long-term incapacity benefit even though he was a student, had never been in work, and had never paid national insurance contributions. The amount of incapacity benefit which he received as at 6 June 2008 was £102.25 per week.

32. Disability living allowance is a non-contributory benefit, which was payable at the material time pursuant to sections 71 to 76 of SSCBA 1992 and associated regulations. It has two components: a care component and a mobility component. Mr Burnip was in receipt of the top rate of each component, totalling £113.75 per week as

at 6 June 2008. He was entitled to the top rate of the care component because (relevantly) he satisfied the requirements of being so severely disabled physically as to require care from another person both throughout the day and at night: see section 72(1)(b) and (c) and (4)(a). He was entitled to the higher rate of the mobility component because, put shortly, his physical disablement meant that he was unable to walk: ibid, section 73(1)(a) and (11)(a).

33. I come on now to the calculation of Mr Burnip's HB. In broad terms, HB is a weekly welfare benefit which is intended to help people on low incomes to meet the cost of their rent. Like income support and council tax benefit, it is an "income-related benefit" within Part VII of SSCBA 1992: see section 123(1)(d). The amount of HB, as explained below, depends on the relationship between a claimant's actual income on the one hand, his "applicable amount" (a statutory prescribed amount representing what the claimant is taken to need to live on) on the other hand, and the rent which he has to pay. In the private sector, HB is received as a weekly allowance. In the social rented sector, it is given effect by means of a rent rebate.

34. In the social sector, there was at the material time (and still is) no requirement to refer a claim for housing benefit paid in the form of rent allowance to the rent officer for a rent determination (regulation 14(1)(a) of the Housing Benefit Regulations 2006 (SI 2006/213)) save where the landlord is a registered housing association and the authority considers that the rent is unreasonably high (regulation 12B(6) of the 2006 Regulations). In the private sector, however, rents are generally higher, and there are restrictions on the amount that can be paid by way of HB. Before 2008, these restrictions were imposed by reference to a "local reference rent". We are concerned, however, with the local housing allowance ("LHA") rules which came into force nationally on 7 April 2008. As Maurice Kay LJ has already explained, those rules use a system of flat rate allowances payable for categories of property determined by reference to the number of bedrooms to which the claimant is entitled, in accordance with regulation 13D(3) of the 2006 Regulations. LHAs are set for each "broad rental market area" by rent officers, on the basis of the median rent for each category of property within the area. The boundaries of the broad rental market areas are also set by rent officers, taking account of a number of specified criteria (such as the availability of facilities and services for health, education, recreation, banking and shopping, and their accessibility by public and private transport). So, for example, there is a total of 14 broad rental market areas in the Greater London area. The maximum weekly HB which can be claimed by a private sector tenant is thus the LHA for the size category of property to which, by application of the bedroom test, he or she is entitled.

35. By virtue of SSCBA 1992 section 135(1), a claimant's "applicable amount" in relation to any income-related benefit is to be prescribed by regulations; and since Mr Burnip was a severely disabled person, it had to include an amount in respect of his disability (section 135(5)). Mr Burnip's weekly applicable amount from 9 June 2008 was £136.75, made up (as Judge Howell explained in para [21] of the Upper Tribunal's decision) of the standard allowance for a single claimant under 25 of £47.95, plus three separate and cumulative premiums for which his circumstances qualified him under Part 3 of Schedule 3 to the 2006 Regulations: the disability premium for a single person of £25.85; the enhanced disability premium of £12.60; and the severe disability premium of £50.35.

36. It is convenient at this point to note the qualification which entitled Mr Burnip, as a single claimant, to the severe disability premium of £50.35 per week. The conditions (set out in para 14(2)(a) of Schedule 3) were that he was in receipt of the care component of disability living allowance at the higher or middle rate; that (subject to irrelevant exceptions) he had no non-dependents aged 18 or over normally residing with him; and that no person was in receipt of a carer's allowance (under section 70 of SSCBA 1992) in respect of caring for him.

37. As I have already noted, Mr Burnip's actual weekly income at this date (apart from HB) had three components: his incapacity benefit of £102.25, his disability living allowance of £113.75, and his student loan, the apportioned weekly amount of which was £72.09. His total weekly income was therefore £288.09. Of this amount, however, as Judge Howell explained in para [22] of the Upper Tribunal's decision:

> "… the whole of the disability living allowance is disregarded from the means testing calculation, and after the deduction of smaller allowable amounts from the student loan for books and travel expenses, [Mr Burnip] was left with a reckonable income for housing benefit purposes of £149, exceeding his applicable amount by £12.25."

38. Where (as in Mr Burnip's case) the claimant's reckonable income exceeds his applicable amount, the weekly HB is reduced by 65% of the excess (SSCBA 1992 section 130(3)(b) and regulations made thereunder). Mr Burnip's maximum eligible rent, based on entitlement to one bedroom, was £103.85. Accordingly, the sum which he actually received as HB was £103.85 less 65% of £12.25 (i.e. £7.96), making £95.89. This was the figure shown on a corrected benefit decision notice issued to him by Birmingham City Council on 12 August 2008. It represented a shortfall of £59.88 when compared with the weekly rent of £155.77 which Mr Burnip in fact had to pay to his landlord.

39. If Mr Burnip had been entitled under the 2006 Regulations to a property with two bedrooms, his maximum eligible rent would have been £126.92 per week, or £23.07 more than the single bedroom rate of £103.85. His actual income would have remained the same, so the shortfall when compared with the rent which he actually paid would also have been correspondingly reduced, to £36.81 from £59.99. Thus, if the present appeal succeeds, the result would be only to ameliorate, not to eliminate, the amount of the shortfall.

40. Judge Howell appears to have taken the view that, if Mr Burnip's appeal were to succeed, he would lose the £50.35 severe disability premium included in the calculation of his applicable amount. In para 36 of the Upper Tribunal decision, he said this:

> "If the claimant had been treated as having another non-dependent adult living with him in his flat, his maximum allowable benefit would have increased to the two-room category (c) rate of £126.92, but the advantage from this would have been more than offset by the loss of the £50.35 severe disability premium (which is for severely disabled people living on their own without another such adult: cf. paragraph

> 14(2)(a)(ii) and (iv) of Schedule 3) and the combined effect would have reduced his weekly housing benefit to £86.23."

With respect to Judge Howell, however, I am satisfied that this is wrong, and Mr Eicke did not seek to argue the contrary. The personal circumstances which entitled Mr Burnip to the severe disability premium (see paragraph … above) would have remained precisely the same, even if he were treated as entitled to a maximum eligible rent on the two-bedroom basis. There is no process of statutory deeming which would require him to be treated for the purposes of the severe disability premium as if he did in fact have another non-dependent adult living with him.

41. The shortfall which I have identified brings me to the last benefit which needs to be considered in Mr Burnip's case, namely discretionary housing benefit. Under The Discretionary Financial Assistance Regulations 2001 (SI 2001/1167, "the 2001 Regulations") a local authority has power to make payments by way of financial assistance, called "discretionary housing payments", to persons who are entitled to HB and who "appear … to require some further financial assistance … in order to meet housing costs" (Regulation 2(1)). By virtue of Regulation 2(2), a local authority has a discretion whether or not to make discretionary housing payments in a particular case, and as to the amount of the payments and the period for which they are made. There is no definition of "further financial assistance" in the 2001 Regulations, and although discretionary housing payments must be claimed, there is no prescribed procedure for making such claims. There is an upper cash limit on the total amount of such payments that an authority may award, pursuant to Article 7 of The Discretionary Housing Payment (Grants) Order 2001 (SI 2001/2340).

42. The DWP produces a "Best Practice Guide" for the making of discretionary housing payments. The edition of this guide in force at the relevant time was promulgated in March 2008. This guidance made it clear that a discretionary housing payment could be made where the LHA did not meet the claimant's rent, and gave as an example of medical circumstances which an authority may wish to consider "Does the claimant require an extra room because of a health problem that affects them or a member of their household?" The guidance also made it clear that it was entirely up to the authority to decide how much of a shortfall to meet by way of a discretionary housing payment, provided only that the combination of HB and the payment did not exceed the weekly eligible rent on the claimant's home. Payments could be made either in advance or in arrears, and for such length of time as the authority might decide, including for an indefinite period until the claimant's circumstances changed.

43. During the period covered by his appeal, Mr Burnip was awarded discretionary housing payments as follows. From 9 June 2008 to 31 March 2009, he received payments of £40 per week. This award was confirmed in a letter to him from Birmingham City Council dated 18 August 2008, which warned him that, as funds were limited, there was no guarantee that his award would continue after 31 March 2009 and he would need to reapply. In the event, no award was made to him between March and May 2009, and between May and November 2009 he received only £15 per week (which was £8.07 less than the difference between the one and two bedroom rates of LHA). It can be seen, therefore, that not only were the awards discretionary and short term, but there was a period during which no award at all was made, and even when Mr Burnip was in receipt of an award he could not rely upon it to

eliminate the difference between the one and two bedroom rates of LHA, let alone the full amount of the shortfall from the rent which he actually had to pay.

44. Against this detailed background, can it be said that the wider benefits context provides an objective and reasonable justification for the discrimination against Mr Burnip which we have found to be established in relation to the amount of his HB? In my judgment, the following considerations strongly suggest a negative answer to this question.

45. First, I think it is necessary to draw a clear distinction between the benefits which Mr Burnip was entitled to claim for his subsistence, and those which he was entitled to claim in respect of his housing needs. His incapacity benefit and disability living allowance were intended to meet (or help to meet) his ordinary living expenses as a severely disabled person. They were not intended to help with his housing needs. This is demonstrated, in my view, not only by the availability of HB and discretionary housing payments as separate benefits with separate rules applicable to them, but also by the way in which HB is structured. As I have explained, the amount of HB is fixed by reference to an applicable amount which represents what the claimant is taken to need to live on, and if a claimant's reckonable income exceeds his applicable amount, the amount of HB is reduced by 65% of the excess. Furthermore, Mr Burnip's applicable amount included the three disability premiums which I have mentioned, while the whole of his disabled living allowance was disregarded in the calculation of his reckonable income. Thus it was only if (in broad terms) his incapacity benefit and student loan together exceeded his applicable amount that any reduction would fall to be made in the amount of his HB; and to the extent that there was such an excess, the HB rules themselves prescribed how it was to be taken into account. It would therefore be wrong in principle, in my judgment, to regard Mr Burnip's subsistence benefits as being notionally available to him to go towards meeting the shortfall between his housing- related benefits and the rent he had to pay.

46. Secondly, it is clear on the evidence that Mr Burnip's objectively verifiable need was for a flat with two bedrooms, and that the maximum LHA available to him on the one bedroom basis left a substantial shortfall from the rent which he had to pay to his landlord. Discretionary housing payments were in principle available as a possible way of bridging this gap, but they cannot in my judgment be regarded as a complete or satisfactory answer to the problem. This follows from the cumulative effect of a number of separate factors. The payments were purely discretionary in nature; their duration was unpredictable; they were payable from a capped fund; and their amount, if they were paid at all, could not be relied upon to cover even the difference between the one and two bedroom rates of LHA, and still less the full amount of the shortfall. To recognise these shortcomings is not in any way to belittle the valuable assistance that discretionary housing payments are able to provide, but is merely to make the point that, taken by themselves, they cannot come anywhere near providing an adequate justification for the discrimination in cases of the present type.

47. A further aspect of the problem is that housing, by its very nature, is likely to be a long term commitment. This is particularly so in the case of a severely disabled person, because of the difficulty in finding suitable accommodation and the probable need for substantial physical alterations to be made to the property in order to adapt it to the person's needs. Before undertaking such a commitment, therefore, a disabled person needs to have a reasonable degree of assurance that he will be able to pay the

rent for the foreseeable future, and that he will not be left at the mercy of short term fluctuations in the amount of his housing-related benefits. For the reasons which I have given, discretionary housing payments cannot in practice provide a disabled person with that kind of assurance.

(b) Ms Trengove

48. Having dealt at some length with the position of Mr Burnip, I can now deal much more briefly with that of Ms Trengove. Although there are differences of detail, I consider that in all essential respects her case was comparable with Mr Burnip's, and that the same result should therefore follow. Nor did Mr Eicke argue that any distinction should be drawn between them.

49. Having previously lived at home with her parents, in October 2008 Ms Trengove moved into a two bedroom flat. The actual rent for the property was £109.62 per week. The amount which she received as HB was £80.85 per week, calculated by reference to a one bedroom LHA of £91.15 for the relevant area. This left a shortfall of £28.77 per week. The LHA rate for two bedrooms was £114.92, so if it were applicable (as the First-tier Tribunal held in her favour that it was) she would have been entitled to receive the full amount of her weekly rent by way of HB.

50. Ms Trengove was subsequently awarded income support. Income support is a further income-related benefit (see section 123(1)(a) of SSCBA 1992), to which I have not yet referred. The basic conditions for its payment are set out in section 124 of SSCBA 1992 and supporting regulations. It includes premiums for disability, severe disability and enhanced disability similar to those which apply in calculating the applicable amount for HB purposes. In Ms Trengove's case, the effect of the award of income support was to entitle her to the full single room rate of LHA of £91.15 per week, thereby reducing her weekly shortfall from £28.77 to £18.47. From March 2009 onwards, Ms Trengove was awarded discretionary housing payments which met the full amount of the shortfall. However, she received no discretionary housing payments between October 2008 and March 2009, leaving the whole of the shortfall unrelieved for that period.

51. It is also worth noting in this context what the First-tier Tribunal said in relation to the discretionary housing payments received by Ms Trengove (at paragraph 27):

> "Although I accept that she has benefited from discretionary payments by the Local Authority which have covered the difference between the Housing Benefit allowed and the rent payable, I consider it extremely unlikely that she and her family would have taken the risk of acquiring the responsibilities of a tenant if she could only pay the rent with the help of discretionary sums payable out of a capped fund with eligibility re-assessed every 12 weeks. It seems to me very much more probable that without entitlement by right to assistance with the full rent, [Ms Trengove's] options would be limited to living with her parents or living in residential care. Neither of these options is desired either by [Ms Trengove] or her parents, and I accept that professional agencies involved with her care have

> also been very keen that she should have an opportunity to live independently."

(c) Mr Gorry

52. In the case of Mr Gorry, the information available to us is relatively scanty. The decision of the First-tier Tribunal contains no findings about the benefits available to the family, and the decision of Judge Turnbull in the Upper Tribunal does not deal with the position in detail. He records, however, that Mr Gorry was at the material time in receipt of income support and carer's allowance; that his wife was in receipt of incapacity benefit, disability living allowance, child tax credits and child benefit; and that, in addition, they both received disabled living allowance in respect of each of their two daughters. It further appears from paragraph 27 of his decision that disability premiums were added in the calculation of the amount of child tax credit for each daughter. As one would expect, therefore, the family was in receipt of substantial disability-related benefits, but as in the case of Mr Burnip I see no reason to doubt that these benefits were all essentially subsistence benefits.

53. In relation to housing, Judge Turnbull records that the house in which Mr Gorry and his family lived was privately rented, at a rent of £995 per month (equivalent to £229.61 per week). The three bedroom rate of HB paid to Mr Gorry at the relevant time was £155.77 per week, leaving a shortfall of £73.84. Between July and November 2008, no discretionary housing payments were made to Mr Gorry, so the whole amount of the shortfall remained unrelieved. For the remaining two months of the tenancy, which expired in January 2009, discretionary housing payments were awarded in the sum of £63.46 per week.

54. The family then moved to cheaper accommodation, with a weekly rent of £196.15. They remained in this accommodation until December 2010. The rate of HB paid to Mr Gorry remained unchanged at £155.77 per week, so the shortfall was now £40.38. Discretionary housing payments in that amount continued to be made until 2 April 2009, but Mr Gorry then had to make a fresh application which was refused in May 2010. Accordingly, he received no discretionary housing payments from 2 April 2009 until the end of this tenancy in December 2010.

55. For reasons similar to those which I have given in relation to Mr Burnip and Ms Trengove, I am satisfied that the housing-related benefits received by Mr Gorry should be viewed separately from the family's subsistence benefits; and I am also satisfied that the discretionary housing payments made to him, although they provided some temporary alleviation, cannot by themselves provide the necessary justification.

The wider picture

56. Apart from his submissions about the range of benefits available to the appellants, Mr Eicke also relied by way of analogy on the broader grounds which led this court to conclude in *AM (Somalia*), in a disability-related context, that the discrimination in question was justified, and on the application of those grounds in Mr Burnip's case by Judge Howell in the Upper Tribunal. In particular, Mr Eicke relied on the wide margin of appreciation accorded to the State in relation to "general measures of economic and social strategy" (*Stec* at paragraph 52, cited above); on the need for

clear rules in such areas; and on the fact that there will inevitably be some hard cases, wherever the line is drawn.

57. The appellant in *AM (Somalia)* was a male citizen of Somalia, who in 2004 had married in Ethiopia a British citizen who normally lived in London. She was disabled, and received various state benefits including disability living allowance. The appellant applied to settle in the United Kingdom as her spouse. The Immigration Judge found that the marriage was genuine, and accepted the wife's evidence about her disability, but rejected the application because the appellant failed to satisfy the condition in paragraph 281(v) of the Immigration Rules that the parties would be able to maintain themselves adequately without recourse to public funds. By the time the case reached the Court of Appeal in 2009, the sole issue had become whether paragraph 281(v) infringed Article 14 by its failure to make special provision for people with disabilities by either excusing them from the maintenance requirement, or at least allowing them to be maintained by third parties. The issue was thus one of disability discrimination.

58. The Court of Appeal held that discrimination was *prima facie* established, but that the Secretary of State succeeded on the issue of justification. The leading judgment was given by Maurice Kay LJ. He accepted in paragraph 24 of his judgment that applicant spouses of disabled sponsors represented "a relatively small subset of the totality of applicants", and that any additional recourse to public funds in such cases would be unlikely to last for more than two years if the exception contended for were to be admitted. On the other hand, counsel for the Secretary of State pointed to "the sheer variability of individual cases", to the need for "potentially burdensome administrative provisions involving periodic assessment", and to the possibility of the Home Office exercising discretion to admit entry where there were exceptional compassionate circumstances. In paragraph 28, Maurice Kay LJ said the question was "how is the balance to be struck in the present case between the rights of the individual and the interests of society in firm and fair immigration control?" He then answered this question in paragraph 29:

> "It is common ground that there is nothing disproportionate in a general rule or policy which makes self-sufficiency a requirement of entry. The first question is whether it is disproportionate not to exclude the disabled. In my judgment, it is not. Unlike the categories of "suspect" grounds to which I referred in paragraph 15, disability is a relative concept. It may be severe or moderate, permanent or temporary. It affects the affluent as well as the indigent. It may or may not affect earning capacity. To some extent, these variables are illustrated by the present case … [*he then referred to the evidence*] There will be disabled sponsors who are far more and far less disabled then the sponsor in this case. All this convinces me that it is reasonable and proportionate to have a criterion of self-sufficiency without a general exemption for the disabled. It will produce cases of hardship but that in itself does not render it disproportionate, particularly where provision is made for exceptional compassionate circumstances."

59. Elias LJ reached the same conclusion, for reasons which he expressed as follows at paragraphs 64 and following of his judgment:

> "64. Mr Fordham submits that precisely because the number of potential beneficiaries of an exemption from the rule will be relatively small, the additional cost will be limited. The Article 8 rights of the disabled demand that the state supports this group and therefore the failure to make an exception to rule 281(v) is plainly disproportionate.
>
> 65. I reject this argument, essentially for the following reasons, which are in large part interrelated. First, this is an area of social policy concerning control of who should be allowed to enter into this country and in what circumstances. As I have noted, the courts are particularly reluctant to interfere in such areas.
>
> 66. Second, as Maurice Kay LJ has pointed out, the courts have frequently recognised that "bright line" rules are generally acceptable in such cases notwithstanding that they might produce some hardship.
>
> 67. Third, the practical effect of making the exception involves public expenditure. In my judgment the courts will be particularly slow to require special treatment for a group where it affects the distribution of national resources, even if it be the case that the sums will be relatively small.
>
> 68. Fourth, and in my view importantly – and this is likely to be true of most indirect discrimination claims of this nature – it is difficult to foresee what other potential claims of a similar kind there may be … This does not merely create a difficulty in foreseeing the potential range of claimants urging special treatment, but it also makes the potential cost very difficult to predict. These uncertainties reinforce the justification for a bright line rule.
>
> 69. Fifth, … there would be additional administrative costs in having to identify whether a particular case falls within or outwith the exception – a particular difficulty given that the concept of disability itself is imprecise – and such cases would have to be periodically reviewed. Indeed, administrative burdens will almost inevitably be created once one departs from a bright line rule because of the need to draw the distinctions which a more nuanced rule will create.
>
> 70. Sixth, as I have said, this is not a case of direct or planned discrimination …
>
> 71. Finally, a factor lending some additional support to this conclusion is the fact that the Secretary of State is empowered

> in particularly compassionate cases to exercise a discretion in favour of entry …
>
> 72. For these reasons, therefore, I am satisfied that the failure to adopt a special rule for those whose spouse in this country cannot work by reason of disability is fully justified. The rule is lawful notwithstanding its discriminatory impact."

60. Mummery LJ agreed with both judgments, without adding anything.

61. In the *Burnip* case, Judge Howell quoted at length from Elias LJ's judgment in *AM (Somalia)*, and held that the same or corresponding considerations would apply equally to the present case, especially as

> "… what is sought is not simply the disapplication of a negative exclusionary rule, but the award of an additional cash benefit outside the rules altogether for which there is in fact no valid "system of reference"."

62. Judge Howell then continued:

> "48. In such a context, and against the background of what the benefits system already does provide for disabled people in this claimant's situation, the argument that an additional cash allowance has to be created by judicial intervention under Article 14 must in my view be approached with extreme caution; even more caution, if anything, than that displayed by the Court of Appeal in *AM (Somalia)*. The self-evident (and in my judgment self-evidently legitimate) aim of the rule being challenged is to control the cost of housing benefit and ensure that this form of social assistance is paid out only for its purpose of helping providing people with a home, not for accommodation to be used for other purposes. It applies the objective and in my judgment entirely rational criterion that the accommodation allowances therefore depend on the number of occupiers, as defined, that is residents living in the property as their home; not people temporarily there for other purposes however necessary or commendable.
>
> 49. The claimant's argument really comes down in my view to saying that because of his special needs as a disabled person he requires a more expensive home for himself, and should be entitled to extra housing benefit to reflect this. He has (or those acting on his behalf have) chosen to pin the claim on the extra room rate for another full-time resident but once one departs from the rules the reality, it seems to me, is that it is the same argument in principle whether quantified in that way or as extra cash towards the increased cost of renting a ground-floor flat with level access, wider doors and other features or adaptations to make it a more suitable home for him.

> 50. The benefits system is intricate and complicated, and as has been seen contains many detailed provisions that interact and interconnect with one another. Of course in such a massive and complex system there will be apparent anomalies and cases where deserving people, as I am sure this claimant is, will find themselves on the wrong side of some detailed distinction or with amounts they consider unfairly fail to reflect their special needs so that more should as a matter of social justice be done for them. But the evaluation, and if necessary correction, of such matters as the provision of the extra resources for the purposes are questions for the legislature and the executive …
>
> 51. The factors of the practical need for a single clearly-defined rule, the existence of the supplementary system of discretionary housing payments to alleviate hard cases (which even if less than perfect did in fact do exactly that for this claimant for the relevant year), and the unknown quantity of other groups who might with equal justice emerge to claim special treatment and extra cash, all support that conclusion in this case at least as much as in *AM (Somalia)*. [*Counsel for Mr Burnip*] naturally pointed to the introduction of the special extra room allowance for the severely disabled from April 2011 as a *de facto* acknowledgment that the previous rule was unjustified, but in my judgment that does not at all follow as a matter of law under Article 14. The extra allowance to alleviate the position of comparatively few claimants is of course being introduced at the same time as much more general cuts across the board in which a lot of others will suffer. In my view the effect is merely to underline the point that the making of such changes, the amounts involved and their timing, are matters for legislation, not judicial tinkering with just one setting in one individual piece of the overall machinery."

63. I acknowledge that there is force in some of the points made by Judge Howell, but I respectfully think that in paragraphs 48 and 49 he concentrated too much on the justification for the general bedroom rule (which is not in dispute) and too little on the object of Mr Burnip's claim, which is not to give him some form of preferential treatment, but merely to ensure that HB can fulfil its intended function for those who are so severely disabled that they need 24 hour care. The simple point is that, without the benefit of the extra room rate, Mr Burnip would be left in a *worse* position than an able bodied person living alone: it is only to correct such disparity of treatment that the claim is brought.

64. Furthermore, there are in my judgment important differences between the circumstances of the present appeals and the position in *AM (Somalia).* First, these are not cases of immigration control, where as Elias LJ noted the courts are particularly reluctant to interfere in matters of policy. On the contrary, we are here concerned with a benefit (HB) the purpose of which is to help people to meet their basic human need for accommodation of an acceptable standard. Secondly, there is no question of a general exception from the normal bedroom test for disabled people of all kinds.

The exception is sought for only a very limited category of claimants, namely those whose disability is so severe that an extra bedroom is needed for a carer to sleep in (or, in cases like that of Mr Gorry, where separate bedrooms are needed for children who, in the absence of disability, could reasonably be expected to share a single room). Thirdly, such cases are by their very nature likely to be relatively few in number, easy to recognise, not open to abuse, and unlikely to undergo change or need regular monitoring. The cost and human resource implications of accommodating them should therefore be modest, quite apart from the point that in some cases the effect of refusing the claim could well be to force the claimant into full-time residential care at much greater expense to the public purse. Fourth, for the reasons which I have already given, the extra assistance which can be provided by discretionary housing payments, valuable though it can be, falls far short of being an adequate solution to the problem. Finally, the fact that Parliament has now seen fit to legislate for cases like those of Mr Burnip and Ms Trengove, and to do so at a time of general economic hardship, may in my view reasonably be taken as recognising both the justice of such claims and the proportionate cost and nature of the remedy.

65. For all these reasons, I am satisfied that maintenance of the single bedroom rule is not a fair or proportionate response to the discrimination which has been established in cases of the present type, and that the defence of justification therefore fails. As to the relief which it would be appropriate to grant, I am in full agreement with the views expressed by Maurice Kay LJ.

SUPREME COURT OF CANADA

CITATION: R. *v.* D.A.I., 2012 SCC 5, [2012] 1 S.C.R. 149

DATE: 20120210
DOCKET: 33657

BETWEEN:

Her Majesty The Queen
Appellant
and
D.A.I.
Respondent
- and -
Women's Legal Education and Action Fund, DisAbled Women's Network Canada, Criminal Lawyers' Association (Ontario) and Council of Canadians with Disabilities
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 90) — McLachlin C.J. (Deschamps, Abella, Charron, Rothstein and Cromwell JJ. concurring)

DISSENTING REASONS: (paras. 91 to 152) — Binnie J. (LeBel and Fish JJ. concurring)

Her Majesty The Queen *Appellant*

v.

D.A.I. *Respondent*

and

Women's Legal Education and Action Fund, DisAbled Women's Network Canada, Criminal Lawyers' Association (Ontario) and Council of Canadians with Disabilities *Interveners*

Indexed as: R. *v.* D.A.I.

2012 SCC 5

File No.: 33657.

2011: May 17; 2012: February 10.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Testimonial competence — Adults with mental disabilities — Whether adult witnesses with mental disabilities must demonstrate understanding of nature of obligation to tell truth in order to be deemed competent to testify — Whether finding of testimonial competence without demonstration of understanding of obligation to tell truth breaches accused's right to fair trial — Canada Evidence Act, R.S.C. 1985, c. C-5, s. 16.

The Crown alleges that the complainant, a 26-year-old woman with the mental age of a three- to six-year-old, was repeatedly sexually assaulted by her mother's partner during the four years that he lived in the home. It sought to call the complainant to testify about the alleged assaults. After a *voir dire* to determine the complainant's capacity to testify, the trial judge found that she had failed to show that she understood the duty to speak the truth. In a separate *voir dire*, the trial judge also excluded out-of-court statements made by the complainant to the police and her teacher on the grounds that the statements were unreliable and would compromise the accused's right to a fair trial. While the remainder of the evidence raised some serious suspicions about the accused's conduct, the case collapsed and the accused was acquitted. The Ontario Court of Appeal affirmed this result.

Held (Binnie, LeBel and Fish JJ. dissenting): The appeal should be allowed, the acquittal set aside and a new trial ordered.

Per McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ.: The question in issue is whether the trial judge correctly interpreted the requirements of s. 16 of the *Canada Evidence Act* for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. Section 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct abstract inquiries into whether the witness understands the difference between truth and falsity, the obligation to give true evidence in court, and what makes a promise binding. The plain words of s. 16(3) focus on the concrete acts of communicating and promising. Judges should not add other elements to the dual requirements imposed by s. 16(3). This approach does not transform the promise into an empty gesture. Adults with mental disabilities may have a practical understanding of the difference between the truth and a lie and know they should tell the truth without being able to explain what telling the truth means in abstract terms. When such a witness promises to tell the truth, the seriousness of the occasion and the need to say what really happened is reinforced.

Insofar as the authorities suggest that s. 16(3) requires an abstract understanding of the obligation to tell the truth, they should be rejected. That requirement was based on a version of s. 16 that explicitly required that the witness "understands the duty of speaking the truth". Although Parliament deleted that requirement in 1987, courts continued to require proof that child witnesses

understood the duty to tell the truth. Parliament responded by enacting s. 16.1(7), which expressly forbade such inquiries of child witnesses. However, the existence of the s. 16.1(7) ban does not require us to infer that mentally disabled adults are to be questioned on the obligation to tell the truth. First, because s. 16(3) only required a promise to tell the truth, Parliament had no need to ban such questioning of adult witnesses with mental disabilities. Second, s. 16(3) required only a promise to tell the truth, so there was no need for Parliament to enact a similar provision with respect to s. 16(3). Third, the enactment of s. 16.1(7) did not imply that the earlier judicial interpretation of s. 16(3) as it applied to children had been endorsed for adult witnesses. No inference as to the meaning of s. 16(3) flows from the mere adoption of s. 16.1(7) with respect to children, and the re-enactment of s. 16(3) does not imply that Parliament accepted the judicial interpretation that prevailed at the time of the re-enactment. Fourth, the fact that s. 16 does not have a provision equivalent to s. 16.1(7) does not mean that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth — s. 16(3) sets two requirements for the competence of adults with mental disabilities, and nothing further need be imported. Fifth, there is no need to prove that, unless it can be shown that adult witnesses with mental disabilities are the same as, or like, child witnesses, they must be subjected to an inquiry into their understanding of the nature of the obligation to tell the truth before they can be held competent to testify.

The underlying policy concerns — bringing the abusers to justice, ensuring fair trials and preventing wrongful convictions — also support allowing adults with

mental disabilities to testify. With respect to the first concern, rejecting the evidence of alleged victims on the ground that they cannot explain the nature of the obligation to tell the truth in philosophical terms would exclude reliable and relevant evidence, immunize an entire category of offenders from criminal responsibility for their acts, and further marginalize the already vulnerable victims of sexual predators. With respect to the second, allowing an adult witness with mental disabilities to testify when the witness can communicate the evidence and promises to tell the truth does not render a trial unfair. Generally, the reliability threshold is met by establishing that the witness has the capacity to understand and answer the questions put to her and by bringing home the need to tell the truth by securing an oath, affirmation or promise. There is no guarantee that any witness will tell the truth — the trial process seeks a basic indication of reliability. That, along with the rules governing admissibility and weight of the evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused has a fair trial.

When applying s. 16(3) in the context of the *Canada Evidence Act*, eight considerations are appropriate. First, the *voir dire* on the competence of a proposed witness is an independent inquiry: it may not be combined with a *voir dire* on other issues. Second, the *voir dire* should be brief, but not hasty. It is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. Third, the primary source of evidence for a witness's competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular

needs; questions should be phrased patiently in a clear, simple manner. Fourth, persons familiar with the proposed witness in her everyday situation understand her best. They may be called as fact witnesses to provide evidence on her development. Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness. Sixth, the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence? Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements. Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

In the instant case, the trial judge erred in failing to consider the second part of the test under s. 16. This error of law led him to rule the complainant incompetent. This error cannot be rectified by comments made by the trial judge at other points in the trial or by the doctrine of deference.

Per Binnie, LeBel and Fish JJ. (dissenting): The majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons by turning Parliament's direction permitting a person "whose mental capacity is

challenged" to testify only "on promising to tell the truth" into an empty formality — a mere mouthing of the words "I promise" without any inquiry as to whether the promise has any significance to the potential witness

Section 16 mandates a single inquiry which presents the trial judge dealing with a witness whose mental capacity is challenged with three options. Section 16(2) provides that, if the challenged witness is able to communicate the evidence and understands the nature of an oath or a solemn declaration in terms of ordinary, everyday social conduct, he or she shall testify under oath or solemn affirmation. If the challenged witness is able to communicate the evidence but does not understand the nature of an oath or a solemn affirmation, s. 16(3) provides that he or she may provide unsworn testimony on promising to tell the truth. If the challenged witness does not satisfy either criterion, s. 16(4) provides that the individual with a mental disability shall not testify.

There is agreement with the majority that promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. It cannot be correct, however, that it is out of bounds for a trial judge to try to determine — in concrete everyday terms — whether there is in reality such a prophylactic effect in the case of a particular witness whose mental capacity has been challenged. If such a witness is so disabled as not to understand the seriousness of the situation and the importance of being careful and correct, there is no prophylactic

effect, and the fair trial interests of the accused under s. 16, as enacted in 1987, are unfairly prejudiced.

In 2005, when Parliament amended the *Canada Evidence Act* to prohibit asking child witnesses "any questions regarding their understanding of the nature of the promise to tell the truth" (s. 16.1(7)), the empirical evidence before Parliament related exclusively to children. No such empirical studies were carried out with respect to adults with mental disabilities. In their case, no "don't ask" provision was proposed, let alone adopted.

There is agreement with the majority that the words "on promising to tell the truth" in s. 16(3) must bear the same meaning as "to promise to tell the truth" in s. 16.1(6). That being the case, the majority must read the s. 16.1(7) "don't ask" rule applicable only to children into s. 16(3) applicable only to mentally challenged adults in order to read down the words "promising to tell the truth" in s. 16(3), and thus treat adults with mental disabilities as equivalent for the purposes of s. 16 to children without mental disabilities. The fact that psychiatrists speak of persons with mental disabilities in terms of mental ages does not mean that an adult with mental age of six is on the same footing as a six-year-old child with no mental disability whatsoever — a six-year-old with the mental capacity of a six-year-old does not suffer from a mental disability. No evidence was led to suggest equivalence and judicial notice cannot be taken of alleged "facts" that are neither notorious nor easily verifiable from undisputed sources.

On a competency *voir dire* where the mental capacity of an adult is challenged, and the adult is herself called as a proposed witness, the court may admit evidence from fact witnesses personally familiar with the complainant's verbal and cognitive abilities and limitations to help the court gain a better understanding of the person's capacity. These witnesses would not be in a position to express an expert opinion, but could testify about their direct personal observations of the proposed witness. Such evidence might, if the trial judge considered it helpful, better enable the judge or jury to appreciate her responses (or non-responses) in the witness box. However, ultimately, the judge must reach his or her own considered opinion about the mental capacity of the proposed witness prior to admitting the testimony.

In this case, the trial judge had serious concerns about the complainant's ability to communicate the evidence. The complainant's answers to a series of simple and concrete questions left him fully satisfied that she did not understand what a promise to tell the truth involves. Much turned on the significance of the complainant's repeated "I don't know" answers. Clearly, it was an important advantage for the trial judge to watch the questions and answers unfold and to assess whether the complainant was actually able to "compute" her responses to what she was being asked. There was no allegation of bad faith, but she may nevertheless have been mistaken in her perception or recollection of events and the crucible of cross-examination was useless because there was no secure method of testing her credibility. Her inability to deal with simple questions would mean her evidence would be effectively immune to challenge by the defence, thereby prejudicing the

interest of society as well as the accused in a fair trial. Sitting on appeal from this determination, and not having had the advantage of observing and questioning the complainant, there is no valid basis for this Court to reverse the trial judge's assessment of her mental capacity.

The trial judge's conclusion that the complainant lacked the ability to perceive, recall and communicate events and to understand the difference between truth and falsehood set up, but did not predetermine, his conclusion that her testimony lacked sufficient reliability. It was neither surprising nor an error however that the trial judge's reasoning on the threshold reliability in his hearsay ruling was quite similar to his reasoning on the s. 16 *voir dire*, and given his advantage in seeing and hearing the complainant, his exclusion of her out-of-court statements should equally be upheld by this Court.

Cases Cited

By McLachlin C.J.

Disapproved: *R. v. Farley* (1995), 23 O.R. (3d) 445; *R. v. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. v. McGovern* (1993), 82 C.C.C. (3d) 301; *R. v. S.M.S.* (1995), 160 N.B.R. (2d) 182; *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342; *R. v. Parrott* (1999), 175 Nfld. & P.E.I.R. 89; *R. v. A. (K.)* (1999), 137 C.C.C. (3d) 554; *R. v. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. v. Brouillard*, 2006 QCCA 1263, 44 C.R.

(6th) 218; *R. v. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192; **distinguished:** *R. v. Khan* (1988), 42 C.C.C. (3d) 197; *R. v. Rockey*, [1996] 3 S.C.R. 829; **referred to:** *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Brasier* (1779), 1 Leach 199, 168 E.R. 202; *R. v. Bannerman* (1966), 48 C.R. 110; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *R. v. Caron* (1994), 72 O.A.C. 287; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

By Binnie J. (dissenting)

R. v. Rockey, [1996] 3 S.C.R. 829; *R. v. Khan*, [1990] 2 S.C.R. 531, aff'g (1988), 42 C.C.C. (3d) 197; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Marquard*, [1993] 4 S.C.R. 223; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178; *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787.

Statutes and Regulations Cited

Act to amend the Criminal Code and the Canada Evidence Act, S.C. 1987, c. 24, s. 18.

Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32, ss. 26, 27.

Canada Evidence Act, R.S.C. 1985, c. C-5, ss. 16 [rep. & sub. 1987, c. 24, s. 18; am. 2005, c. 32, s. 26], 16.1 [ad. 2005, c. 32, s. 27].

Canada Evidence Act, 1893, S.C. 1893, c. 31, s. 25.

Canadian Charter of Rights and Freedoms.

Interpretation Act, R.S.C. 1985, c. I-21, s. 45.

Authors Cited

Bala, Nicholas, et al. "Brief on Bill C-2: Recognizing the Capacities & Needs of Children as Witnesses in Canada's Criminal Justice System", submitted by the Child Witness Project to the House of Commons Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, March 2005.

Canada. House of Commons. *Evidence of the Standing Committee on Justice and Human Rights*, No. 77, 2nd Sess., 37th Parl., October 29, 2003, at 17:20 (online: www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1137489&Mode=1 &Parl=37&Ses=2&Language=E).

Canada. House of Commons. *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005, p. 7 (online: www.parl.gc.ca/content/hoc/Committee/381/JUST/Evidence/EV1718347/JUST EV26-E.PDF).

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 1, 2nd Sess., 33rd Parl., November 27, 1986, pp. 21, 24 and 33.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986, pp. 26-27.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 3, 2nd Sess., 33rd Parl., December 11, 1986, p. 7.

Canada. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 17, 1st Sess., 38th Parl., June 23, 2005, p. 19.

Canada. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 18, 1st Sess., 38th Parl., July 7, 2005, pp. 105-6.

Côté, Pierre-André, in collaboration with Stéphane Beaulac and Mathieu Devinat. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, MacPherson and Armstrong JJ.A.), 2010 ONCA 133, 260 O.A.C. 96, 252 C.C.C. (3d) 178, 73 C.R. (6th) 50, [2010] O.J. No. 665 (QL), 2010 CarswellOnt 880, affirming a decision of McKinnon J., 2008 CanLII 21725, [2008] O.J. No. 1823 (QL), 2008 CarswellOnt 2637. Appeal allowed, Binnie, LeBel and Fish JJ. dissenting.

Jamie C. Klukach and *John Semenoff*, for the appellant.

Howard L. Krongold and *Leonardo Russomanno*, for the respondent.

Joanna L. Birenbaum, for the interveners the Women's Legal Education and Action Fund and the DisAbled Women's Network Canada.

Joseph Di Luca and *Erin Dann*, for the intervener the Criminal Lawyers' Association (Ontario).

David M. Wright and *Helga D. Van Iderstine*, for the intervener the Council of Canadians with Disabilities.

The judgment of McLachlin C.J. and Deschamps, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

[1] THE CHIEF JUSTICE — Sexual assault is an evil. Too frequently, its victims are the vulnerable in our society — children and the mentally handicapped. Yet rules of evidence and criminal procedure, based on the norm of the average witness, may make it difficult for these victims to testify in courts of law. The challenge for the law is to permit the truth to be told, while protecting the right of the accused to a fair trial and guarding against wrongful conviction.

[2] Parliament has addressed this challenge by a series of amendments to the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that modify the normal rules of testimonial capacity for children and adults with mental disabilities. This Court has considered the provisions relating to children on a number of occasions. This appeal involves the provisions relating to adults with mental disabilities.

[3] At the heart of this case is a young woman, K.B., aged 26, with the mental age of a three- to six-year-old. The Crown alleges that she was repeatedly sexually assaulted by her mother's partner at the time, D.A.I. The prosecution sought to call the young woman to testify about the alleged assaults. It also sought to adduce evidence through her school teacher and a police officer of what she told them.

[4] The trial judge excluded this evidence, on the ground that K.B. was not competent to testify in a court of law (A.R., vol. I, at p. 2). As a result, the case collapsed and D.A.I. was acquitted (2008 CanLII 21725 (Ont. S.C.J.)). The Ontario Court of Appeal affirmed the acquittal (2010 ONCA 133, 260 O.A.C. 96).

[5] I respectfully disagree. In my view, the trial judge made a fundamental error of law in interpreting and applying the provisions of the *Canada Evidence Act* governing the testimonial competence of adult witnesses with mental disabilities. This error of law vitiates the trial judge's ruling that K.B. could not be allowed to testify. Subsequent evidence on other matters cannot overcome this fatal defect. I would therefore set aside the acquittal of D.A.I. and order a new trial.

I. Factual Background

[6] The complainant, K.B., was 22 at trial and 19 at the time of the alleged assault, but possessed the mental age of a three- to six-year-old. She lived with her mother and her mother's partner, D.A.I., as well as her sister. During the four years he was in the home, D.A.I. developed a close relationship with K.B.

[7] Sometime after D.A.I. separated from K.B.'s mother and left the home, K.B. told her special education teacher about a "game" that she and D.A.I. used to play together which involved D.A.I. touching her. She later repeated this statement to the police. K.B., through bodily gestures, described the game as involving touching

her breasts and vagina. In her statement to the police, she indicated that D.A.I. had touched her vagina, buttocks and breasts beneath her pajamas, and that this had happened many times.

[8] At the preliminary inquiry, K.B. was ruled competent to testify on the basis that she was able to communicate the evidence. Her videotaped statement to the police was admitted as her examination-in-chief and she was cross-examined.

[9] The issue of K.B.'s testimonial capacity was raised at trial, and the trial judge held a *voir dire* to determine whether she could be allowed to testify. K.B. and Dr. K., the defence's expert witness, were the only ones to testify during the *voir dire* on competence. The Crown's examination of K.B. demonstrated that she understood the difference between telling the truth and lying in concrete situations. However, the trial judge went beyond this to question K.B. on her understanding of the nature of truth and falsity, of moral and religious duties, and of the legal consequences of lying in court. K.B. was unable to respond adequately to these more abstract questions, to which she frequently answered "I don't know" (A.R., vol. I, at pp. 117-19). Dr. K., a psychiatrist, testified for the defence. Dr. K's opinion was formed without personal contact with K.B. It was based on school and medical records, as well as on K.B.'s behaviour in her videotaped statement and during the *voir dire*. Dr. K. expressed the view that K.B. had "serious difficulty in differentiating the concept of truth and lie", noted her low tolerance for frustration, and said, "I don't think she ha[d] the ability to think what you're asking and come up with an answer" (*ibid.*, at pp. 159 and 161).

[10] At the end of the *voir dire* on competence, the trial judge refused to hear from K.B.'s teacher of six years, Ms. W., and ruled that K.B. was incompetent to testify. K.B. was held incompetent because she had "not satisfied the prerequisite that she understands the duty to speak to the truth", which the trial judge took to be required by s. 16(3) of the *Canada Evidence Act*: "She cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies" (*ibid.*, at p. 3).

[11] A second *voir dire* was held to decide on the Crown's application for admitting K.B.'s out-of-court statements to the police and to her teacher, Ms. W. The teacher testified that K.B. would not intentionally lie, but that her ability to understand was more developed than her ability to express herself: "This causes a lot of frustration for [K.B.], she frequently responds to questions by saying 'I don't know'" (*ibid.*, at p. 176; see also pp. 184-85). Also, evidence was led corroborating K.B.'s allegations. A family friend testified that, while he was in D.A.I.'s room for another purpose, he found a Polaroid photo of K.B. with her breasts exposed and another photo of two unidentified people having sex. D.A.I.'s explanation of the first photo was that K.B. had flashed him while he was taking a photo of her. K.B.'s sister also testified that she had found such photos. However, she did not report it to her mother and the photos were not available at trial. K.B.'s sister also said she once saw D.A.I. touch K.B.'s breasts while she was lying on her bed.

[12] The *voir dire* on hearsay admissibility was concluded by the trial judge's dismissal of the Crown's application. The trial judge rejected K.B.'s out-of-court statements to Ms. W. and to the police, holding that K.B.'s hearsay evidence was inadmissible because it was "unreliable, and its admission would seriously compromise the accused's right to a fair trial" (2008 CanLII 21726 (Ont. S.C.J.), at para. 57).

[13] At trial, the judge concluded that while the remainder of the evidence raised "some serious suspicions" about D.A.I.'s conduct, it was too scant to support a conviction (para. 11). The case essentially collapsed because of the trial judge's ruling that K.B. was not competent to testify.

[14] The question we must decide is whether the trial judge correctly interpreted the requirements of the *Canada Evidence Act* for the testimonial competence of persons of 14 years of age or older (adults) with mental disabilities. If he applied too high a standard, his decision to preclude K.B. from testifying must be set aside and the case remitted for a new trial.

II. Legal Analysis

A. *Testimonial Competence: A Threshold Requirement*

[15] Before turning to s. 16(3) of the *Canada Evidence Act*, it is important to distinguish between three different concepts that are sometimes confused: (1) the witness's competence to testify; (2) the admissibility of his or her evidence; and (3) the weight of the witness's testimony. The evidentiary rules governing all three concepts share a common purpose: ensuring that convictions are based on solid evidence and that the accused has a fair trial. However, each concept plays a distinct role in achieving this goal.

[16] The first concept, and the one most relevant to this appeal, is the principle of competence to testify. Competence addresses the question of whether a proposed witness has the capacity to provide evidence in a court of law. The purpose of this principle is to exclude at the outset worthless testimony, on the ground that the witness lacks the basic capacity to communicate evidence to the court. Competence is a threshold requirement. As a matter of course, witnesses are presumed to possess the basic "capacity" to testify. However, in the case of children or adults with mental disabilities, the party challenging the competence of a witness may be called on to show that there is an issue as to the capacity of the proposed witness.

[17] The second concept is admissibility. The rules of admissibility determine what evidence given by a competent witness may be received into the record of the court. Evidence may be inadmissible for various reasons. Only evidence that is relevant to the case may be considered by the judge or jury. Evidence may also be inadmissible if it falls under an exclusionary rule, for example the confessions rule or

the rule against hearsay evidence. Among the purposes of the rules of admissibility are improving the accuracy of fact finding, respecting policy considerations, and ensuring the fairness of the trial.

[18] The third concept — the responsibility of the trier of fact to decide what evidence, if any, to accept — is based on the assumption that the witness is competent and the rules of admissibility have been properly applied. Fulfillment of these requirements does not establish that the evidence should be accepted. It is the task of the judge or jury to weigh the probative value of each witness's evidence on the basis of factors such as demeanour, internal consistency, and consistency with other evidence, and to thus determine whether the witness's evidence should be accepted in whole, in part, or not at all. Unless the trier of fact is satisfied that the prosecution has established all elements of the offence beyond a reasonable doubt, there can be no conviction.

[19] Together, the rules governing competence, admissibility and weight of the evidence work to ensure that a verdict of guilty is based on accurate and credible evidence and that the accused person has a fair trial. The point for our purposes is a simple one: the requirement of competence is only the first step in the evidentiary process. It is the initial threshold for receiving evidence. It seeks a minimal requirement — a basic ability to provide truthful evidence. A finding of competence is not a guarantee that the witness's evidence will be admissible or accepted by the trier of fact.

B. *The Requirements for Competence of Adult Witnesses With Mental Disabilities: Section 16 of the Canada Evidence Act*

[20] Against this background, I come to the provision at issue in this case, s. 16(3) of the *Canada Evidence Act*, which governs the capacity to testify of adults with mental disabilities. Section 16 provides:

> **16.** (1) [Witness whose capacity is in question] If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
>
> (*a*) whether the person understands the nature of an oath or a solemn affirmation; and
>
> (*b*) whether the person is able to communicate the evidence.
>
> (2) [Testimony under oath or solemn affirmation] A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
>
> (3) [Testimony on promise to tell truth] A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.
>
> (4) [Inability to testify] A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.
>
> (5) [Burden as to capacity of witness] A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

[21] Section 16(1) sets out what a judge must do when a challenge is raised. First, the judge must determine "whether the person understands the nature of an oath or a solemn declaration" and "whether the person is able to communicate the evidence" (s. 16(1)). If these requirements are met, the witness testifies under oath or affirmation, as other witnesses do (s. 16(2)). If these requirements are not met, the judge moves on to s. 16(3). Section 16(3) provides that "[a] person . . . who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may . . . testify on promising to tell the truth."

[22] In brief, s. 16(1) provides that an adult witness whose competence to testify is challenged should testify under oath or affirmation, if the witness "understands the nature of an oath or a solemn affirmation" and can "communicate the evidence". Here K.B. did not meet the first requirement. The inquiry therefore moved to s. 16(3), which states that if an adult witness cannot take the oath or affirm under s. 16(1), then she must be permitted to testify *if she is "able to communicate the evidence" and promises to tell the truth.*

[23] On its face, s. 16 says that in a case such as this where the witness cannot take the oath or affirm, the judge has only one further issue to consider — whether the witness can communicate the evidence. If the answer to that question is yes, the judge must then ask the witness whether she promises to tell the truth. If she does, she is competent to testify. It is not necessary to inquire into whether the witness understands the duty to tell the truth.

[24] The respondent argues, however, that the plain words of s. 16(3) do not suffice. They must be supplemented, he says, by the requirement that an adult witness with mental disabilities who cannot take an oath or affirm must not only be able to communicate the evidence and promise to tell the truth, but must also *understand the nature of a promise to tell the truth*.

[25] I cannot accept this submission. The words of an Act are to be interpreted in their entire context: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. The wording of s. 16(3), its history, its internal logic and its statutory context all point to the conclusion that s. 16(3) should be read as it stands, without reading in a further requirement that the witness demonstrate an understanding of the nature of the obligation to tell the truth. All that is required is that the witness be able to communicate the evidence and in fact promise to tell the truth.

[26] First, as already mentioned, this interpretation goes beyond the words used by Parliament. To insist that the witness demonstrate understanding of the nature of the obligation to tell the truth is to import a requirement into the section that Parliament did not place there. The first and cardinal principle of statutory interpretation is that one must look to the plain words of the provision. Where ambiguity arises, it may be necessary to resort to external factors to resolve the ambiguity: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 44. However, Parliament has clearly stated the requirements for finding adult witnesses with mental disabilities to be competent. Section 16 shows no ambiguity.

[27] Second, the history of s. 16 supports the view that Parliament intended to remove barriers that had prevented adults with mental disabilities from testifying prior to the 1987 amendments (S.C. 1987, c. 24). The amendments altered the common law rule, by virtue of which only witnesses under oath could testify. To take the oath or affirm, a witness must have an understanding of the duty to tell the truth: *R. v. Brasier* (1779), 1 Leach 199, 168 E.R. 202. Adults with mental disabilities might not be able to do this. To remove this barrier, Parliament provided an alternative basis for competence for this class of individuals. Section 16(1) of the 1987 provision continued to maintain the oath or affirmation as the first option for adults with mental disabilities, but s. 16(3) provided for competence based simply on the ability to communicate the evidence and a promise to tell the truth.

[28] This history suggests that Parliament intended to eliminate an understanding of the abstract nature of the oath or solemn affirmation as a prerequisite for testimonial capacity. Failure to show that the witness *could demonstrate an understanding of the obligation to tell the truth* was no longer the end of the matter. Provided the witness (1) was able to *communicate the evidence*, and (2) promised to tell the truth, she should be allowed to testify.

[29] The drafters of s. 16(3) did not intend this provision to require an abstract understanding of the duty to tell the truth (see Appendix A). The original text of Bill C-15, which adopted the 1987 amendments, was changed by the Legislative Committee on Bill C-15 precisely to avoid that interpretation. The version of s. 16(3)

first put before Parliament allowed testimony on promising to tell the truth if the witness was "sufficiently intelligent that the reception of the evidence is justified". A discussion was held on the meaning of "sufficient intelligence", after which the Committee concluded that all that was needed for a witness to be sufficiently intelligent was to understand the moral difference between telling the truth and lying. The Committee, fearing that this would open the door to abstract inquiries, ultimately replaced "sufficient intelligence" by "able to communicate the evidence". The deliberations that followed emphasized the practical ability to communicate the evidence. There was no suggestion that ability to communicate the evidence accompanied by a promise to tell the truth implicitly imposed a requirement that the witness demonstrate a more abstract understanding of the duty to tell the truth.

[30] The historic background against which s. 16(3) was enacted explains why Parliament might have wished in 1987 to lower the requirements of testimonial competence for adults with mental disabilities, who are nonetheless capable of communicating the evidence. While adults with mental disabilities received little consideration in the pre-1987 case law, the inappropriateness of questioning children on abstract understandings of the truth had been noted and criticized. In *R. v. Bannerman* (1966), 48 C.R. 110 (Man. C.A.), Dickson J. *ad hoc* (as he then was) rejected the practice of examining child witnesses on their religious beliefs and the philosophical meaning of truth. Meanwhile, awareness of the sexual abuse of children and adults with mental disabilities was growing. To rule out the evidence of children and adults with mental disabilities at the stage of competence — the effect of

the requirement of an abstract understanding of the nature of the obligation to tell the truth — meant their stories would never be told and their cases never prosecuted. These concerns explain why Parliament moved to simplify the competence test for adult witnesses with mental disabilities.

[31] Third, and flowing from this history, the internal logic of s. 16 negates the suggestion that "promising to tell the truth" in s. 16(3) must be read as implying an understanding of the obligation to tell the truth. Two procedures are provided by s. 16. The preferred option is testimony under oath or affirmation (s. 16(1)), and the alternative procedure is testimony on a promise to tell the truth (s. 16(3)). If the witness is required under s. 16(3) to demonstrate that she understands the obligation to tell the truth, s. 16(3) adds little, if anything, to s. 16(1). In both cases, the witness is required to articulate abstract concepts of the nature of truth and the nature of the obligation to tell the truth in court. The result is essentially to render s. 16(3) a dead letter and to negate the dual structure of the provision. This runs against the principle of statutory interpretation that Parliament does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[32] Fourth, s. 16(4) indicates that ability to communicate the evidence is the only quality that an adult with mental disabilities must possess in order to testify under s. 16(3). Section 16(4) provides that the proposed witness is unable to testify if she neither understands the nature of an oath or solemn affirmation nor is able to communicate the evidence. It follows that the witness is competent to testify if she is

able to communicate the evidence; she may testify on promising to tell the truth under s. 16(3). The qualities envisaged in s. 16 as basis for testimonial competence are mentioned in s. 16(4). Imposing an additional qualitative requirement to understand the nature of a promise to tell the truth would flout the utility of s. 16(4).

[33] Fifth, the legislative context speaks against reading s. 16(3) as requiring that an adult witness with mental disabilities understand the nature of the obligation to tell the truth. If this requirement is added to s. 16(3), the result is a different standard for the competence of adults with mental disabilities under s. 16(3) and children under s. 16.1 (enacted in 2005 (S.C. 2005, c. 32) pursuant to the "Brief on Bill C-2: Recognizing the Capacities & Needs of Children as Witnesses in Canada's Criminal Justice System" (Child Witness Project, March 2005) (the "Bala Report")). As will be discussed more fully below, s. 16(3) governing the competence of adults with mental disabilities, and ss. 16.1(3), (5) and (6) governing the competence of children, set forth essentially the same requirements. Broadly speaking, both condition testimonial capacity on: (1) the ability to communicate or answer questions; and (2) a promise to tell the truth. While it was open to Parliament to enact different requirements for children and adults with the minds of children, consistency of Parliamentary intent should be assumed, absent contrary indications. No explanation has been offered as to why Parliament would consider a promise to tell the truth a meaningful procedure for children, but an empty gesture for adults with mental disabilities.

[34] The foregoing reasons make a strong case that s. 16(3) should be read as requiring only two requirements for competence of an adult with mental disabilities: (1) ability to communicate the evidence; and (2) a promise to tell the truth. However, two arguments have been raised in opposition to this interpretation: first, without a further requirement of an understanding of the obligation to tell the truth, a promise to tell the truth is an "empty gesture"; second, Parliament's failure in 2005 to extend to adults with mental disabilities the s. 16.1(7) prohibition on the questioning of children means that it intended this questioning to continue for adults. I will examine each argument in turn.

[35] The first argument is that unless an adult witness with mental disabilities is required to demonstrate that she understands the nature of the obligation to tell the truth, the promise is an "empty gesture". However, this submission's shortcoming is that it departs from the plain words of s. 16(3), on the basis of an assumption that is unsupported by any evidence and contrary to Parliament's intent. Imposing an additional qualitative condition for competence that is not provided in the text of s. 16(3) would demand compelling demonstration that a promise to tell the truth cannot amount to a meaningful procedure for adults with mental disabilities. No such demonstration has been made. On the contrary, common sense suggests that the act of promising to tell the truth may be useful, even in the absence of the witness's ability to explain what telling the truth means in abstract terms.

[36] Promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. A witness who is able to communicate the evidence, as required by s. 16(3), is necessarily able to relate events. This in turn implies an understanding of what really happened — i.e. the truth — as opposed to fantasy. When such a witness promises to tell the truth, this reinforces the seriousness of the occasion and the need to do so. In dealing with the evidence of children in s. 16.1, Parliament held that a promise to tell the truth was all that is required of a child capable of responding to questions. Parliament did not think a child's promise, without more, is an empty gesture. Why should it be otherwise for an adult with the mental ability of a child?

[37] The second argument raised in support of the proposition that "promising to tell the truth" in s. 16(3) implies a requirement that the witness must show that she understands the nature of the obligation to tell the truth is that Parliament has not enacted a ban on questioning adult witnesses with mental disabilities on the nature of the obligation to tell the truth, as it did for child witnesses in 2005 in s. 16.1(7). To understand this argument, we must briefly trace the history of s. 16.1.

[38] In 2005, following the Bala Report, Parliament once more modified the *Canada Evidence Act*'s provisions on testimonial competence, but this time only with respect to children. The central focus of the 2005 legislation relating to the *Canada Evidence Act* was the competence of *child* witnesses, with the aim of altering the

restrictive gloss the case law had placed on the previous provisions relating to the capacity of children to testify. Chief among this case law was *R. v. Khan* (1988), 42 C.C.C. (3d) 197 (Ont. C.A.), which insisted that a child understand the nature of the obligation to tell the truth before the child could testify. Section 16.1, in unequivocal language, rejected this requirement. It stated:

> **16.1** (1) [Person under fourteen years of age] A person under fourteen years of age is presumed to have the capacity to testify.
>
> (2) [No oath or solemn affirmation] A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
>
> (3) [Evidence shall be received] The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
>
> (4) [Burden as to capacity of witness] A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
>
> (5) [Court inquiry] If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
>
> (6) [Promise to tell truth] The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.
>
> (7) [Understanding of promise] <u>No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.</u>
>
> (8) [Effect] For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

[39] Section 16.1, like s. 16(3) governing adult witnesses with mental disabilities, imposed two preconditions for the testimony of children: (1) that the child be able to understand and respond to questions (s. 16.1(5)); and (2) that the child promise to tell the truth (s. 16.1(6)). But, taking direct aim at *Khan*'s insistence that children be questioned on their understanding of the nature of the obligation to tell the truth, s. 16.1(7) went on to state explicitly that children not "*be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court*".

[40] The argument is that if Parliament had intended adult witnesses with mental disabilities to be competent to testify simply on the basis of the ability to communicate and the making of a promise, it would have enacted a ban on questioning them on their understanding of the nature of the obligation to tell the truth, as it did for child witnesses under s. 16.1(7). The absence of such a provision, it is said, requires us to draw the inference that Parliament intended that *adult* witnesses with mental disabilities *must* be questioned on the obligation to tell the truth.

[41] First, this argument overlooks the fact that Parliament's concern in enacting the 2005 amendment to the *Canada Evidence Act* was exclusively with children. The changes arose out of the Bala Report on the problems associated with prosecuting crimes against children. The Parliamentary debates on s. 16.1 attest to the fact that the focus of the 2005 amendment was on children, and only children.

[42] Moreover, it is apparent from the Parliamentary works on Bill C-2 that s. 16.1(7) was intended to confirm the existing formal requirement of a promise alone, and not to modify the law: see Appendix B. The record of the standing House of Commons committee which studied Bill C-2 contains a discussion between Joe Comartin and Professor Nicholas Bala, during a debate on the phrasing of s. 16.1(7), which revealed that the original intent of s. 16(3) was to allow children and adults with mental disabilities to testify by merely promising to tell the truth, once they were held to be able to communicate the evidence:

> **[Prof. Nicholas Bala:]** . . . the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts — I was actually a witness in 1988, when the provisions came into effect — I think it was thought by people, well, we don't have to be very explicit here, because the judges will get this right.
>
> Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it's important to give them as much direction as possible. My concern is that some judge might read this — and we have quite a lot of case law about this — and say, okay, I can't ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you'll be required to promise to tell the truth. We can't ask about the nature of the promise, but can we ask you about "truth" and "lie"? [Emphasis added; p. 7.]
>
> (House of Commons, *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005)

[43] This view was confirmed by Ms. Catherine Kane, Director of the Policy Centre for Victim Issues of the Department of Justice Canada, during her opening statement to the Standing Senate Committee on Legal and Constitutional Affairs:

> **[Ms. Catherine Kane:]** . . . These amendments were made in 1988 with the purpose of trying to more readily permit children's evidence to be received. However, as the cases have interpreted this provision, we have not seen that ready acceptance of children's evidence.
>
> If these two criteria are met, the child gives evidence under an oath or an affirmation. However, if the child does not understand the nature of the oath or the affirmation but has the ability to communicate the evidence, the evidence is received on a promise to tell the truth. That is the current law. While it may appear quite sensible on its face, the interpretations and practise of these provisions do not reflect Parliament's intention in amending the Evidence in an effort to permit children's evidence to be admitted more readily.
>
> As interpreted by the courts, section 16 requires that before the child is permitted to testify, the child be subjected to an inquiry as to his or her understanding of the obligation to tell the truth, the concept of a promise, and an ability to communicate. [Emphasis added; pp. 105-6.]
>
> (Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 18, 1st Sess., 38th Parl., July 7, 2005)

Therefore, it cannot be inferred that Parliament's failure to extend the express ban on questioning in s. 16.1(7) to adult witnesses shows an intent to permit such questioning of adult witnesses with mental disabilities.

[44] Second, as already mentioned, the wording of s. 16(3) governing the competence of adult witnesses had since 1987 required only a promise to tell the truth. There was no need for Parliament to add a provision on questioning an adult witness's understanding of the nature of the obligation to tell the truth in s. 16(3). The fact that Parliament did so 18 years later for children's evidence under s. 16.1(7) reflects concern with the fact that courts in children's cases, such as *Khan*, were continuing to engage in this type of questioning, instead of accepting a simple

promise to tell the truth. It does not evince an intention that Parliament intended the words "promising to tell the truth" to have different meanings in ss. 16(3) and 16.1(6).

[45] Third, the argument that the enactment of s. 16.1(7) for children but not for adults endorsed as applicable to adult witnesses the earlier judicial interpretation of the provisions relating to children does not take into account s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, which provides:

> **45.** (1) [Repeal does not imply enactment was in force] The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that the enactment was previously in force or was considered by Parliament or other body or person by whom the enactment was enacted to have been previously in force.
>
> (2) [Amendment does not imply change in law] The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under that enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.
>
> (3) [Repeal does not declare previous law] The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.
>
> (4) [Judicial construction not adopted] A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.

[46] Section 45(3) of the *Interpretation Act* provides that the amendment of an enactment (in this case the adoption of s. 16.1(7)) shall not be deemed to involve any

declaration as to the meaning of the previous law (in this case s. 16(3)). Therefore, no inference as to the meaning of s. 16(3) flows from the mere adoption of s. 16.1(7) with respect to children.

[47] Additionally, s. 45(4) of the *Interpretation Act* states that the re-enactment of a provision (in this case, s. 16 with respect to adults with mental disabilities) is not sufficient to infer that Parliament adopted the provision's judicial interpretation which prevailed at the time of the re-enactment. It follows that the fact that s. 16 was re-enacted for adults with mental disabilities in 2005 does not, alone, imply that Parliament intended to countenance the judicial interpretation of this section which required understanding the obligation to tell the truth.

[48] Fourth, the argument that the absence of the equivalent of s. 16.1(7) in s. 16(3) means that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth is logically flawed. The argument rests on the premise that s. 16(3), unless amended, requires an inquiry into the witness's understanding of the obligation to tell the truth. On this basis, it asserts that, unless the ban on questioning in s. 16.1(7) dealing with children is read into s. 16(3), such questioning must be conducted. Thus, my colleague Binnie J. states that "[t]he Crown invites us, in effect, to apply the 'don't ask' rule governing children to adults whose mental capacity is challenged" (para. 127).

[49] The fallacy in this argument is the starting assumption that s. 16(3) requires importing a "don't ask" rule. As explained earlier, it does not. Section 16(3) sets two requirements for the competence of adults with mental disabilities: the ability to communicate the evidence and a promise to tell the truth. It is self-sufficient. Nothing further need be imported.

[50] Fifth, and following from the previous point, the argument relies on the assumption that unless it can be shown that adult witnesses with mental disabilities are the same as, or like, child witnesses, adult witnesses with mental disabilities must be treated differently, and subjected to an inquiry into their understanding of the nature of the obligation to tell the truth before they can be held competent to testify. Thus Binnie J. states that before s. 16(3) can be read as importing the "don't ask" rule, it is for the Crown to establish that there is no difference between children and adults with mental disabilities on the test of what reasonable people would accept. He opines that an assertion of equivalency is "pure assertion on a key issue" (para. 130).

[51] There are several answers to this "equivalency" argument. First, like the previous argument, it rests on the mistaken assumption that the Crown asks us to import a "don't ask" rule into s. 16(3). The plain words of s. 16(3) do not require an understanding of the obligation to tell the truth, and it is for the party seeking to depart from the text of s. 16(3) to demonstrate that adults with mental disabilities should be treated differently from children. Second, the argument suffers from

inconsistency. It claims that the equivalency of the vulnerabilities of these two groups of witnesses is "pure assertion on a key issue", but at the same time claims that the previous judge-made law for children (*Khan*) should apply to adult witnesses with mental disabilities. Third, one may question how equivalency, were it needed, should be established: Is the proper approach to competence what reasonable people would conclude, or judicial opinion informed by assessment of the situation and expert opinion?

[52] The final and most compelling answer to the equivalency argument is simply this: When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old? Parliament, by applying essentially the same test to both under s. 16(3) and s. 16.1(3) and (6) of the *Canada Evidence Act*, implicitly finds no difference. In my view, judges should not import one.

[53] I conclude that s. 16(3) of the *Canada Evidence Act*, properly interpreted, establishes two requirements for an adult with mental disabilities to take the stand: the ability to communicate the evidence and a promise to tell the truth. A further requirement that the witness demonstrate that she understands the nature of the obligation to tell the truth should not be read into the provision.

C. *The Jurisprudence*

[54] I have concluded that s. 16(3), on its plain words and in its context, reveals only two requirements for an adult with mental disabilities to have the capacity to testify: (1) that the witness be able to communicate the evidence, and (2) that the person promise to tell the truth. It is necessary next to consider whether the jurisprudence requires a different result. My colleague Binnie J. argues that the cases, and in particular *Khan*, require that "promising to tell the truth" in s. 16(3) must be read as impliedly importing an additional requirement — an understanding of the nature of the obligation engaged by the promise. With respect, I cannot agree.

[55] It is necessary at the outset to describe what *Khan* decided. *Khan* was concerned with the predecessor of s. 16, which was first enacted in 1893 (S.C. 1893, c. 31, s. 25) and dealt only with children. The provision required that the proposed witness "understan[d] the duty of speaking the truth". This phrase was deleted when the provision was amended in 1987. Explaining the statutory requirement that the witness must "understan[d] the duty of speaking the truth" in *Khan*, Robins J.A. stated:

> To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so. [Emphasis added; p. 206.]

[56] This oft-cited statement of the law proved difficult to apply. The first sentence suggests that the threshold for testimonial competence is low, based on truth telling in "everyday social conduct". This suggests that the judge need only be satisfied that the witness understands the difference between truth and falsehood in relation to everyday matters and activities — not in some abstract metaphysical sense. The second sentence in this passage from *Khan*, specifically the phrases "knows that it is wrong to lie" and "understands the necessity to tell the truth" (emphases added), move beyond everyday social conduct into more abstract, philosophical realms. In *obiter*, Robins J.A. opined that the same test should be applied to the post-1987 section, on the grounds that without the requirement that the witness understand what a promise is and the importance of keeping it, the promise would be an "empty gesture".

[57] In *R. v. Farley* (1995), 23 O.R. (3d) 445, the Ontario Court of Appeal adopted this *obiter dictum* and applied it to the post-1987 version of s. 16(3), the provision applicable in this case. Other provincial courts of appeal followed suit: *R. v. P.M.F.* (1992), 115 N.S.R. (2d) 38; *R. v. McGovern* (1993), 82 C.C.C. (3d) 301 (Man.); *R. v. S.M.S.* (1995), 160 N.B.R. (2d) 182. In *R. v. Rockey*, [1996] 3 S.C.R. 829, a minority of this Court, *per* McLachlin J., held that a child was incompetent to testify on the basis of his inability to *communicate* the evidence, referring to *Farley* with approval; the question of whether s. 16(3) incorporated the *Khan* test was not at issue in that case. Appellate courts continue to require demonstration of an understanding of the duty to speak the truth under s. 16(3): *R. v. Ferguson* (1996),

112 C.C.C. (3d) 342 (B.C.); *R. v. Parrott* (1999), 175 Nfld. & P.E.I.R. 89 (Nfld.); *R. v. A. (K.)* (1999), 137 C.C.C. (3d) 554 (Ont.); *R. v. R.J.B.*, 2000 ABCA 103, 255 A.R. 301; *R. v. Brouillard*, 2006 QCCA 1263, 44 C.R. (6th) 218; *R. v. E.E.D.*, 2007 SKCA 99, 304 Sask. R. 192. In the case at bar, the Ontario Court of Appeal affirmed that view, upholding the trial judge's insistence on the understanding of the duty to speak the truth not merely in "everyday social conduct", but on an understanding of the duty *abstracted* from everyday situations.

[58] This is the first case in which this Court has been squarely called upon to interpret s. 16(3) of the *Canada Evidence Act* and confront the legacy of the *obiter dicta* in *Khan*. In my view, the test proposed in *Khan* is unhelpful and inapplicable, insofar as it is read as requiring or condoning an abstract inquiry into the nature of the obligation to tell the truth.

[59] First and foremost, *Khan* was concerned with a substantially different pre-1987 version of s. 16, which was adopted in 1893 and which explicitly required that the proposed witness "understands the duty of speaking the truth". The current provision requires only that the witness be able to communicate the evidence and promise to tell the truth. It speaks only of two practical, less abstract, requirements — the ability to communicate the evidence and a promise to tell the truth. In short, *Khan* imposed a requirement to demonstrate understanding of the nature of the obligation to tell the truth, based on the phrase "understands the duty of speaking the truth". That phrase has been removed from the current s. 16(3). It follows that *Khan*

simply does not apply to this case, and that the *obiter dictum* in *Khan* suggesting that it does should be rejected. In 1987, Parliament deleted the requirement of understanding the nature of the duty to tell the truth. Judges should not bring it back in.

[60] Second, the *Khan* test, as already noted, is ambivalent. It first suggests that all that is required is an understanding of the duty to speak the truth "in terms of ordinary everyday social conduct" (p. 206). However, it then goes on to illustrate this test in terms abstracted from everyday social conduct. In my view, the former approach is preferable.

[61] This lower threshold recognizes that witnesses of limited mental ability, whether by reason of age or disability, understand and articulate events in the concrete terms of the world around them. The capacity to abstract from the concrete and draw generalizations about conduct unrelated to concrete situations typically develops at a later, more advanced stage of mental development. A child or adult with mental disabilities may be able to distinguish between what is true and false or right and wrong in a particular situation, yet lack the ability to articulate in general language the reasons for this understanding. To insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations, may result in the witness's evidence being excluded, even though it is reliable.

[62] Third, as discussed above, Parliament's response to *Khan*'s insistence on an understanding of the duty to speak the truth in abstract terms and the metaphysical questioning this insistence gave rise to, was to expressly forbid such inquiries in the case of children by enacting s. 16.1(7) in 2005. Why then, one may ask, should courts struggle to read a contrary purpose into the plain language of s. 16, which requires only a concrete inquiry into whether the proposed witness can communicate the evidence and a promise to tell the truth?

[63] I conclude that, insofar as the authorities suggest that "promising to tell the truth" in s. 16(3) should be read as requiring an abstract inquiry into an understanding of the obligation to tell the truth, they should be rejected. All that is required is that the witness be able to communicate the evidence and promise to tell the truth.

D. *Policy Considerations*

[64] I have concluded that s. 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct an abstract inquiry into whether the witness generally understands the difference between truth and falsity and the obligation to give true evidence in court. Mentally limited people may well understand the difference between the truth and a lie and know they should tell the truth, without being able to

articulate in general terms the nature of truth or why and how it fastens on the conscience in a court of law. Section 16(3), in assessing the witness's capacity, focuses on the concrete acts of communicating and promising. The witness is not required to explain the difference between the truth and a lie, or what makes a promise binding. I have argued that this result follows from the plain words of s. 16 of the *Canada Evidence Act*, and that judges should not by implication add other elements to the dual requirements of an ability to communicate evidence and a promise to tell the truth imposed by s. 16(3).

[65] The discussion of the proper interpretation of s. 16(3) of the *Canada Evidence Act* would not be complete, however, without addressing the policy concerns underlying the issue. Two potentially conflicting policies are in play. The first is the social need to bring to justice those who sexually abuse people of limited mental capacity — a vulnerable group all too easily exploited. The second is to ensure a fair trial for the accused and to prevent wrongful convictions.

[66] The first policy consideration is self-evident and requires little amplification. Those with mental disabilities are easy prey for sexual abusers. In the past, mentally challenged victims of sexual offences have been frequently precluded from testifying, not on the ground that they could not relate what happened, but on the ground that they lacked the capacity to articulate in abstract terms the difference between the truth and a lie and the nature of the obligation imposed by promising to tell the truth. As discussed earlier, such witnesses may well be capable of telling the

truth and in fact understanding that when they do promise, they should tell the truth. To reject this evidence on the ground that they cannot explain the nature of the obligation to tell the truth in philosophical terms that even those possessed of normal intelligence may find challenging is to exclude reliable and relevant evidence and make it impossible to bring to justice those charged with crimes against the mentally disabled.

[67] The inability to prosecute such crimes and see justice done, whatever the outcome, may be devastating to the family of the alleged victim, and to the victim herself. But the harm does not stop there. To set the bar too high for the testimonial competence of adults with mental disabilities is to permit violators to sexually abuse them with near impunity. It is to jeopardize one of the fundamental desiderata of the rule of law: that the law be enforceable. It is also to effectively immunize an entire category of offenders from criminal responsibility for their acts and to further marginalize the already vulnerable victims of sexual predators. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse.

[68] What then of the policy considerations on the other side of the equation? Here again, the starting point is clear. The *Canadian Charter of Rights and Freedoms* guarantees a fair trial to everyone charged with a crime. This right cannot be abridged; an unfair trial can never be condoned.

[69] It is neither necessary nor wise to enter on the vast subject of what constitutes a fair trial. One searches in vain for exhaustive definitions in the jurisprudence. Rather, the approach taken in the jurisprudence is to ask whether particular rules or occurrences render a trial unfair. It is from that perspective that we must approach this issue in this case.

[70] The question is this: Does allowing an adult witness with mental disabilities to testify when the witness can communicate the evidence and promises to tell the truth render a trial unfair? In my view, the answer to this question is no.

[71] The common law, upon which our current rules of evidence are founded, recognized a variety of rules governing the capacity to testify in different circumstances. The golden thread uniting these varying and different rules is the principle that the evidence must meet a minimal threshold or reliability as a condition of being heard by a judge or jury. Generally speaking, this threshold of reliability is met by establishing that the witness has the capacity to understand and answer the questions put to her, and by bringing home to the witness the need to tell the truth by securing an oath, affirmation or promise. There is no guarantee that any witness — even those of normal intelligence who can take the oath or affirm — will in fact tell the truth, all the truth, or nothing but the truth. What the trial process seeks is merely a basic indication of reliability.

[72] Many cases, including *Khan*, have warned against setting the threshold for the testimonial competence too high for adults with mental disabilities: *R. v. Caron* (1994), 72 O.A.C. 287; *Farley*; *Parrott*. This reflects the fact that such witnesses may be capable of giving useful, relevant and reliable evidence. It also reflects the fact that allowing the witness to testify is only the first step in the process. The witness's evidence will be tested by cross-examination. The trier of fact will observe the witness's demeanour and the way she answers the questions. The result may be that the trier of fact does not accept the witness's evidence, accepts only part of her evidence, or reduces the weight accorded to her evidence. This is a task that judges and juries perform routinely in a myriad of cases involving witnesses of unchallenged as well as challenged mental ability.

[73] The requirement that the witness be able to communicate the evidence and promise to tell the truth satisfies the low threshold for competence in cases such as this. Once the witness is allowed to testify, the ultimate protection of the accused's right to a fair trial lies in the rules governing admissibility of evidence and in the judge's or jury's duty to carefully assess and weigh the evidence presented. Together, these additional safeguards offer ample protection against the risk of wrongful conviction.

E. *Summary of the Section 16(3) Test*

[74] To recap, s. 16(3) of the *Canada Evidence Act* imposes two conditions for the testimonial competence of adults with mental disabilities:

(1) the witness must be able to communicate the evidence; and

(2) the witness must promise to tell the truth.

Inquiries into the witness's understanding of the nature of the obligation this promise imposes are neither necessary nor appropriate. It is appropriate to question the witness on her ability to tell the truth in concrete factual circumstances, in order to determine if she can communicate the evidence. It is also appropriate to ask the witness whether she in fact promises to tell the truth. However, s. 16(3) does not require that an adult with mental disabilities demonstrate an understanding of the nature of the truth *in abstracto*, or an appreciation of the moral and religious concepts associated with truth telling.

[75] The following observations may be useful when applying s. 16(3) in the context of s. 16 of the *Canada Evidence Act*.

[76] First, the *voir dire* on the competence of a proposed witness is an independent inquiry: it may not be combined with a *voir dire* on other issues, such as the admissibility of the proposed witness's out-of-court statements.

[77] Second, although the *voir dire* should be brief, it is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. A witness should not be found incompetent too hastily.

[78] Third, the primary source of evidence for a witness's competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner.

[79] Fourth, the members of the proposed witness's surrounding who are personally familiar with her are those who best understand her everyday situation. They may be called as fact witnesses to provide evidence on her development.

[80] Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.

[81] Sixth, the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence?

[82] Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate

concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements.

[83] Finally, the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

III. Application

[84] During the *voir dire* on K.B.'s testimonial capacity, the Crown posed a line of questions going to whether she could tell the difference between true and false factual statements in concrete circumstances. These were relevant to K.B.'s basic ability to communicate the evidence:

> **MR. SEMENOFF:**
>
> **Q.** How old are you now, [K.B.]?
>
> **A.** I'm 22, you know that.
>
> **Q.** 22? When's your birthday?
>
> **A.** [Birth date].
>
> **Q.** [Birth date]. Are you going to school now or are you done with school?
>
> **A.** I'm not done in school yet.
>
> **Q.** What school do you go to, [K.B.]?
>
> **A.** [Name of school].
>
> **Q.** How long -- do you know how long you've been going to [name of school]?

A. I don't know.

Q. Did you go to any school before you went to [name of school]?

A. From [name of previous school].

Q. From [name of previous school]. Okay. Did you have a teacher from that school, a Ms. [W.]?

A. Ms. [R.].

Q. Oh, [R.]. Okay. And I call her Ms. [W.], do you know what her name is, is it [R.] or is it Ms. [W.]?

A. [R.].

Q. Okay.

. . .

Q. [K.B.], if I were to tell you that the room that we're in that the walls in the room are black[,] would that be a truth or a lie, [K.B.]?

A. A lie.

Q. Why would it be a lie?

A. It's different colours in here.

Q. There are different colours in here. What colour are the walls?

A. Purple.

Q. Purple. Okay. If I were to tell you that the gown that I'm wearing that that is black, would that be a truth or a lie?

A. The truth.

Q. And why is that?

A. I don't know.

Q. You don't know. Is it a good thing or a bad thing to tell the truth?

A. Good thing.

Q. Is it a good thing or a bad thing to tell a lie?

A. Bad thing.

(A.R., vol. I, at pp. 111-13)

However, the trial judge went on to question K.B. on her understanding of the meaning of truth, religious concepts, and the consequences of lying.

[THE COURT:]

[Q.] Do you go to church, [K.B.]?

A. No.

Q. No. Have you ever been taught about God or anything like that?

A. No.

Q. No? All right. What happens if you steal something?

A. I don't know.

Q. You don't know. If you steal something and no one sees it, will anything happen to you? Nothing will happen. Why won't anything happen?

A. I don't know.

Q. You don't know. Tell me what you think about the truth.

A. I don't know.

Q. You don't know. All right. Is it important to tell the truth?

A. I don't know.

Q. You don't know. Tell me what a promise is when you make a --

A. I don't know.

Q. -- promise. What's a promise?

A. I don't know.

Q. You don't know what a promise is. Okay. Have you ever been in court before?

A. Once.

Q. Once? And do you think it's an important thing to be in court?

A. I don't know.

Q. You don't know. All right. Do you know what an oath is, to take an oath?

A. I don't know.

Q. No. Do you have any idea what it means to tell the truth?

A. I don't know.

Q. You don't know. If you tell a lie does anything happen to you? Nothing happens.

A. No.

. . .

[THE COURT:]

[Q.] Do you know why you're here today?

A. I don't know. To talk about [D.A.I.].

Q. Yes, and do you think that's really important?

A. Maybe yeah.

Q. Maybe yeah? Remember earlier I was asking you about a promise?

A. No.

Q. Have you ever made a promise to anybody?

A. I don't know.

Q. That you promised you'll be good, did you ever say that? Have you ever heard that expression "I promise to be good, mommy"?

A. Okay.

Q. All right. So do you know what a promise is, that you're going to do something the right way? Do you understand that?

A. Okay.

Q. Can you tell me whether you understand that, [K.B.]?

A. I don't know.

Q. Does anything happen if you break a promise?

A. I don't know.

Q. You told me you don't go to church, right?

A. Right.

Q. And no one has ever told you about God; is that correct? No one has ever told you about God?

A. No.

Q. Has anyone ever told you that if you tell big lies you'll go to jail?

A. Right.

Q. If you tell big lies will you go to jail?

A. No.

(*Ibid.*, at pp. 117-19 and 155-56)

[85] As these passages demonstrate, the trial judge was not satisfied with the Crown's questions on K.B.'s ability to recount events and distinguish between telling the truth and lying in concrete, real-life situations. He went on to question her on the nature of truth, religious obligations and the consequences of failing to tell the truth. Because K.B. was unable to satisfactorily answer these more abstract questions, he ruled that she could not be allowed to promise to tell the truth and refused to allow her to testify.

[86] This ruling was based on an erroneous interpretation of s. 16(3), which the trial judge read as requiring an understanding of the duty to speak the truth. Hence, K.B. was precluded from testifying on promising to tell the truth. The trial judge summed up his conclusions as follows:

> Having questioned [K.B.] at length I am fully satisfied that [K.B.] has not satisfied the prerequisite that she understands the duty to speak to the truth. She cannot communicate what truth involves or what a lie involves, or what consequences result from truth or lies, and in such circumstances, quite independent of the evidence of [Dr. K.], I am not satisfied that she can be permitted to testify under a promise to tell the truth. [Emphasis added; *ibid.*, at p. 3.]

[87] The fatal error of the trial judge is that he did not consider the second part of the test under s. 16. He failed to inquire into whether K.B. had the ability to communicate the evidence under s. 16(3), insisting instead on an understanding of the duty to speak the truth that is not prescribed by s. 16(3). This error, an error of law, led him to rule K.B. incompetent and hence to the total exclusion of her evidence from the trial. This fundamental error vitiated the trial.

[88] This fundamental flaw in the trial cannot be rectified by comments made by the trial judge at other points in the trial or by the doctrine of deference. My colleague Binnie J. suggests that the trial judge's comments during the *voir dire* and hearing on hearsay admissibility (paras. 136, 138 and 139) support his conclusion on the earlier *voir dire* that K.B. was not competent to testify under s. 16(3). However, it is difficult to see how subsequent comments in the course of dealing with other issues

could rehabilitate the trial judge's erroneous application of the requirements for competence under s. 16. The *voir dire* on competence and the *voir dire* on the admissibility of hearsay evidence were two different inquiries. The evidence of Ms. W., on which the trial judge relied in making the comments regarding hearsay, was not before the trial judge when he ruled K.B. incompetent to testify. Moreover, the threshold of reliability for hearsay evidence differs from the threshold ability to communicate the evidence for competence; a ruling on testimonial capacity cannot be subsequently justified by comments in a ruling on hearsay admissibility. Had the competence hearing been properly conducted, this might have changed the balance of the trial, including the hearing (if any) on hearsay admissibility. The trial judge's fundamental error in the s. 16 inquiry on competence cannot be corrected by speculation based on comments made in a different inquiry.

[89] Nor does the ruling that K.B. was incompetent, based as it was on a misstatement of the legal test under s. 16(3), attract deference. This amounted to an error of law, to be judged on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26-37. The defect in the trial judge's ruling cannot, in my view, be cured.

[90] I would allow the appeal, set aside the acquittal, and direct a new trial.

The reasons of Binnie, LeBel and Fish JJ. were delivered by

[91] BINNIE J. (dissenting) — I agree with the Chief Justice that, in this case, "[t]wo potentially conflicting policies are in play", the first being to "bring to justice" those accused of sexual abuse and the second being "to ensure a fair trial for the accused and to prevent wrongful convictions" (para. 65). In my view, by turning Parliament's direction permitting a person "whose mental capacity is challenged" to testify only "on promising to tell the truth" into an empty formality — a mere mouthing of the words "I promise" without any inquiry as to whether the promise has any significance to the potential witness — the majority judgment unacceptably dilutes the protection Parliament intended to provide to accused persons.

[92] I prefer the contrary interpretation of s. 16(3) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, expressed by our Chief Justice herself in her concurring judgment in *R. v. Rockey*, [1996] 3 S.C.R. 829, where, as McLachlin J., drawing a distinction between "the ability to communicate the evidence and the ability to promise to tell the truth" (para. 25), wrote:

> The only inference that can be drawn from this evidence is that while [the potential witness] Ryan understood the difference between what is "so" and "not so", he had no conception of any moral obligation to say what is "right" or "so" in giving evidence or otherwise. In these circumstances, no judge could reasonably have concluded that Ryan was able to promise to tell the truth. [Emphasis added; para. 27.]

McLachlin J.'s views on the requirements of s. 16(3) were not disagreed with by the majority, and indeed on this point she simply reflected the Court's earlier unanimous opinion in *R. v. Khan*, [1990] 2 S.C.R. 531, at pp. 537-38.

[93] The majority judgment in the present case repudiates the earlier jurisprudence and the balanced approach it achieved. It entirely eliminates any inquiry into whether the potential witness has any "conception of any moral obligation to say what is 'right'".

[94] I agree with the Chief Justice that "allowing the witness to testify is only the first step in the process" (para. 72). More particularly, my colleague continues:

> The witness's evidence will be tested by cross-examination. The trier of fact will observe the witness's demeanour and the way she answers the questions. [*Ibid*.]

In this case, the exchanges between the challenged witness, K.B., and the trial judge, demonstrated the futility of any such cross-examination. The trial judge noted that K.B. "did not 'compute' questions before giving answers, that she was not processing the information being communicated to her, and that she had serious problems relating to her ability to communicate and to recollect" (2008 CanLII 21726 (Ont. S.C.J.) (the "hearsay decision"), at para. 7). As a practical matter, it is not possible to cross-examine such a witness meaningfully. The trial judge concluded correctly on this point that "there is no secure method of testing K.B.'s credibility" (para. 56). The result of the majority judgment in this case is to create unfair prejudice to the accused.

[95] What is fundamental, as was emphasized here by the Ontario Court of Appeal, is that the trial judge had the opportunity to observe the witness's demeanour and the way she answers the questions (McLachlin C.J., at para. 72). We do not have that advantage. The trial judge concluded, based on his direct observation, that, in light of the severity of her mental disability, K.B.'s evidence could not be relied upon for the truth-seeking purposes of a criminal trial and it ought to be altogether excluded. In a judge-alone trial, it goes without saying, where the trial judge found that K.B.'s testimony did not meet even a threshold of admissibility, he would not — had the evidence been admitted — have accepted it as the basis for a proper conviction. An acquittal was inevitable.

[96] In the result, despite all the talk in our cases of the need to "defer" to trial judges on their assessment of mental capacity, a deference which, in my opinion, is manifestly appropriate, the majority judgment shows no deference to the views of the trial judge whatsoever and orders a new trial. I am unable to agree. I therefore dissent.

I. Judicial History

A. *Ontario Superior Court of Justice, 2008 CanLII 21726 (the "Hearsay Decision")*

[97] The Chief Justice has set out the substance of the trial judge's ruling. I should add that he found numerous contradictions in K.B.'s testimony. For example,

K.B. testified that she had told her mother about D.A.I. touching her, but her mother contradicted this (para. 38). With respect to the out-of-court statements, the trial judge expressed serious concerns about the truth of the statements based on K.B.'s "serious problems in communicating her evidence, her incapacity to answer relatively simple questions surrounding the allegations, her confusion with respect to whether or not she spoke to her mother" (para. 53 (emphasis added)). He also noted the testimony of K.B.'s teacher that K.B.'s mother had told her that she viewed K.B.'s story with "disbelief" (para. 54). Given the close relationship between K.B. and the respondent D.A.I., the trial judge found that "[w]hat may have been innocent in intent has the potential to be misinterpreted" (para. 55).

[98] The trial judge concluded:

> I am convinced that to admit K.B.'s statement for its truth would effectively deprive the court of any reliable method of testing its truth. It is clear from the short cross-examination undertaken . . . at the preliminary inquiry, there is no secure method of testing K.B.'s credibility. . . . What the Crown purports to be confirmatory evidence is either ambiguous or itself unreliable. [Emphasis added; para. 56.]

B. *Ontario Court of Appeal, 2010 ONCA 133, 260 O.A.C. 96 (Doherty, MacPherson and Armstrong JJ.A.)*

[99] Doherty and MacPherson JJ.A. applied a "very deferential" standard of review to the trial judge's assessment under s. 16, noting that the trial judge heard not only what the proposed witness said, but also how it was said (paras. 20-21). In their

view, Parliament chose to create a new testimonial competence test for children but to limit it so as only to apply to children under 14 (para. 41). For whatever reason, Parliament intended to treat children and adults with a mental disability differently when it comes to testimonial competence (para. 43).

[100] The Court of Appeal also held that the trial judge had correctly rejected the confirmatory evidence tendered by the Crown, namely K.B.'s sister's evidence and the photograph found in the respondent's bedroom (para. 50). He had carefully considered the sister's testimony, but decided that it was unreliable. The trial judge had also found that the respondent's explanation that K.B. flashed him when he took the photograph could have been true. Doherty and MacPherson JJ.A., speaking for a unanimous Court of Appeal, held that both of these conclusions were open to the trial judge (*ibid.*). The appeal was accordingly dismissed.

II. Analysis

[101] The substantial issue in this appeal concerns the correctness of the trial judge's approach to assessment of the testimonial capacity of the complainant, K.B. The admissibility of her evidence turns on the interpretation of the rules established by Parliament in s. 16 of the *Canada Evidence Act*, which delineates the circumstances in which a proposed witness "of fourteen years of age or older whose mental capacity is challenged" may or may not testify.

[102] A trial judge is faced with three options. If the challenged witness is "able to communicate the evidence" and "understands the nature of an oath or a solemn affirmation", the person "shall testify under oath or solemn affirmation" (s. 16(2)). A person who satisfies the first criterion ("able to communicate the evidence") but not the second (i.e. does not understand "the nature of an oath or a solemn affirmation") may provide unsworn testimony "on promising to tell the truth" (s. 16(3)). A person who does not satisfy either criterion "shall not testify" (s. 16(4)).

[103] The few questions posed by the trial judge touching on religion in this case were relevant to the first option of having K.B. testify under oath or affirmation which, as the Chief Justice recognizes, is the "preferred option" (para. 31). If the trial judge had found that K.B. understood the nature of the oath, he would have been obliged to have her testimony given under oath. It was proper for the trial judge to test K.B.'s ability to satisfy this standard rather than assuming, on account of her mental disability, that she would fail the s. 16(1) test.

[104] As to the second option (unsworn evidence), it is clear that Parliament did not consider an ability to communicate the evidence to be the sole and sufficient condition of admissibility. A person giving unsworn testimony must nevertheless promise to tell the truth, and this additional requirement is not, in my view, an empty formality but is intended to bolster the court's effort to establish the true facts and to protect the legitimate interest of the accused to a fair trial.

[105] I agree with the Chief Justice that "[p]romising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose" (para. 36). I do not agree with my colleague, however, that it is out of bounds for a trial judge to try to determine — in concrete everyday terms — whether there is in reality such a "prophylactic" effect in the case of a particular witness whose mental capacity has been challenged. If such a witness is so disabled as not to understand "the seriousness of the situation and the importance of being careful and correct", there is no prophylactic effect, and the fair trial interests of the accused are unfairly prejudiced.

A. *The Khan Test*

[106] It is, of course, true that an inability to deal with concepts ("oaths", "solemn affirmations" and "promises") does not mean that a person suffering from a mental disability is by that fact unable to relate the factual events that he or she encountered. Many individuals whose mental capacity is not open to challenge may have difficulty giving a correct explanation of these concepts.

[107] In an effort to solve this dilemma, this Court in *Khan* adopted the approach formulated by Robins J.A. in *Khan* when it was before the Ontario Court of Appeal ((1988), 42 C.C.C. (3d) 197, at p. 206):

> To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so. [Emphasis added.]

This approach (adopted at a time before the *Canada Evidence Act* introduced its present distinction between children and adults with challenged mental capacity) gives meaningful content to the statutory language while recognizing that the "simple line of questioning" is to be factual, not metaphysical.

[108] It is true, as the Chief Justice points out, that *Khan* was decided under an earlier version of s. 16 which referred expressly to "the duty of speaking the truth". However, as both *Khan* and McLachlin J. in *Rockey* were at pains to point out, those words were not interpreted as contemplating an abstract inquiry. In *Rockey*, decided at a time when s. 16(3) read the same as it does now, McLachlin J. insisted on a determination of "the ability to promise to tell the truth" (para. 25 (emphasis added)), but not as the mere physical ability of a potential witness to say the words. In that case, the child witness was not called to testify and the issue was whether his out-of-court statements could nevertheless be admitted against the accused under the principled hearsay exception. To do so required a demonstration of necessity and reliability. McLachlin J. held that "necessity" was established. In her view, the child was incompetent to testify under s. 16(3) because, not only was it "unrealistic to conclude that Ryan could have communicated his evidence in any useful sense either

in the courtroom or in a smaller room via closed circuit television", but, as stated, because "no judge could reasonably have concluded that Ryan was able to promise to tell the truth" (paras. 26-27). Although Parliament had by that time eliminated the words "duty of speaking the truth" from s. 16(3), McLachlin J. nevertheless concluded that the words "on promising to tell the truth" incorporated the understanding in practical terms of a "moral obligation to say what is 'right'" (para. 27).

[109] In the result, the child was held under s. 16(3) to be incompetent to testify. The necessity for the hearsay evidence was therefore established. His out-of-court evidence was admitted and the accused was convicted.

[110] There is nothing in McLachlin J.'s reasons in *Rockey* to suggest that the "ability to promise to tell the truth" is to be ascertained on a "don't ask" basis, i.e. not to endeavour to determine whether the potential witness has any sense of what it means in simple concrete terms to promise to tell the truth. On the contrary, McLachlin J. rested her conclusion on the evidence heard by the trial judge concerning the ability of the potential witness to explain events and to understand the difference in practical terms between telling the truth and lying.

[111] Nor was it suggested in *Rockey* that, by insisting on "the ability" to make the promise, McLachlin J. was reading extraneous words into the statute, which is now the cornerstone of the majority judgment in this case. The making of a promise

is not just a physical act. The question is whether the potential witness recognizes a sense of obligation, however articulated or unarticulated, to stick to the truth. This interpretation was consistent with the Parliamentary record which, as we will see, demonstrates a legislative intention under s. 16(3) that a trial judge be satisfied that a witness — as a condition precedent to testimonial capacity — understands the difference in practical everyday terms between telling the truth and not telling the truth.

[112] Of course, there are witnesses who suffer no mental disability and who recognize perfectly well that they are undertaking an obligation to tell the truth but nevertheless do not do so. That is a different problem. Their mental capacity is not in issue. In their case, the courts rely on cross-examination and other techniques to ferret out the truth. In the case of K.B., there was no allegation whatsoever of bad faith, but she may nevertheless have been mistaken in her perception or recollection of events, and the crucible of cross-examination was considered by the trial judge to be useless because, as stated, he found that "there is no secure method of testing K.B.'s credibility" (hearsay decision, at para. 56).

[113] The *Khan* test specifically framed the inquiry as being into "ordinary everyday social conduct" (C.A., at p. 206). At no point did this Court in *Khan* or McLachlin J. in *Rockey* require that the potential witness be able to *articulate* or even understand in the abstract concepts such as oaths, affirmations or promises. Leaving aside McLachlin J.'s reference to a "moral obligation" in *Rockey* — which, if

anything, proposed a more strict test for admissibility than the Court's judgment in *Khan* — if it appears to the trial judge that the potential witness whose mental capacity is challenged has demonstrated an understanding of a promise to tell the truth in terms of ordinary, everyday social conduct, the witness has met the test for giving unsworn testimony. The same would be true in my view of a witness who understands the seriousness of the situation and "the importance of being careful and correct", to use the Chief Justice's words in this case (para. 36). However, even this approach could not be satisfied by K.B. according to the trial judge who was uniquely placed to observe her demeanour.

[114] I respectfully disagree with the Chief Justice's characterization of *Khan* as insisting "on an understanding of the duty to speak the truth in abstract terms and the metaphysical questioning this insistence gave rise to" (para. 62). The *Khan* test, in my view, did just the opposite. In that case, Robins J.A. found that the trial judge had erroneously applied the standards applicable to a child giving sworn testimony to a situation in which only the unsworn testimony of a child was sought and to which less onerous standards were applicable. Robins J.A. underscored the difference between the two standards in no uncertain terms:

> An appreciation of the assumption of "a moral obligation" or "getting a hold on the conscience of the witness" or . . . an "appreciation of the solemnity of the occasion" or an awareness of an added duty to tell the truth over and above the ordinary duty to do so are <u>all matters involving abstract concepts which are not material to a determination of whether a child's unsworn evidence may be received</u>. A child need not comprehend "what it is to tell the truth in court" or to appreciate "what happens when

> you tell a lie in the courtroom" before he or she can give unsworn evidence. [Emphasis added; emphasis in original deleted; pp. 205-6.]

Therefore, I have no disagreement with the Chief Justice insofar as she affirms the existing law that the judge's inquiry should not ask the potential witness to "articulate abstract concepts" (para. 31) or tell what "the truth means in abstract terms" (para. 35) or venture into "abstract, philosophical realms" (para. 56) or conduct "an abstract inquiry into the nature of the obligation to tell the truth" (para. 58). Nor did *Khan*, or McLachlin J. in *Rockey*, in my view, "insist on the articulation of the nature of the obligation to tell the truth, abstracted from particular situations" (para. 61). On the contrary, it seems to me that *Khan* affirms — not denies — that "[i]t is unnecessary and indeed undesirable to conduct an abstract inquiry" (para. 64). At no point does *Khan* require an explanation of "the nature of the obligation to tell the truth in philosophical terms" (para. 66). The reasons of McLachlin J. in the later case of *Rockey* expressed no disagreement with the *Khan* approach. It is the present majority opinion that effects a marked departure from the existing jurisprudence.

B. *An Issue of Statutory Interpretation*

[115] The bottom line of the majority judgment in this case is that s. 16(3) precludes a court from conducting an inquiry into whether (as McLachlin J. in *Rockey* put it) the proposed witness has "the ability to promise to tell the truth" (para. 25). This is based, it is said, on "[t]he first and cardinal principle of statutory interpretation [which] is that one must look to the plain words of the provision. Where ambiguity

arises, it may be necessary to resort to external factors to resolve the ambiguity . . . . Section 16 shows no ambiguity" (McLachlin C.J., at para. 26).

[116] A more contextual approach to statutory interpretation has been emphasized by our Court on numerous occasions in recent years, as set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, quoting Professor Driedger:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

[117] Leaving aside for the moment the amendments relating to children in s. 16.1 added by the 2005 amendments, the relevant "three options" for persons with mental disability are set out in s. 16(1) to (4) as follows:

> **16.** (1) [Witness whose capacity is in question] If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
>
> (*a*) whether the person understands the nature of an oath or a solemn affirmation; and
>
> (*b*) whether the person is able to communicate the evidence.
>
> (2) [Testimony under oath or solemn affirmation] A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

> (3) [Testimony on promise to tell truth] A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.
>
> (4) [Inability to testify] A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.
>
> (5) [Burden as to capacity of witness] A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

[118] Section 16 mandates only one "inquiry" by the trial judge in dealing with a witness "whose mental capacity is challenged". Section 16(3) is simply part of a single evaluation in which the trial judge considers the gamut from permitting the challenged witness to testify under oath to not being able to testify at all.

[119] As to whether the expression "promising to tell the truth" means more than the mere verbal ability to mouth the words I refer to what McLachlin J. herself said in *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 236: "The phrase 'communicate the evidence' indicates more than mere verbal ability." Equally, it seems to me, the requirement that a witness promise to tell the truth requires more than "mere verbal ability" to say the words. The trial judge is required to ascertain whether the witness possesses not only the "mere verbal ability" but understands "in ordinary, everyday terms" the difference between truth and fiction and the importance of sticking to the former in his or her testimony.

[120] In the initial version of s. 16 proposed by the government, there appeared a requirement that a child be "of sufficient intelligence" to testify. This was deleted. The Chief Justice suggests that the record of the Legislative Committee on Bill C-15 shows that "sufficient intelligence" was essentially understood as the ability to appreciate the moral difference between telling the truth and lying (para. 29). I disagree. As I read the legislative record, the term "sufficient intelligence" was dropped from the draft bill because in the Committee's view it potentially risked being interpreted as requiring judges to evaluate a child witness's IQ rather than his or her capacity to communicate and understand the difference between truth and lies. The Parliamentarians were assured that s. 16(3), without the words "sufficient intelligence", still required that "the child understands the difference between telling the truth and lying", as demonstrated in the following exchange:

> **[The Hon. Mary] Collins:** Yes. However, if we leave in the "sufficient intelligence", and with the interpretation that has been given, I still feel that is going to be a potential barrier.
>
> **Mr. Pink:** It may be that the committee is going to have to decide on words other than "sufficient intelligence". What is the purpose of the query in the first place? Does it not really boil down to determining truth or falsehood? Is that not what it is all about?
>
> **[The Hon. Mary] Collins:** I would think so. Yes. So <u>if the child understands the difference between telling the truth and lying, that would seem to me to be all you would really need to find out</u>.
>
> **Mr. Pink:** I agree.
>
> **[The Hon. Mary] Collins:** Thank you. [Emphasis added; p. 27.]
>
> (House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986)

[121] This seems as clear a demonstration as one could ask for from the Parliamentary record that it was intended under s. 16(3) that the trial judge be satisfied that the witness "understands the difference between telling the truth and lying" (emphasis added). Nothing in the legislative record of the 1987 amendments suggests that the mere verbal ability to mouth the words of a promise would be sufficient.

[122] As to the "object of the Act", it seems clear that Parliament, in making the amendments to s. 16 in 1987 (S.C. 1987, c. 24), was attempting to strike a balance between access to justice and the rights of an accused in enacting s. 16 (*ibid.*, No. 1, November 27, 1986, at pp. 21, 24 and 33). A promise to tell the truth affords some protection to an accused, but not if "the promise" is reduced to an empty formality (or, to use McLachlin J.'s phrase in *Marquard*, to a "mere verbal ability" (p. 236)), which is the unfortunate result of the majority judgment in this case.

C. *The Proper Interpretation of Section 16(3) Was Not Altered by the 2005 Amendments Related to the Evidence of Children Under 14 Years Old*

[123] In 2005, Parliament amended the *Canada Evidence Act* with respect to the unsworn evidence of children based in part on the report of the Child Witness Project at Queen's University. I agree with the Chief Justice that "Parliament's concern in enacting the 2005 amendment to the *Canada Evidence Act* was exclusively with children. The changes arose out of the Bala Report on the problems associated with prosecuting crimes against children. The Parliamentary debates on s. 16.1 attest

to the fact that the focus of the 2005 amendment was on children, and only children" (para. 41 (emphasis added)).

[124] The 2005 amendments provide as follows (S.C. 2005, c. 32):

> **16.1** (1) [Person under fourteen years of age] A person under fourteen years of age is presumed to have the capacity to testify.
>
> (2) [No oath or solemn affirmation] A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
>
> (3) [Evidence shall be received] The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
>
> (4) [Burden as to capacity of witness] A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
>
> (5) [Court inquiry] If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
>
> (6) [Promise to tell truth] The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.
>
> (7) [Understanding of promise] No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
>
> (8) [Effect] For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

[125] The Crown acknowledges that there are "obvious distinctions" between Parliament's test for adults with limited mental capacity under s. 16 and children under 14 years of age under s. 16.1 (A.F., at para. 57). For adults, s. 16(3) retains the more expansive test developed in the jurisprudence regarding the ability to communicate the evidence: see *Marquard*. A child need only be able "to understand and respond to questions" (s. 16.1(5)). Section 16(1) retains the potential for a challenged adult to testify under oath, whereas s. 16.1(2) provides that a child witness shall *not* take an oath or make a solemn affirmation. The child, as in the case of the challenged adult, must promise to tell the truth (s. 16.1(6)), but s. 16.1(7) specifically prohibits asking children "any questions regarding their understanding of the nature of the promise to tell the truth". The Crown contends that research shows "that regardless of an inability to define these abstract concepts, the making of a promise to tell the truth by a child makes it more likely that a child will tell the truth" (A.F., at para. 79 (emphasis added)).

[126] I agree with the Chief Justice that the words "on promising to tell the truth" in s. 16(3) and s. 16.1(6) should receive the same interpretation. It is for that very reason that, in my view, Parliament felt it necessary in 2005 to introduce the s. 16.1(7) "don't ask" rule. Otherwise, the "simple line of questioning" to determine whether the potential witness understands "the seriousness of the situation and the importance of being careful and correct" would continue to apply to children under the 2005 amendments as well as to adults whose mental capacity is challenged. The point, however, is that s. 16.1(6), unlike s. 16(3), must be read together with s. 16.1(7)

(the "don't ask" rule), and s. 16.1(7) was limited to children because the empirical research related to "children, and only children". Thus, the witness from the Department of Justice told the Parliamentary Committee:

> Professor Bala's research seems to highlight that there's significance in giving that promise because children understand what a promise is all about. [Emphasis added; 17:20.]
>
> (House of Commons, *Evidence of the Standing Committee on Justice and Human Rights*, No. 77, 2nd Sess., 37th Parl., October 29, 2003)

Senator Landon Pearson emphasized the empirical foundation of the "don't ask" rule:

> I want to put on the record the degree to which this provision of the bill is based on a considerable body of research on the capacity of children to understand that when they say "I promise to tell the truth," that they know what they are doing. [Emphasis added; p. 19.]
>
> (Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 17, 1st Sess., 38th Parl., June 23, 2005)

No such empirical studies were carried out with respect to adults with mental disabilities. In their case, there was no "don't ask" equivalent to s. 16.1(7) even proposed, let alone adopted. As the Chief Justice emphasizes, the 2005 amendments deal with "children, and only children" (para. 41).

[127] The Crown invites us, in effect, to apply the "don't ask" rule governing children to adults whose mental capacity is challenged, despite evidence of legislative intent to the contrary. It does so on the basis that both are members of a "vulnerable

group" (A.F., at para. 58) and should be treated as equivalent. That is a policy argument for Parliament, not a change to be brought about by judicial amendment.

[128] The Chief Justice endorses a version of this equivalence argument in posing a rhetorical question:

> When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year-old with the mental capacity of a six-year-old? [para. 52]

In my view, the difference is that a six-year-old with the mental capacity of a six-year-old does not suffer from a mental disability. The fact that psychiatrists speak of persons with mental disabilities calibrated in terms of mental ages is a useful way of describing the relative extent and severity of a person's disability, but it does not mean that a 22-year-old woman with a severe mental disability is on the same footing as a six-year-old child with no mental disability whatsoever, and of course the empirical evidence before Parliament in 2005 did not suggest otherwise.

[129] The rhetorical question posed by the Chief Justice seeks to reverse the onus of proof. It *presumes* without proof the fact of equivalence and demands a rebuttal, but it was for the government to persuade Parliament, if it could, that there is no relevant difference between an adult with a severe mental disability and a child with no mental disability. It made no effort to do so because there was no evidence on which such an argument *could* have been made.

[130] No evidence was led in these proceedings to suggest equivalence and we cannot take judicial notice of alleged "facts" that are neither notorious nor easily verifiable from undisputed sources: *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 53. While greater latitude is allowed in the judicial notice of legislative facts (as opposed to adjudicative facts), it would still be necessary for the Crown to show that its assertion of equivalence of children and adults with a mental disability in this respect "would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the 'fact' to the disposition of the controversy" (*ibid.*, at para. 65 (emphasis deleted)). The Crown's assertion of equivalence is pure assertion on a key issue, and mere assertion does not meet the *Spence* standard.

[131] Section 16(3) *does not* require an inquiry into the proposed witness's understanding of the abstract "nature of the obligation to tell the truth". The argument about abstract concepts was rejected in *Khan* and by McLachlin J. in *Rockey*, and there is no need for the majority to resurrect it at this point for the sole purpose of rejecting it yet again. That is not a point of disagreement between us and should not be portrayed as such. Section 16(3) requires only the "ability to promise to tell the truth" (quoting *Rockey*) in terms of ordinary, everyday social conduct.

[132] It is the majority, not the minority here, that must resort to extraneous language not found in s. 16(3) to achieve the result it seeks. As stated, I agree with the Chief Justice that the words "on promising to tell the truth" in s. 16(3) must bear the same meaning as "to promise to tell the truth" in s. 16.1(6). That being the case, the majority must read the s. 16.1(7) "don't ask" rule applicable only to children into s. 16(3) applicable only to mentally challenged adults in order to read down the words "promising to tell the truth" in s. 16(3), and thus rob the words of s. 16(3) of their ordinary meaning, in my opinion.

[133] The Chief Justice refers to s. 45 of the federal *Interpretation Act*, R.S.C. 1985, c. I-21, for the proposition that no inference as to the meaning of s. 16(3) flows from the adoption of s. 16.1(7) with respect to children (para. 46). Professor P.-A. Côté puts the point somewhat differently:

> The provisions [s. 45] do not, for example, prevent interpreting the act of amendment as an expression of the legislature's opinion; they simply eliminate an *a priori* presumption ("shall not be deemed"). The context, or even the formulation (in the form of a preamble, for example), of an amendment is quite capable of marking a clear desire to change the state of the law.
>
> (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 569)

In any event, this is not the foundation of the respondent's argument. He relies on s. 16(3) as it was enacted in 1987. He does not rely, nor does he need to rely, on the 2005 amendments which, as the majority concedes, apply only to children.

D. *Was the Section 16(3) Test Misapplied in This Case?*

[134] The Crown contends that, even if the *Khan* test is affirmed, it was not applied properly in this case. Firstly, the trial judge should have sought assistance from individuals apart from Dr. K., a forensic psychiatrist called by the defence, whose evidence was, in any event, put aside by the trial judge as unnecessary. The trial judge did not hear from K.B.'s teacher or other support workers who were familiar with K.B.'s strengths and weaknesses for purposes of the s. 16 inquiry. The Crown argues that they could have assisted the court to pose questions in a way that K.B. was capable of dealing with. To do so could have disclosed K.B.'s true capacity to deal with concrete facts without the distraction of conceptual issues, which, as the *voir dire* confirmed, K.B. could not handle. Secondly, the Crown says that the trial judge, having chosen to proceed without such assistance, misdirected his questions to metaphysical issues which could not and did not provide the basis for a fair determination of K.B.'s mental capacity.

[135] I approach the trial judge's assessment of K.B. on the basis of "the ability to communicate the evidence and the ability to promise to tell the truth" (*Rockey*, at para. 25).

(1) <u>The Ability to Communicate the Evidence</u>

[136] The trial judge clearly had serious concerns about this first branch of the test. He reminded K.B.'s teacher, Ms. W., of testimony she had given at the preliminary inquiry, in which Ms. W. had said the following:

> If the purpose of her testifying is to determine the truth of what happened, her capacity to express her recollections could be severely limited. So the court may be asking her to do something that she can't do, and her failure to do that may skew her knowledge of what happened. In other words, the outcome — there's a potential for the outcome to not get at the truth, because of . . . her incapacity to express that. [Emphasis added; hearsay decision, at para. 4.]

This evidence, given earlier at the preliminary inquiry, was properly considered by the trial judge at the subsequent competency hearing.

[137] Moreover, during the competency *voir dire* itself, Dr. K., observing K.B.'s low tolerance for frustration, testified, "I don't think she has the ability to think what you're asking and come up with an answer" (A.R., vol. I, at p. 161). The expert also stated, as noted by the trial judge, and echoing the words in *Rockey*, that K.B. "had serious problems relating to her ability to communicate and to recollect" (hearsay decision, at para. 7 (emphasis added)). She could not adequately communicate evidence because, by reason of her mental disability, she was simply unable to "compute" what she was being asked.

[138] The accuracy of the trial judge's assessment of the extent of K.B.'s mental disability was corroborated and confirmed at subsequent stages of the trial. In

the course of her testimony at the hearsay *voir dire*, for example, Ms. W., K.B.'s teacher, referred to a statement K.B. had made to an educational assistant, claiming that she, K.B., had spent the weekend at the respondent's house (which was not true). Ms. W. said that if K.B. were asked what she had done that weekend, and replied "[D.A.I.]'s place", this might have meant that she had been *thinking about* D.A.I. and *wanted* to go to his place, not that she had gone there at all (A.R., vol. II, at pp. 25 and 27; see also p. 7). Communication of wishful thinking is not communication of evidence.

[139] Further, the trial judge, in rejecting K.B.'s out-of-court statements, adverted to the earlier observations that K.B. had "serious problems in communicating her evidence, her incapacity to answer relatively simple questions surrounding the allegations, her confusion with respect to whether or not she spoke to her mother" (hearsay decision, at para. 53 (emphasis added)).

[140] While it is true that the trial judge emphasized the second branch of the test (the ability to promise to tell the truth), his concerns about K.B.'s ability to communicate the evidence are plain and obvious and were in themselves sufficient to conclude that she lacked the capacity to testify by reason of her severe mental disability.

(2) The Ability to Promise to Tell the Truth

[141] As noted by the Chief Justice, this was the principal ground for the rejection of K.B.'s evidence. However, I believe, as did Doherty and MacPherson JJ.A., for a unanimous Court of Appeal, that this conclusion was certainly open to the trial judge on the evidence.

[142] At the competency hearing, Dr. K. counselled the trial judge that "when you ask about truth, honesty, lie, these are difficult concepts for anybody" (A.R., vol. I, at p. 137). The inquiry, he said, could better be pursued by asking K.B. what she had for breakfast or "other areas in her life, day to day events, and see whether she can understand what is true and what is lie" (p. 140). Such questions would yield an answer that could be verified one way or another (p. 145) and, according to Dr. K., could assist to "see whether she has any ability to discriminate between what is real or just come up with an answer kind of thing" (p. 137).

[143] Armed with this guidance, the trial judge embarked on a second round of questions to ascertain K.B.'s capacity. He asked K.B. a series of simple and concrete questions about her family, school, breakfast routine, and so on. He then posed the following questions to K.B. and received the following responses (*ibid.*, at pp. 155-56):

> **[THE COURT:]**
>
> **Q.** You don't know. Do you know why you're here today?
>
> **A.** I don't know. To talk about [D.A.I.].

Q. Yes, and do you think that's really important?

A. Maybe yeah.

Q. Maybe yeah? Remember earlier I was asking you about a promise?

A. No.

Q. Have you ever made a promise to anybody?

A. I don't know.

Q. That you promised you'll be good, did you ever say that? Have you ever heard that expression "I promise to be good, mommy"?

A. Okay.

Q. All right. So do you know what a promise is, that you're going to do something the right way? Do you understand that?

A. Okay.

Q. Can you tell me whether you understand that, [K.B.]?

A. I don't know.

Q. Does anything happen if you break a promise?

A. I don't know.

Q. You told me you don't go to church, right?

A. Right.

Q. And no one has ever told you about God; is that correct? No one has ever told you about God?

A. No.

Q. Has anyone ever told you that if you tell big lies you'll go to jail?

A. Right.

Q. If you tell big lies will you go to jail?

A. No.

Q. No?

THE COURT: Those are all the questions I'm going to pursue at this point.

The Crown also posed a second set of questions (*ibid.*, at pp. 156-58):

Q. We asked you the last time if you knew the difference between a truth and a lie, do you remember that, [K.B.]?

A. Yeah.

Q. Okay. We talked about the room and the colour of the room?

A. Sometimes.

Q. Okay.

Do you think it's important to tell the truth or do you think it matter (*sic*)?

A. Does it matter?

Q. It matters?

A. Does it matter?

Q. Does it matter. Do you understand when I say "matter", do you understand what that means?

A. I don't know.

. . .

Q. Okay. We talked about the room. If I were to say to you that you had eggs for breakfast would that be a truth or a lie?

A. I don't know.

Q. You don't know? How about lunch, if I said you had eggs for lunch, ---

A. Yuk.

Q. --- would that be a truth or a lie?

A. I don't know.

Q. You don't know? Okay.

A. It's getting hard.

Q. It's getting hard?

A. Yeah.

Q. Why is it getting hard?

A. I don't know why.

Q. You don't know. Okay.

MR. SEMENOFF: Thank you.

At the conclusion of K.B.'s testimony, the trial judge ruled her unsworn testimony to be inadmissible. He explained:

> What I'm saying is I wouldn't have to hear from [Dr. K.]. I've heard from him but it doesn't in any way add or detract or anything from the opinion I've come to, having watched and questioned this witness, which is my obligation.
>
> In other words, I suppose what I'm saying to you is I'm fully satisfied that this witness does not understand what a promise to tell the truth involves, has no concept of that. None. Zero. Then that's what this inquiry is about. [*Ibid.*, at p. 165]

Contrary to the majority opinion, I do not read the trial judge's assessment as based on K.B.'s inability to articulate concepts. It was based on her inability — by virtue of her mental disability — to "understand what a promise to tell the truth involves". The trial judge made the sort of practical inquiry in everyday terms that *Khan* required.

[144] This was a borderline case. The Crown complains that some of the questions were too abstract, while the question about going to church was beside the point once it became clear that K.B. would give testimony unsworn or not at all. The trial judge could certainly have proceeded further with pointed and concrete factual questions to get at the degree of K.B.'s disability but he saw and heard K.B. and clearly he believed that he had heard enough. Sitting on appeal with nothing but a bare transcript in front of us, in my opinion, we are not in a position to say that his appreciation of K.B.'s capacity was wrong.

(3) Conclusion on the Competency Issue

[145] Much of the dispute in this case turned on the significance of K.B.'s "I don't know" answers. Clearly, it was an important advantage for the trial judge to watch the questions and answers unfold and to assess whether K.B. was actually able to "compute" her responses to what she was being asked — a condition precedent, surely, to any ability to test her evidence by cross-examination. The trial judge observed K.B.'s demeanour as she struggled with the attempted dialogue. The trial judge was responsible for protecting the fair trial interests of the accused, as well as society's interest in the prosecution of crimes. The inability of K.B. to deal with simple questions would mean that her evidence — however erroneous it might be, and however much (to pick up on her teacher's observation) it might be the product of K.B.'s wishful thinking — would be effectively immune to challenge by the

defence, thereby prejudicing the interest of society as well as the accused in a fair trial.

[146] The teacher, Ms. W., thought that a skilled questioner who possessed direct personal knowledge of K.B. might be able to help K.B. overcome these limitations. On this view, a judge would need to rely on the teacher's guidance not only to formulate the questions, but also to interpret K.B.'s responses. Generally speaking, of course, only an expert witness can put opinions before the court and, even then, only when the trial judge would be unable to determine the issue in question properly without expert assistance: *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Parrott*, 2001 SCC 3, [2001] 1 S.C.R. 178. At the end of the day, it has to be the judge or jury — not the lay witness — to assess the witness's testimony.

[147] In *Parrott*, the complainant was a mature woman who was said to possess the mental development equivalent in some respects to that of a three- or four-year-old child. The Crown declined to call the complainant herself on the basis that a court appearance might cause her trauma or other adverse effects, and instead called expert witnesses to lay the foundation for the admission of her earlier out-of-court statements. In this context, we held that the experts could not be substituted for calling the complainant herself, but that

> [i]f she had been called and it became evident that the trial judge required expert assistance to draw appropriate inferences from what he had heard her say (or not say), or if either the defence or the Crown had wished to pursue the issue of requiring an oath or solemn affirmation, expert

> evidence might then have become admissible to assist the judge. [para. 52]

[148] I think we should go further in this case and hold that on a competency *voir dire* where the mental capacity of an adult is challenged and the adult is herself called as a proposed witness, the court may also admit evidence from *fact* witnesses personally familiar with the proposed witness's verbal and cognitive abilities and limitations to help the court gain a better understanding of the person's capacity. These witnesses, unlike Dr. K., would not be in a position to express an opinion, but could testify about their direct personal observations of the proposed witness. Such evidence might, if the trial judge considered it helpful, better enable the judge or jury to appreciate her responses (or non-responses) in the witness box.

[149] Ultimately, however, it is the judge who must reach his or her own considered opinion about the level of mental capacity of the proposed witness. Where, as in this case, the judge, after hearing from the proposed witness, considers the calling of additional fact witnesses to be unnecessary, I do not think we are in a position to second-guess that procedural conclusion.

[150] Accordingly, I would reject the Crown's appeal with respect to the trial judge's ruling that the unsworn evidence of K.B. is inadmissible. In his view, the quality of the proposed evidence did not meet the s. 16(3) threshold. Sitting on appeal from this determination, and not having had the advantage of observing and questioning K.B., I see no valid basis for reversing that evidentiary ruling.

E. *Admissibility of Out-of-Court Statements*

[151] The Crown contends that the trial judge erred by effectively deciding that K.B.'s testimonial incompetence predetermined the unreliability of her hearsay statements. The admissibility analysis in a hearsay *voir dire* is to be focused on whether the hearsay dangers have been overcome: *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787, at para. 71. These hearsay dangers include the inability to inquire into the declarant's perception, memory and credibility. The trial judge's conclusion in the competency hearing that K.B. lacked the ability to perceive, recall and communicate events and to understand the difference between truth and falsehood set up, but did not predetermine, the trial judge's conclusion that K.B.'s testimony lacked sufficient reliability. I agree with Doherty and MacPherson JJ.A., that "it is not surprising, and it is not an error, that the trial judge's reasoning on the issue of the threshold reliability in his hearsay ruling was quite similar to his reasoning on the *CEA* s. 16 voir dire" (para. 48). I would therefore not give effect to this ground of appeal.

III. Disposition

[152] I would dismiss the appeal.

APPENDIX A

Until 1987, s. 16 of the *Canada Evidence Act* provided:

> **16.** (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
>
> (2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

The origin of this provision, at stake in *Khan*, can be traced back to s. 25 of the *Canada Evidence Act*, *1893*, S.C. 1893, c. 31. This was the first instance in Canadian history that Parliament legislated on the testimonial competence of children. At the time however, and until 1987, no statutory provision addressed the capacity to testify of adults with mental disabilities. Section 25 of the 1893 *Canada Evidence Act* provided:

> **25.** In any legal proceeding where a child of tender years is tendered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.
>
> 2. But no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

On October 29, 1986, Minister of Justice Ramon Hnatyshyn presented the House of Commons with Bill C-15, *An Act to amend the Criminal Code and the Canada Evidence Act*. During the first reading of Bill C-15, cl. 17 proposed to repeal s. 16 of the *Canada Evidence Act* and to replace it with a new provision:

> **17.** Section 16 of the said Act is repealed and the following substituted therefor:
>
> "**16.** (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
>
> (*a*) whether the person understands the nature of an oath or a solemn affirmation; and
>
> (*b*) whether the person is sufficiently intelligent that the reception of the evidence is justified.
>
> (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is sufficiently intelligent that the reception of the evidence is justified shall testify under oath or solemn affirmation.
>
> (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is sufficiently intelligent that the reception of the evidence is justified may testify on promising to tell the truth.
>
> (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is sufficiently intelligent that the reception of the evidence is justified shall not testify.
>
> (5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation."

A crucial amendment, for present purposes, was made to the original text of Bill C-15 by the *ad hoc* Legislative Committee on Bill C-15. This amendment replaced the requirement to be "sufficiently intelligent" initially provided in Mr. Hnatyshyn's proposal with the criterion that the proposed witness be "able to communicate the evidence".

What is striking from the lengthy works of the Legislative Committee on Bill C-15 is the focus on the "ability to communicate the evidence" as the sole qualitative requirement for the competence of children or adults with mental disabilities who do not understand the nature of an oath. There is nothing in the record of the Committee which suggests that a "promise to tell the truth" also imposed an understanding of the nature of such a promise.

In fact, the requirement to be "sufficiently intelligent" in the original draft was understood by the Committee as requiring an understanding of the moral difference between telling the truth and lying. On December 4, 1986, the Committee held a discussion on the meaning of "sufficient intelligence". It came to the conclusion that all that was needed for a witness to be sufficiently intelligent was to understand the moral difference between telling the truth and lying:

> **Mr. Nicholson:** Well, that is the first test. I think the section Mrs. Collins referred to, proposed subsection 16(3) of our proposed section 16, says that if the person does not understand the nature of an oath, well it is fine, because it often happens that the children may not know the concept of God and hell and all that sort of thing. I have seen it happen in a trial, but if the person testifies on the promise of telling the truth then let the

judge after that just decide how much weight he or she will place on that evidence without making the other determination of "sufficient intelligence".

Mr. Pink: Under section 16 of the Canada Evidence Act it says:

. . .

Now, it has been my experience in determining the so-called "sufficient intelligence" — that is, when the judge goes through the series of questions he normally does about how far is he in school, how is he doing in school, and things of that sort, and he knows where he lives, he knows the difference between speaking the truth and speaking a falsity and things of that sort, then the judge concludes he is of sufficient intelligence, we will accept his evidence, but because he does not understand the nature of an oath, it will be unsworn evidence, that is all.

Mr. Nicholson: Do you think that is still a necessary element?

Mr. Pink: Absolutely.

Mr. Nicholson: Do you think it is important to have this, that we cannot just eliminate it and have the judge decide the weight that he gives to the evidence, which is basically what we do with adults?

Mr. Pink: I personally feel that before a child's evidence is received, he must understand the difference between telling the truth and a falsity; he has to know that before his evidence can be received.

. . .

Mrs. Collins: How do you deal with the problem of a mentally retarded child? We know that sometimes those children are the victims or are easily the victims of sexual abuse. Also, how do you deal then with children of very, very tender years, who we also know can be victimized by sexual abuse, three-year-olds?

Mr. Pink: First of all, I do not think you will ever see a three-year-old giving evidence. I have seen cases where mentally retarded children have in fact given evidence, because the judge was satisfied, after querying him, that he knew the difference between telling the truth or a falsehood. He knew it was right to tell the truth, he knew it was wrong to tell a lie. He did not understand the nature of an oath and all that, so his evidence was not sworn.

> **Mrs. Collins:** Yes. However, if we leave in the "sufficient intelligence", and with the interpretation that has been given, I still feel that is going to be a potential barrier.
>
> **Mr. Pink:** It may be that the committee is going to have to decide on words other than "sufficient intelligence". What is the purpose of the query in the first place? Does it not really boil down to determining truth or falsehood? Is that not what it is all about?
>
> **Mrs. Collins:** I would think so. Yes. So if the child understands the difference between telling the truth and lying, that would seem to me to be all you would really need to find out.
>
> **Mr. Pink:** I agree. [Emphasis added; pp. 26-27.]
>
> (House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15*, No. 2, 2nd Sess., 33rd Parl., December 4, 1986)

One week later, on December 11, 1986, the Legislative Committee on Bill C-15 heard evidence from Professor Nicholas Bala, then Director of the Canadian Council on Children and Youth. Professor Bala expressed his fears about the "sufficient intelligence" requirement for testimonial capacity as understood by the Committee, and he proposed replacing it with the ability to communicate criterion:

> **Dr. Nick Bala** . . .
>
> Our concern is that standard of sufficient intelligence. A layperson or indeed even a lawyer not familiar with the case law might think well, of course, you are not going to want to hear from a child not sufficiently intelligent enough to testify. But when one starts looking at the case law and when one realizes that the concept of "sufficient intelligence" is one which appears in the present section 16 of the Canada Evidence Act, one realizes it therefore will be brought to the courts with all the precedents decided and all the traditions decided. That will make it very difficult for children to testify; in particular children under 10 may well be considered, for example, to be of average intelligence, but not of sufficient intelligence to testify.

> Therefore we would submit that there should be another test, and the test we have suggested in our brief is a test of ability to communicate; that is to say the judge should be satisfied the child is able to communicate, and if the child seems able to communicate the case should be left to the trier of the fact, the jury or the judge. Obviously a prosecutor who is calling a child as a witness is not going to do that unless the prosecutor is satisfied the child has something to say of value and some recollection of the events, and is not going to be wasting everybody's time.
>
> (*Ibid.*, No. 3, 2nd Sess., 33rd Parl., December 11, 1986, p. 7)

The debates that followed in the Committee supported the view that it was not prudent to condition testimonial capacity on sufficiency of intelligence, which was conceived as including an understanding of the difference between truth and falsity. As a result, the Committee modified the proposed amendment to s. 16 of the *Canada Evidence Act* in order to replace the requirement of sufficient intelligence for ability to communicate the evidence, as was originally suggested by Professor Bala.

As such, s. 18 of the *Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, provided the following:

> **18.** Section 16 of the said Act is repealed and the following substituted therefor:
>
> "**16.** (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
>
> (*a*) whether the person understands the nature of an oath or a solemn affirmation; and

(*b*) whether the person is able to communicate the evidence.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation."

The amendment to Bill C-15 shows that Parliament did not intend children and adults with mental disabilities to be questioned on their understanding of the difference between truth and falsehood in order to testify.

Additionally, the fact that the legislative debates emphasized that ability to communicate was the qualitative condition for testimonial capacity under s. 16(3), and that no mention was made that promising to tell the truth required understanding of a promise to tell the truth, demonstrate the intent of Parliament that a mere promise would suffice.

APPENDIX B

The second important amendment to s. 16 of the *Canada Evidence Act* began in 2004, when Minister of Justice Irwin Cotler presented the House of Commons with Bill C-2. In 2005, Parliament adopted the *Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32. Sections 26 and 27 provided:

> **26. The portion of subsection 16(1) of the *Canada Evidence Act* before paragraph (*a*) is replaced by the following:**
>
> **16.** (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
>
> **27. The Act is amended by adding the following after section 16:**
>
> **16.1** (1) A person under fourteen years of age is presumed to have the capacity to testify.
>
> (2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
>
> (3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
>
> (4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
>
> (5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
>
> (6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

> (7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
>
> (8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

A reading of the works of the two standing committees which studied Bill C-2 shows that Parliament did not intend the prohibition of questions to children on whether they understand the duty to tell the truth under s. 16.1(7) to change the law. On the contrary, s. 16.1(7) was seen as reaffirming the requirement of s. 16(3) that the ability to communicate the evidence was the sole qualitative condition for capacity and that a mere promise to tell the truth would suffice.

During a debate on the phrasing of s. 16.1(7), held in the House of Commons Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, a discussion between Joe Comartin and Professor Nicholas Bala revealed the perception that s. 16(3) had been misinterpreted by courts. The original intent of the provision was to allow challenged witnesses to testify by merely promising to tell the truth, once they were held to be able to communicate the evidence. This discussion, which occurred on March 24, 2005, shows that s. 16.1(7) was aimed at clarifying the state of the law:

> **Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Professor Bala, to start, I read your material in the paper around the changes you want to proposed subsection 16.1(7), but I don't understand, quite frankly, how

you would change it. Proposed subsection 16.1(6) provides, as you're promoting strongly, that no oath be issued, that they simply be required to promise to tell the truth.

So I don't know exactly how you want (7) amended, from its current proposal.

Prof. Nicholas Bala: The concern I have about proposed subsection 16.1(7) is that it says no child shall be asked any questions regarding their understanding of the nature "of the promise" for the purpose of determining whether their evidence shall be received by the court, and I would submit to you that it should be "of the promise to tell the truth".

It's a relatively small change, but again, the concern I have arises out of the fact that the present legislation has been interpreted very narrowly by judges. When you actually go back through the transcripts — I was actually a witness in 1988, when the provisions came into effect — I think it was thought by people, well, we don't have to be very explicit here, because the judges will get this right.

Obviously, on many issues we do have to trust our judiciary, but on certain issues I think it's important to give them as much direction as possible. My concern is that some judge might read this — and we have quite a lot of case law about this — and say, okay, I can't ask you about your understanding of the nature of the promise, but what about asking you questions about truth-telling? Parliament specifically said in subsection 16.1(6) that you'll be required to promise to tell the truth. We can't ask about the nature of the promise, but can we ask you about "truth" and "lie"?

Some judges will continue to interpret it that way. In some ways, it's a very small amendment, but I assume it's consistent with your actual intent. My concern, as I say, has been based on how some of these previous provisions have been interpreted. [Emphasis added; p. 7.]

(House of Commons, *Evidence of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, No. 26, 1st Sess., 38th Parl., March 24, 2005)

This perception was also shared, at the time, by the Department of Justice. Ms. Catherine Kane, Director of the Policy Centre for Victim Issues of Justice Canada, testified that s. 16 was originally intended by Parliament to allow

witnesses to give evidence without inquiring into their comprehension of the duty to tell the truth. During her opening statement before the Standing Senate Committee on Legal and Constitutional Affairs, on July 7, 2005, Ms. Kane explained how the initial purpose of s. 16 had been misinterpreted by courts:

> **Ms. Catherine Kane** . . .
>
> The other part concerns the amendments to the Canada Evidence Act with respect to children. Under the current law, the Canada Evidence Act treats children under 14 in the same way as it treats other people whose mental capacity is challenged. There is a current section 16 that requires the judge to conduct a two-part inquiry whether they are dealing with a person who has some mental disabilities or whether they are dealing with a child under 14. The two-part inquiry requires the judge to first determine, in the case of a child, whether the child understands the nature of an oath or the nature of a solemn affirmation and, second, to determine if the child is able to communicate the evidence. These amendments were made in 1988 with the purpose of trying to more readily permit children's evidence to be received. However, as the cases have interpreted this provision, we have not seen that ready acceptance of children's evidence.
>
> If these two criteria are met, the child gives evidence under an oath or an affirmation. However, if the child does not understand the nature of the oath or the affirmation but has the ability to communicate the evidence, the evidence is received on a promise to tell the truth. That is the current law. While it may appear quite sensible on its face, the interpretations and practise of these provisions do not reflect Parliament's intention in amending the [e]vidence in an effort to permit children's evidence to be admitted more readily.
>
> As interpreted by the courts, section 16 requires that before the child is permitted to testify, the child be subjected to an inquiry as to his or her understanding of the obligation to tell the truth, the concept of a promise, and an ability to communicate. [Emphasis added; pp. 105-6.]
>
> (Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 18, 1st Sess., 38th Parl., July 7, 2005)

Appeal allowed, BINNIE, LEBEL *and* FISH JJ. *dissenting.*

Solicitor for the appellant: Attorney General of Ontario, Toronto.

Solicitors for the respondent: Webber Schroeder Goldstein Abergel, Ottawa.

Solicitor for the interveners the Women's Legal Education and Action Fund and the DisAbled Women's Network Canada: Women's Legal Education and Action Fund, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Di Luca Copeland Davies, Toronto.

Solicitors for the intervener the Council of Canadians with Disabilities: Aikins, MacAulay & Thorvaldson, Winnipeg.

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DECISION ON THE MERITS

3 June 2008

Mental Disability Advocacy Center (MDAC) v. Bulgaria

Complaint No. 41/2007

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 230th session attended by:

Mrs	Polonca KONČAR, President
Mssrs	Andrzej SWIATKOWSKI, First Vice-President
	Tekin AKILLIOGLU, Second Vice-President
	Jean-Michel BELORGEY, General Rapporteur
	Alfredo BRUTO DA COSTA
	Nikitas ALIPRANTIS
	Stein EVJU
Mrs	Csilla KOLLONAY LEHOCZKY
Mssrs	Lucien FRANCOIS
	Lauri LEPPIK
	Colm O'CINNEIDE
Mrs	Monika SCHLACHTER
	Lyudmila HARUTYUNYAN

Assisted by Mr Régis BRILLAT, Executive Secretary,

Having deliberated on 1 April 2008 and 3 June 2008,

On the basis of the report presented by Mrs Polonca Končar,

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint dated 15 February 2007 was registered on 20 February 2007. The Mental Disability Advocacy Centre (MDAC) alleges that the situation in Bulgaria is not in conformity with Article 17§2 alone and in conjunction with Article E of the Revised European Social Charter (the "Revised Charter") because children living in homes for intellectually disabled children in Bulgaria receive no education.

2. On 26 June 2007, the Committee declared the complaint admissible.

3. In accordance with Article 7§1 and §2 of the Protocol providing for a system of collective complaints ("the Protocol") and with the Committee's decision on the admissibility of the complaint, on 2 July 2007 the Executive Secretary communicated the text of the admissibility decision to the Bulgarian Government ("the Government"), the MDAC, the Contracting Parties to the Protocol and the states that have made a declaration in accordance with Article D§2 of the Revised Charter, and on 6 July 2007 to the international employers' organisations and trade unions referred to in Article 27§2 of the 1961 European Social Charter, i.e. the European Trade Union Confederation (ETUC), Businesseurope (former UNICE) and the International Organisation of Employers (IOE).

4. In accordance with Article 31§1 of the Committee's Rules, the Committee set a deadline of 28 September 2007 for presentation of the Government's submissions on the merits. It also set 28 September 2007 as the deadline for the Contracting Parties to the Protocol, the states that have made a declaration in accordance with Article D§2 of the Revised Charter and the international employers' organisations and trade unions referred to in paragraph 2 of Article 27 of the 1961 European Social Charter to submit any observations on the merits.

5. The Government's submissions on the merits of the complaint were registered on 1 October 2007.

6. In accordance with Article 31§2 of the Rules, the President of the Committee invited the MDAC to reply to these submissions by 30 November 2007. The MDAC's reply was registered on 30 November 2007 and forwarded to the Government on 6 December 2007.

SUBMISSIONS OF THE PARTIES

a. The complainant organisation

7. The MDAC asks the Committee to find that the Government's failure to provide education for children with moderate, severe or profound intellectual disabilities living in homes for mentally disabled children in Bulgaria violates Article 17§2 of the Revised Charter, alone and in conjunction with Article E.

b. The Government

8. The Government invites the Committee:

i. to recognise its efforts to secure equal access to education;

ii. to note the legal and practical steps that have been taken to overcome the problems of offering children living in homes for mentally disabled children access to schooling, and its political commitment to ensuring that these continue to be implemented and put into practice, in accordance with the objectives of the Revised Charter and subject to available resources;

iii. to reject the MDAC's application as unfounded.

RELEVANT DOMESTIC LAW

9. The relevant provisions of Bulgarian law concerning access to education for mentally disabled children are as follows:

10. The Constitution of the Republic of Bulgaria of 13 July 1991;

Articles 6 and 53 of the Constitution read:

Article 6

"1. All persons are born free and equal in dignity and rights.

2. All persons shall be equal before the law. There shall be no privileges or restriction of rights on grounds of race, national or social origin, ethnic affiliation, sex, origin, religion, education, opinion, political affiliation, personal or social status or wealth."

Article 53

"1. Everyone shall have the right to education.

2. School attendance up to the age of 16 shall be compulsory.

3. Primary and secondary education in state and municipal schools shall be free. In circumstances established by law, higher educational establishments shall provide education free of charge.

4. Higher educational establishments shall enjoy academic autonomy.

5. Citizens and organisations shall be free to found schools in accordance with conditions and procedures established by law. The education they provide shall comply with the requirements of the state.

6. The state shall promote education by opening and financing schools, by supporting capable school and university students, and by providing opportunities for occupational training and retraining. It shall exercise control over all kinds and levels of schooling.

11. National Education Act 1991, as amended by the Act of 2002

Article 4:

"(1) All citizens shall have the right to education. They shall be entitled to constantly heighten their education and qualifications.
(2) Restrictions or privileges based on race, nationality, sex, ethnic and social origin, religion and social status shall be inadmissible."

Article 7:

"(1) Schooling up to the age of 16 shall be compulsory.
(2) (Amended Official Journal (OJ) No. 36/1998) Schooling shall start at the age of 7, where such age shall have been attained in the year of enrolment in the first (1st) grade. Children who have turned 6 shall also be entitled to enrolment in the first (1st) grade provided their physical and mental development, at their parents' or guardians' discretion, so allows."

Article 9:

"(1) Every citizen shall exercise his right to education in the school and type of education of his choice in keeping with his personal preferences and potential.
(2) The right pursuant to Paragraph (1) for minors shall be used by their parents or guardians."

Article 14:

"Schools and kindergartens shall create conditions for the normal physical and mental development of children and pupils."

Article 16:

"State educational requirements shall be applicable to: (…)
8. (Amended, OJ No. 90/2002) teaching of children and pupils with special educational needs and/or chronic conditions"

Article 21:

(Amended, OJ No. 90/2002)
"(1) Children with special educational needs and/or chronic conditions shall be enrolled at kindergartens pursuant to Article 18.
(2) Kindergartens under Paragraph (1) shall be obligated to accept children with special educational needs and/or chronic conditions.
(3) Special kindergartens and auxiliary units may also be established for children with special educational needs and/or chronic conditions.
(4) Children with special educational needs and/or chronic conditions shall be enrolled in the kindergartens and auxiliary units under Paragraph (3) only where all other opportunities for education at state-owned or municipal kindergartens and auxiliary units have been exhausted and where the parents or guardians have expressed such a wish in writing."

Article 27:

(Amended, OJ No. 90/2002)

"(1) Children with special educational needs and/or chronic conditions shall be offered integrated education at the schools under Article 26, Paragraph (1), Items 1 through 10.

(2) Schools under Paragraph (1) shall be obligated to accept children with special educational needs and/or chronic conditions.

(3) Special schools and auxiliary units may also be established for children with special educational needs and/or chronic conditions.

(4) Children with special educational needs and/or chronic conditions shall be enrolled in the schools and auxiliary units under Paragraph (3) only where all other opportunities for education at state-owned or municipal schools have been exhausted and where the parents or guardians have expressed such a wish in writing."

Article 43:

"(1) (Previous Article 43, OJ 36/1998, amended, OJ No. 90/2002) The Ministry of Education and Science shall ensure favourable conditions for identifying and training particularly gifted children. It shall establish furtherance funds to award scholarships to gifted children, as well as scholarship funds for children with chronic ailments and for children with special educational needs.

(2) (New, OJ No. 36/1998) The Ministry of Education and Science shall ensure additional educational opportunities for potential drop-out students."

12. Integration of Disabled Persons Act

Act of 14 September 2006 amending and extending the Integration of Disabled Persons Act of 17 September 2004.

Chapter II - Education and vocational training

Article 16

"(1) Teams for the comprehensive educational assessment and integrated education of children with disabilities shall be set up at the regional inspectorates of the Ministry of Education and Science.

(2) Special integrated education centres, under the authority of the Ministry of Education and Science, shall be opened with a view to facilitating the integrated education of children with disabilities."

Article 17

"The Ministry of Education and Science shall provide:

(1) Education for children with disabilities at pre-school and school age in the schools and kindergartens referred to in Article 26, paragraph (1)3, and Article 18 of the National Education Act;

(2) An environment conducive to integrated education for children with disabilities;

(3) Appropriate remedial speech and hearing therapy and corrective treatment for children suffering from partial or total loss of visual acuity;

(4) Modern schoolbooks, teaching materials, technologies and technical tools for the education of children with disabilities up to the age of 18 or until the end of their secondary education;

(5) Vocational training for children with disabilities."

Article 18

"The Ministry of Education and Science shall make provision for the education of children with special educational needs who are not integrated into the mainstream education environment."

13. Implementing regulation of the National Education Act (revised)
(published on 30 July 1999 and amended on several occasions, the last on 8 November 2005)

Article 6a

(new Article, adopted in 2003)
"The team in charge of assessing difficult cases in terms of educational needs may:
…
(4) single out up to two pupils with special educational needs per class; these pupils shall be transferred to the least crowded classes.
…
(8) … (b) facilitate the integrated education of children with special educational needs by co-ordinating, supervising and providing methodological assistance to teams in kindergartens and schools into which children with special educational needs and/or chronic conditions have been integrated."

Article 7

(text amended in 2003)
"Kindergartens, schools and auxiliary units shall work with funding authorities to provide an environment conducive to the integrated education of children with special educational needs and/or chronic conditions."

Article 26

"(1) Kindergartens are preparatory institutions forming part of the national education system, in which children are educated and taught from the age of three up to their entry into the first year of primary school.
(2) (text amended in 2003) Children with special educational needs and/or chronic conditions shall be integrated into the kindergartens described in paragraph (1) above, which are legally required to accept them.

Article 27

"(1) Kindergartens may be:
1. full-time, part-time or organised on a weekly basis;
2. (text amended in 2003)special schools for children with special educational needs and/or chronic conditions."

Article 28

(text amended in 2003)
"(2) The kindergartens referred to in Article 27, paragraph (1)2, shall admit children with special educational needs and/or chronic conditions, subject to the written consent of parents or guardians, where all other possibilities of attending the kindergartens referred to in Article 27 (1)1 have been exhausted.
(3) The kindergartens referred to in Article 27 (1)1 shall cater for up to two children with special educational needs per group."

Article 50

"(6) (text amended in 2001) State and municipal schools shall cater for up to five pupils with chronic physical or sensory conditions per class. Vocational schools shall also cater for children placed in orphanages.
(7) (text amended in 2003) In cases other than those provided for in paragraph (6) above, state and municipal schools may also provide integrated education for two pupils per class with special educational needs on a proposal by the team in charge of comprehensive educational assessment."

14. Order no 6 on children with special educational needs and/or chronic conditions (published in August 2002)

Article 2

(1) Children with special educational needs and/or chronic conditions shall be given an integrated education in mainstream kindergartens, schools and auxiliary units.
(2) Children with special educational needs and/or chronic conditions may be educated in special kindergartens, schools and auxiliary units.
(3) Children shall attend special schools only where all other possibilities of attending mainstream kindergartens and schools have been exhausted, subject to the explicit consent of parents or tutors."

15. Case-law

Case no 13789/06, Sofia court of first instance, decision of 18 May 2007

"The court finds that the requirement for the Ministry of Education to create a conducive environment is a prerequisite to integrated schooling. Therefore, the equal right to education of children with disabilities is only effective if such an environment is created in every school … and the failure to create such an environment amounts in itself to unequal treatment of children with disabilities in that they do not then have the same opportunities as children without disabilities" (pages 7-8).

THE LAW

THE ALLEGED VIOLATION OF ARTICLES 17§2 AND E OF THE REVISED SOCIAL CHARTER

16. Article 17§2 of the Revised Charter reads:

Article 17 – The right of children and young persons to social, legal and economic protection

Part I: "*Children and young persons have the right to appropriate social, legal and economic protection*."

Part II: "*With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed*:

(…)

2 to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools."

17. Article E of the Revised Charter reads:

Article E – Non-discrimination

"*The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status*."

A. Submissions of the parties

a. The complainant organisation

18. The MDAC maintains that Bulgaria's failure to provide education for the children falling within the subject matter of the scope of the complaint violates its obligations under Article 17§2 of the Revised Charter, alone and in conjunction with Article E. It argues that Article 17§2 of the Revised Charter requires the Government to provide primary education for all children, including children with intellectual disabilities.

19. The MDAC restricts the scope of its complaint to the situation of children with moderate, severe or profound intellectual disabilities living in homes for mentally disabled children (hereafter "HMDCs"), thus excluding children with mild intellectual disabilities and those not living in HMDCs.

20. The MDAC states that HMDCs come under the authority of the Ministry of Labour and Social Policy. They admit children aged over 2. Most of these children have been diagnosed as having moderate, severe or profound intellectual disabilities and have been either abandoned by their parents or orphaned. The HMDCs are residential establishments open throughout the year, in which the children spend all their time. There are other kinds of centres for intellectually disabled children in Bulgaria but they are not the subject of the complaint. The complaint concerns the 28 HMDCs throughout the country. According to the MDAC no education is provided in HMDCs and the Government has made little effort to educate children in these homes.

21. According to the MDAC, in order to meet certain quality standards education systems must satisfy the criteria of availability, accessibility, acceptability and adaptability, as laid down by the UN Committee on Economic, Social and Cultural Rights in its general comment no. 13 on the right to education (E/C.12/1999/10 of 8 December 1999, §6).

22. The MDAC states that until a reform in 2002, children with moderate, severe or profound intellectual disabilities were considered to be uneducable and hence given no access to education. Under the National Education Act 2002, the Bulgarian state has undertaken to provide these children with education.

23. The complaint is based on various sources, in particular the 2005 report of the Bulgarian child protection agency. This included figures on the situation in 18 HMDCs. According to the data in this report, only 32 children (i.e. 2.8%) living in the HMDCs which were visited were being taught in mainstream primary schools while 39 children (i.e. 3.4%) were in special schools, meaning that a total of only 71 children were attending any kind of school. In certain establishments, as in Sofia, none of the children attended schools, whereas in others, such as the one in Turnava, all the children were in school, though this was solely attributable to the personal initiative of the director. The MDAC claims that certain children are refused admission even though they want to go to school and are apt, in that they are able to write

their full names and ages despite never having attended school. It concludes that the existing education system in Bulgaria is clearly depriving these children of access to education, which is a direct infringement of their right to education without discrimination.

24. The complainant also alleges that ordinary schools are not equipped to the abilities and needs of children from HMDCs. Teacher training is inadequate and teaching materials for intellectually disabled children are either totally unavailable or unsuited to their needs. According to the MDAC, this means that Bulgaria is in direct violation of the right to education and directly discriminates against these children on account of their disability.

25. In respect of the children who do not attend an outside educational structure, the complainant highlights that HMDCs are not educational institutions and therefore the children are ineligible for a diploma attesting completion of primary school education. They are therefore legally prevented from entering secondary education. The MDAC concludes that the treatment of children in HMDCs does not satisfy the criterion of the acceptability of the education provided and cannot be considered to be a form of education.

26. Finally, the MDAC maintains that the Government cannot rely on lack of resources or argue that it is implementing these rights gradually to show that it is not discriminating against disabled children with regard to their access to education. It notes firstly that certain measures are not expensive, such as informing directors of HMDCs of the contents of the 2002 legislation so that they know that from now on the children in their charge are not only “educable” but also entitled to be educated in ordinary or special schools. The same applies where it comes to informing the municipal officials to whom HMDCs are accountable as well as local schools. The MDAC states that, in practice, HMDC directors and municipal officials know little or nothing about the changes created by the 2002 legislation. The MDAC also states that the Government has chosen to use the resources that are available for educating disabled children to improve access to schools for children with physical disabilities while spending very little on the education of intellectually disabled children. According to the MDAC, the Government's failure to provide education for children with moderate, severe or profound intellectual disabilities is the result of serious and unreasonable policy failures and not of the alleged resource shortages.

b. The Government

27. The Government describes its efforts to implement the right of intellectually disabled children to equal access to education.

28. In particular, it argues that Bulgarian legislation offers sufficient safeguards. Article 6 of the Constitution embodies the principle of equality before the law and prohibits all discrimination. Article 53 establishes the right to education. The Government also refers to the legislative and practical steps it has taken to overcome the problems of access to education of children living in HMDCs. In particular, the National Education Act 1991, as amended by the

Act of 10 September 2002, requires schools to admit disabled children and create the conditions for their integration. The Government has also adopted several action plans. It refers specifically to the national plan for integrating children with special educational needs and/or chronic conditions into the national education system, approved by the government in December 2003, which implements Regulation No. 6 and lays down a timetable for integration from 1 January 2004 to 1 January 2007. It also cites the action plans on Bulgarian mental health policy (2004-2012) and on equal opportunities for disabled persons (2006-2007 and 2008-2015).

29. The Government also refers to its political commitment to these measures and to ensuring that they are implemented, in accordance with the Revised Charter and subject to available resources.

30. The Government says that the trend is towards integrating most children with disabilities into mainstream schools. Its education policy is to reduce the number of special schools and increase the number of children with special educational needs in mainstream schools. This calls for the adaptation of premises to these children's specific needs, appropriate school textbooks and other written material and equipment, and specialist staff qualified to work with children with disabilities. Teams to assess the needs of disabled children are gradually being introduced. Training has been organised for regional education inspectorates, nursery school heads, teachers and representatives of local government.

31. The Government acknowledges that a high number of children do not attend school or leave school very early. However this does not just concern intellectually disabled children and so, according to the Government, the MDAC's contention that such children are being systematically discriminated against is unfounded.

32. The Government reiterates that it has a consistent and clearly defined policy on the integration of children living in special institutions, which extends to its education policy. This is an ongoing process, the visible results of which will become evident in the long term and which will require considerable financial input. The Government hopes to achieve the Revised Charter's objectives "within a reasonable period of time", with measurable progress and with the fullest possible use of available resources.

B – Assessment of the Committee

i – The alleged violation of Article 17§2 of the Revised Charter

Preliminary remarks

33. Referring to its admissibility decision and the issue of the delimitation of the material scope of Articles 15 and 17, the Committee considers that the fact that the right to education of persons with disabilities is guaranteed by

Article 15§1 of the Revised Charter does not exclude that relevant issues relating to the right of children and young persons with disabilities to education may not be examined in the framework of Article 17§2, *inter alia*.

34. The Committee begins by pointing out that both the first and the second paragraphs of Article 17 of the Revised Charter guarantee children's right to education. The Committee considers that Article 17§2 applies fully in this case as it covers all children and hence concerns children with intellectual disabilities. The Committee recalls in this respect that:

"Therefore Article 17 as a whole requires states to establish and maintain an education system that is both accessible and effective. In assessing whether the system is effective the Committee will examine under Article 17: … whether, considering that equal access to education should be guaranteed for all children, particular attention is paid to vulnerable groups such as children from minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant teenagers, teenage mothers, children deprived of their liberty etc. and whether necessary special measures have been taken to ensure equal access to education for these children" *(Conclusions 2003, Bulgaria, Article 17§2).*

"States need to ensure a high quality of teaching and to ensure that there is equal access to education for all children, in particular vulnerable groups" *(Conclusions 2005, Bulgaria, Article 17§2).*

35. Firstly, as regards taking special account of children with disabilities, the Committee points out that, while it is acceptable for a distinction to be made between children with and without disabilities in the application of Article 17§2, the integration of children with disabilities into mainstream schools in which arrangements are made to cater for their special needs should be the norm and teaching in specialised schools must be the exception (Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §49).

36. In addition, for any special education that is set up to be in conformity with Article 17§2, the children concerned must be given sufficient instruction and training and complete their schooling in equivalent proportions to those of children in mainstream schools (Conclusions 2005, Bulgaria, Article 17§2).

37. The Committee considers that all education provided by states must fulfil the criteria of availability, accessibility, acceptability and adaptability. It notes in this respect General Comment No. 13 of the Committee on Economic, Social and Cultural Rights of the United Nations International Covenant on Economic, Social and Cultural Rights on the right to education (document E/C.12/1999/10 of 8 December 1999, §6). In the present case, the criteria of accessibility and adaptability are at stake, i.e. educational institutions and curricula have to be accessible to everyone, without discrimination and teaching has to be designed to respond to children with special needs.

38. As regards the respect for the right to education of intellectually disabled children residing in HMDCs, the Committee takes note of the efforts made by the Government, particularly through the adoption of legislation and the setting up of action plans. It considers this to be a necessary first step but

one that is insufficient to bring a situation into conformity with the Revised Charter. It reiterates that "the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact" (International Commission of Jurists v. Portugal, Complaint No. 1/1998, decision on the merits of 10 September 1999, §32). Consequently, the manner in which this legislation and these action plans are implemented is decisive.

39. The Committee points out that when it is exceptionally complex and expensive to secure one of the rights protected by the Revised Charter, the measures taken by the state to achieve the Revised Charter's aims must fulfil the following three criteria: "(i) a reasonable timeframe, (ii) a measurable progress and (iii) a financing consistent with the maximum use of available resources" (European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §37; Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §53). It also recalls that "States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities" and that they must also take "practical action to give full effect to the rights recognised in the Charter" (Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §53). Similarly, "States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources" (European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §35).

40. The Committee points out that where precise facts are used to support allegations that a state has infringed the Revised Charter, it is for the Government to answer the allegations using specific evidence such as measures introduced, statistics or examples of relevant case-law (see European Roma Rights Centre v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §50). The MDAC has submitted precise elements to the Committee with a view to demonstrate that the manner in which Bulgaria's legislation and action plans are implemented is highly inadequate. The Committee notes that the Government, however, has failed to provide evidence to refute these.

41. In addition, the Committee notes that the Government describes the situation of children with disabilities in general and not the specific case of children with moderate, severe or profound intellectual disabilities residing in HMDCs, who are the subjects of this complaint.

42. To be able to assess the situation of these children, the Committee must therefore rely on the data referred to in the 2005 report prepared by the Bulgarian national child protection agency, which is mentioned by the MDAC in its complaint and not disputed by the Government.

43. The Committee refers to Order No. 6 on children with special educational needs and/or chronic conditions, 2002, which entitles children with any type of intellectual disability to be educated in special schools or mainstream schools of their parent's or tutor's choice. The Committee notes that only 2.8% of the children with intellectual disabilities residing in HMDCs are integrated in mainstream primary schools, which is extremely low whereas integration should be the norm. Mainstream educational institutions and curricula are not accessible in practice to these children. There also appears to be insufficient evidence to show real attempts to integrate these children into mainstream education. The Committee considers therefore that the criterion of accessibility is not fulfilled.

44. For the very few children integrated into mainstream primary schools, the way in which they are dealt with should be suited to their special needs. The Committee finds on this point in particular that teachers have not been trained sufficiently to teach intellectually disabled children and teaching materials are inadequate in mainstream schools. These schools are therefore not suited to meet the needs of children with intellectual disabilities and hence to provide their education. The Committee concludes that neither therefore is the criterion of adaptability met.

45. The Committee notes that only 3.4% of children with intellectual disabilities residing in HMDCs attend the special classes set up for them. Despite the fact that special classes should not be the norm but only an exception to mainstream education, the figure is very low and demonstrates that special education is not accessible to children with intellectual disabilities residing in HMDCs.

46. As to the educational activities that intellectually disabled children follow within the HMDCs, the Committee takes note that the HMDCs are not themselves be regarded as educational institutions, that, consequently, the children are ineligible for a diploma attesting completion of primary school education and that they are therefore prevented from entering secondary education. The Committee notes, in addition, that the programmes of activity implemented at HMDCs were drawn up by the Ministry of Labour and Social Policy before the 2002 reform, at a time when intellectually disabled children were still officially regarded as being uneducable. The Committee also notes that it has been confirmed by various eye-witness reports and studies that the children do not receive any education in the HMDCs. The Committee concludes that the activities pursued by intellectually disabled children living in HMDCs who attend neither a mainstream school nor a special class cannot be considered to be a form of education.

47. As to the Government's argument that the right of children with intellectual disabilities residing in HMDCs to education is being implemented progressively, the Committee is aware of Bulgaria's financial constraints. It notes that any progress that has been made has been very slow and mainly concerns the adoption of legislation and policies (or action plans), with little or no implementation. It would have been possible to take some specific steps at no excessive additional cost (for example HMDC directors and the municipal

officials to whom HMDCs and primary schools are accountable could have been informed about and given training on the new legislation and action plans). The choices made by the Government resulted in the situation described above (see in particular §§ 43 et 45). Progress is therefore patently insufficient at the current rate and there is no prospect that the situation will be in conformity with article 17§2 within a reasonable time. Consequently, the Committee considers that the measures taken do not fulfil the three criteria referred to above, i.e. a reasonable timeframe, measurable progress and financing consistent with the maximum use of available resources. In view of this situation, the Committee considers that Bulgaria's financial constraints cannot be used to justify the fact that children with intellectual disabilities in HMDCs cannot enjoy their right to an education.

48. Consequently, the Committee holds that the situation in Bulgaria constitutes a violation of Article 17§2 of the Revised Charter because children with moderate, severe or profound intellectual disabilities residing in HMDCs do not have the effective right to an education.

ii – The alleged violation of Article 17§2 of the Revised Charter read in conjunction with Article E

49. Article E prohibits any discrimination in the enjoyment of the rights set forth in the Revised Charter. Although disability is not explicitly included in the list of grounds of discrimination prohibited by Article E, the Committee has found previously that it is "adequately covered by the reference to 'other status'" (Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §51).

50. The Committee has previously observed that:

"The wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in interpreting Article 14 and most recently in the Thlimmenos case [*Thlimmenos v. Greece* [GC], no 34369/97, ECHR 2000-IV, §44)], the principle of equality that is reflected therein means treating equals equally and unequals unequally. In particular it is said in the above mentioned case:

> 'The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'.

In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality." (Autism-Europe v. France, Collective Complaint No. 13/2002, decision on the merits of 4 November 2003, §52).

51. Therefore, the Committee notes that failure to take appropriate measures to take account of existing differences may amount to discrimination.

52. The Committee recalls its case law regarding disputes about discrimination in matters covered by the Revised Charter, adopted in the framework of reporting procedure, that the burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment. It also applies to the collective complaints procedure. The Committee therefore relies on the specific data sent to it by the complainant organisation, such as its statistics which show unexplained differences. It is then for the Government to demonstrate that there is no ground for this allegation of discrimination.

53. The Committee refers to the data cited above, according to which only 6.2% of the intellectually disabled children living in HMDCs are educated in mainstream primary schools or in special schools. It notes that, in reply, the Government states that a high percentage of children in Bulgaria do not go to school and that this does not just apply to children with intellectual disabilities. However, the Government fails to support this assertion with statistical data or to specify whether this is already a problem at primary school level or affects only secondary schools. The Committee underlines that it has already noted that, for the period 1997-2000, primary school attendance rates were 93% for girls and 95% for boys, despite a regrettable, excessively high drop-out rate (Conclusions 2005, Article 17§2, Bulgaria). The disparity between these figures is so great that it demonstrates that there is discrimination against children with intellectual disabilities residing in HMDCs in comparison with all other children with regard to access to education in Bulgaria.

54. Consequently, the Committee holds that the situation in Bulgaria constitutes a violation of Article 17§2 of the Revised Charter read in conjunction with Article E because of the discrimination against children with moderate, severe or profound intellectual disabilities residing in HMDCs as a result of the low number of such children receiving any type of education when compared to other children.

CONCLUSION

55. For these reasons the Committee concludes

- unanimously that there is a violation of Article 17§2 of the Revised Charter because children with moderate, severe or profound intellectual disabilities residing in HMDCs do not have an effective right to education;
- by 12 votes to 1 that there is a violation of Article 17§2 of the Revised Charter taken in conjunction with Article E because there is discrimination against children with moderate, severe or profound intellectual disabilities residing in HMDCs as a result of the low number of such children receiving any type of education when compared to other children.

Polonca KONČAR
President and Rapporteur

Régis BRILLAT
Executive secretary

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DECISION ON THE MERITS

COMPLAINT No. 13/2002

By Autism - Europe
against France

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (hereafter referred to as "the Committee"), during its 197th session attended by:

Messrs	Jean-Michel BELORGEY, President
	Nikitas ALIPRANTIS, Vice-President
Ms	Polonca KONCAR, Vice-President
Messrs	Stein EVJU, General Rapporteur
	Rolf BIRK
	Matti MIKKOLA
	Konrad GRILLBERGER
	Tekin AKILLIOĞLU
	Alfredo BRUTO DA COSTA
Ms	Csilla KOLLONAY LEHOCZKY
Messrs	Gerard QUINN
	Lucien FRANCOIS
	Andrzej SWIATKOWSKI

Assisted by Mr Régis BRILLAT, Executive Secretary of the European Social Charter

After having deliberated on the 3 and 4 November 2003,

On the basis of the report presented by Mr Gerard QUINN,

Delivers the following decision adopted on this last date:

PROCEDURE

1. On 12 December 2002, the Committee declared the complaint admissible.

2. In accordance with Article 7§1 and §2 of the Protocol providing for a system of collective complaints and with the Committee's decision on the admissibility of the complaint, the Executive Secretary communicated, on 13 December 2002, the text of the admissibility decision to the French Government, to Autism-Europe, to the Contracting Parties to the Protocol, to the states that have made a declaration in accordance with Article D§2 of the revised European Social Charter, as well as to the European Trade Union Confederation (ETUC), the Union of the Confederations of Industry and Employers of Europe (UNICE) and the International Organisation of Employers (IOE), inviting them to submit their observations on the merits of the complaint. In accordance with Article 25§2 of the Committee's Rules of Procedure, the President fixed a deadline of 15 February 2003 for the presentation of observations.

3. On 11 February 2003, the French Government presented its observations on the merits of the complaint.

4. The President set 11 April 2003 as the deadline for Autism-Europe to present its observations in response to the Government. The observations were registered on 10 April 2003.

5. During its 193rd session (31 March – 4 April 2003), the European Committee of Social Rights decided, in accordance with Article 7§4 of the Protocol providing for a system of collective complaints and Article 29§1 of the Committee's Rules of Procedure, to organise a public hearing.

6. The hearing took place in public at the Human Rights Building in Strasbourg on 29 September 2003. Autism-Europe was represented by E. FRIEDEL, Lawyer, and by Ms D. PAGETTI-VIVANTI, President of Autism-Europe. The Government was represented by Mr A. BUCHET, Deputy Director of Human Rights, Legal Affairs Department at the Ministry of Foreign Affairs, Mr P. DIDIER-COURBIN, Deputy Director for Persons with Disabilities, General Directorate of Social Action at the Ministry for Health, the Family and Disabled Persons, Ms M-C. COURTEIX, Head of the task force: School adaptation and integration, Directorate for school education at the Ministry for National Education, and Ms J. VILLIGER, Office for Disabled Adults, General Directorate of Social Action at the Ministry for Health, the Family and Disabled Persons.

According to Article 29§2 of its Rules of Procedure, the Committee invited the ETUC to participate in the hearing. ETUC was represented by Mr G. FONTENEAU, Social Adviser, and by Mr K. LÖRCHER, Legal Adviser.

The Committee heard addresses by E. FRIEDEL, Mr. A. BUCHET, and Mr. G. FONTENEAU and replies to questions put by members of the Committee.

SUBMISSIONS OF THE PARTICIPANTS IN THE PROCEDURE

a) The Complainant Organisation

7. Autism-Europe asked the Committee:

- to rule that France is failing to satisfactorily apply its obligations under Articles 15§1 and 17§1 of Part II of the Revised European Social Charter because children and adults with autism do not and are not likely to effectively exercise, in sufficient numbers and to an adequate standard, their right to education in mainstream schooling or through adequately supported placements in specialised institutions that offer education and related services;

  and

- to rule that France is in violation of the non-discrimination principle embodied in Article E of Part V of the Revised European Social Charter since persons with autism do not benefit from the right to education recognized to persons with disabilities by Article 15§1 and generally set out in Article 17§1 of Part II of the Charter.

The complainant alleged that France is not taking enough action as required under the revised European Social Charter to secure children and adults with autism a right to education as effective as that of all the other children.

b) The French Government

8. The French Government (hereafter "the Government") asked the Committee to reject the complaint as unfounded in each respect. It considers that the relevant legislation and the practice concerning the provision of education for persons with autism did not infringe Articles 15, 17 and E of the Revised European Social Charter (hereinafter Revised Charter).

c) The European Trade Union Confederation (ETUC)

9. The ETUC argues that France does not comply with Articles 15, 17 and E of the Revised Charter.

RELEVANT DOMESTIC LAW

10. On the basis of the submissions by the parties, the relevant domestic law on the provision of education for persons with autism may be summarised as follows:

The right to education of persons with disabilities is enshrined in two Acts:

- Act no. 75/534 of 30 June 1975, People with disabilities (policy) act,

- and Act no. 75/535 of 30 June 1975 on social and medico-social institutions,

Part of Act no. 75/534 has been enshrined in Act no. 89/486 of 10 July 1989 laying down framework provisions on education. Another piece of legislation makes more detailed

provision for persons with autism (Act no. 96/1076 of 11 December 1996 on social and medico-social institutions and making adapted provision for persons with autism). All the above legislation has now been codified in the Code of Social Action and the Education Code respectively.

11. The relevant provisions of the Education Code are Articles L.111-1, L.112-1 to L.112-3, and L.351-1.

Article L.111-1 provides that:

> "the right to education is secured to all".

More particularly, and dealing with children and young persons with disabilities, Article L.112-1 states that:

> "Schooling is compulsory for children and young persons with disabilities. They shall meet the compulsory-education requirement either through integration in the ordinary education system or, failing that, through special education, as decided by the *départemen*t special education board in accordance with the individual's particular needs".

Article L.112-2 continues:

> "Educational integration of young people with disabilities shall be facilitated".

The scope of special education is defined by Article L.112-3, which provides:

> "Special education shall combine educational, psychological, social, medical and paramedical action; it shall be delivered either at establishments within the general system or by specialist establishments or services….".

With respect to the delivery of special education Article L.351-1 provides that:

> "… The state shall pay for the education and initial vocational training of children and adolescents with disabilities:
>
> 1. preferably, by integrating into ordinary classes … all children capable of being integrated despite their disabilities;
> 2. or by making qualified staff for whom the education minister is responsible available to establishments and services set up and maintained by other ministries, by public law entities or by authorised non-profit groups or bodies …
> 3. or by entering into contracts or partnerships with private education establishments …"

That is, Article L.112-1 and Article L.351-1 establish a statutory preference in favour of the education of children with disabilities in the mainstream.

12. The relevant provisions of the Code of Social Action are Articles L.114-1, L.114-2, L.116-1, L.116-2, L.242-4 and 10, and L.246-1.

According to Article L.114-1, the State is obliged to guarantee the right of persons with disabilities to have access to fundamental rights, including the right to education.

The right to the enjoyment of these rights in a mainstream environment is acknowledged by Article L.114-2 insofar as it provides that:

"The action taken shall, whenever the aptitudes of the person with disability and the capabilities of the family so allow, ensure access for the minor or adult with disability to those institutions open to the whole population…".

The overall goals of social and medical action are set out under Article L.116-1 and 2 as follows:

"Social and medico-social action shall promote, within an inter-ministerial framework, the autonomy and protection of persons … prevent exclusion and correct its effects. It shall be based on continuous evaluation of needs and of expectations … in particular those of people with disabilities … and on making facilities and allowances available to them. It shall be performed by the state, the local authorities and the public establishments run by them, social-security agencies, the voluntary sector and social and medico-social institutions…

Social and medico-social action shall be so conducted as to respect the equal dignity of all human beings, with the aim of making adapted provision to meet the needs of each individual and affording them equitable access throughout the country."

Early intervention is mandated by Article L.242-4, which provides that:

"The earliest possible provision is necessary. It shall be possible for it to continue for as long as the condition of the person with the disability warrants it and without any limit of age or duration ….".

With respect to the financing of these measures, Article L.242-10 reads:

"Expenses for accommodation and care in special education establishments and vocational establishments, together with the cost of outside care in connection with such education, with the exception of expenses falling to be met by the state under Article L.242-1[1], shall be wholly met by the sickness insurance schemes, subject to the rates which are the basis for calculation of benefit. Where such costs are not covered by the sickness-insurance schemes, they shall be covered by social assistance[2]…."

Article L.246-1 makes more particular provision for persons with autism:

"Any person with a disability resulting from autism syndrome or related disorders shall receive, regardless of age, multidisciplinary provision catering for his or her specific needs and difficulties. Such provision shall be adapted to the condition and age of the individual and have regard to the resources available. It may be educational, therapeutic or social."

13. To summarise, persons with autism may attend mainstreaming education, either in their own right (individual mainstreaming) in ordinary classes with the assistance of special auxiliary staff, or as part of a group (collective mainstreaming) through school integration classes (CLIS) at primary level and educational integration units (UPI) at secondary level. Persons who, by reason of the severity of their autism, cannot integrate the ordinary educational system may receive special education in a specialised institution or through medico-social services (SESSAD – special education and domiciliary care services). Specialised institutions include: IME – medical-educational institutes; IMP – medical-teaching institutes; IMPRO – medical-occupational institutes; MAS – Special residential establishments and FDT – double-charging establishment for the most severely disabled.

14. The individual mainstreaming into regular schooling is financed through the general education budget. However, the mainstreaming of individuals through collective mainstreaming is financed through the sickness-insurance budget. Also all the above

[1] This article expressly refers to the aforementioned Article L.351-1 of the Education Code.

[2] These provisions also appear in Article L.321-1 of the Social Security Code.

forms of special education are financed mainly through the sickness-insurance budget and, in the case of autism, by the special appropriations system addressed to it. Teachers in special education and special auxiliary staff in these specialised institutions are paid out of the national education budget.

15. According to the prevalence rate used, the number of persons with autism varies largely. The complainant assumed that, on the basis of the most recent scientific knowledge, the appropriate prevalence rate is 16 per 10 000 persons. As a consequence, it is claimed that there are approximately 100 000 persons with autism in France, of whom 25 000 children and young people. The Government opted for a prevalence rate of 4-5.6 per 10 000 persons: accordingly, there are approximately 7,000 children and 20,000 adults with autism in France. The complaint alleges that a certain number of French children with autism attend institutions in Belgium.

AS TO THE LAW

I. ARGUMENTS OF THE PARTIES

16. Autism-Europe initially argued, but did not pursue at the hearing, that the relevant parts of French law are as such, in violation of Articles 15§1 and 17§1 of the Revised Charter. Having abandoned that line of argumentation the complainant argued instead that the implementation of the law, or the *de facto,* situation, is in violation of the said Articles. More specifically, the complainant finally argued that, in practice, insufficient provision is made for the education of children and adults with autism due to identifiable shortfalls – both quantitative and qualitative - in the provision of both mainstream education as well as in the so-called special education sector.

17. The Committee therefore finds it unnecessary to proceed further with respect to the original argument. Accordingly, its analysis will be confined to the question whether the relevant French practice constitutes, as alleged by the complainant, a violation of Articles 15§1, 17§1 and E of the Revised Charter.

18. Articles 15§1, 17§1 and E of the Revised Charter read as follows:

"Article 15 - The right of persons with disabilities to independence, social integration and participation in the life of the community

> With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:
> 1. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private;
> ……

Article 17 - The right of children and young persons to social, legal and economic protection

> With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:
> 1. a to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
> ……

Article E – Non-discrimination

> The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status. "

A. The alleged unavailability of special education institutions and services

19. Autism-Europe argued that the special education institutions and socio-medical services allocated for the education of children and adults with autism have been historically inadequate. The 1995-2000 catch-up plan for persons with autism failed to overcome the backlog; likewise, the 2001-2003 multi-annual plan on disabled children, young persons and adults, which addressed also persons with autism, is alleged to be far from filling the gap. It also asserted that 75 000 persons with autism (of whom 19 000 are children) are in need of special education, but that only 10% of them have a place (about 8,000 places in all are currently available).

20. According to Autism-Europe, the current situation as regards placements in special education stands as follows:

Situation as compiled by Autism-Europe: Number of places per 75 000 persons with autism in France

Number in 1995	Actually established 1995-2000	To be opened 2001-2003	Total	Remaining needs	Rate of satisfaction
5400	1400	1053	7853	67147	11.6%

Official figures[3]: number of places per 48 000 persons with autism in France

Number in 1995	Officially established 1995-2000	To be opened 2001-2003	Total	Remaining needs	Rate of satisfaction
5400	2033	1053	8486	39514	21.4%

[3] As from DGAS, Report to the Parliament on the implementation of Act no.96/1076, "Autism: evaluation of action 1995-2000", December 2000. The difference as regards the estimate of the number of persons with autism is due to the retained incidence rate of the disability.

21. The complainant alleges that even if the official French rate of prevalence is accepted (which it asserts is lower that the one retained by the Health World Organisation), the finances dedicated to the 1995-2000 catch-up plan could only envisage the creation of 1 400 wholly new places, and not the 2033 places officially claimed to be opened. It further alleges that the 2001-2003 multi-annual plan would not really help to change the situation since it would only enable the creation of 1053 additional places for a budget of € 22.87 million.

22. According to the complainant, on average, 300 places have been created annually since 1995, which represents an annual increasing rate of 0.7% in comparison with the official needs. At this pace, it will take one hundred years to resorb the deficit of places, and this without taking into account the natural increase of the autistic population, which, on the basis of the official figures, it is estimates will grow by 160 persons per year.

23. In reply the Government acknowledged that the catch-up plan of 1995-2000 had fallen short of real needs. In its written memorials, the Government indicated that, within the framework of the 2001-2003 multi-annual plan or other exceptional plans, these special appropriations amounting in total to about €30 million enabled, or will enable, the creation of 1053 places reserved specifically for persons with autism. It further asserted that 1756 SESSAD (special education and domiciliary care) places for the educational integration of children with disabilities, including autistic children, and young people had been created (on a budget of € 36.95 million), and 507 were planned in 2003. In total 3228 SESSAD places have been created between 2001 and 2003. It asserted that there were 5500 places in specialist residential establishments (MAS), residential establishments with medical facilities (FAM) and special employment centers (CAT) for severely disabled adults, some of whom would include autistic persons. Finally, it asserted that the 2003 Social Security Finance Act set aside € 70 million for severely disabled adults and € 9 million for improving facilities in establishments and other services and on the educational integration of disabled children through the establishment of additional places in residential and non-residential centers with educational and medical facilities and in SESSAD (special education and domiciliary care services).

24. At the hearing, the Government indicated that 94 000 children and young persons with disabilities (0-20 years of age) are taken care of in special education institutions, socio-medical services, or health institutions. More precisely, as regards autism, it reaffirmed that, through the catch-up plan of 1995-2000, a total of about 2033 places (820 for children and 1213 for adults) have been created. In addition, the multi-annual plan 2001-2003 and special appropriations has finally permitted, as of September 2003, the creation of some other 1306 places for children, young people and adults with autism.

25. The Government acknowledged that part of figures provided did not concern directly persons with autism, but in general disabled or seriously disabled persons. However, it argued that, on the one hand, the approach chosen by France is not the provision of specialised services for any category of disabled persons, but their reception in multipurpose establishments and services; and, on the other hand, that statistic programmes aiming at disaggregating data concerning specifically persons with autism (which currently do not exist) have been recently launched.

26. In any event, the Government considered that, even if the creation of places, and thereby the allocation of resources, were insufficient to cover all needs, the catch-up for educational provision of autistic persons did not only lie in allocating additional funding, but also in diversifying the offer of services at *département* level by implementing Act no. 2002/2 containing reforms of social and medico-social provision.

B. Separation and limitation of budgetary resources

27. Autism-Europe advanced a structural reason why there is inadequate funding for the education of children and young adults with autism and argued that this violates Article 15§1 in combination with Article 17§1. Special education, it is alleged, is at an automatic disadvantage because it does not fall under the finance Act and is not therefore considered to be a public service that the State is obliged to provide. Hence, unlike ordinary education, its financing is not calculated according to the number of children in the system and those forecast for the future.

28. Autism-Europe observed that the financing of special education comes mainly under the sickness-insurance budget approved through the social security finance Act, to the exception of teachers provided by the national system to the special education sector who are paid by the State budget. This implies for the complainant that the expenditure is not determined according to the real needs of the number of people with disabilities who need adapted educational provision. Thus, it argued that, because of the budgeting mechanism chosen, persons with disabilities do not in practice (despite the legislation) benefit from the right to education because they cannot do so for as long as the funding of special education placements remains outside the national education system and is treated as “social assistance” or “care” to which health or social-action expenditure limits apply.

29. As far as persons with autism are concerned, the complainant specifically argued that, unless France alters its budgetary and financial policy, the shortfall on educational provision for autistic persons will never be made up and the quantitative needs will never be met.

30. The Government contested the complainant’s argument and considered that, on the basis of Article L.112-1 of the Education Code, children with disabilities are fully covered by the educational public service requirement, either through ordinary or special education. According to Article L.112-3, special education is much more than just a form of care, since it combines educational, psychological, social, medical and paramedical inputs. Moreover, the Government recalled that special education is not financed solely by the sickness insurance scheme since the state pays for its educational component (Article L.242-1 of the Social Action Code). Accordingly, 5 400 teachers are assigned to medical-social establishments and services and health establishments to assist 94,000 children and young persons with disabilities.

31. Finally, the Government contested that the financing of the part of special education met by the sickness insurance system through the ONDAM - the national objective for sickness insurance expenditure - is less generous than what would be a state financing within the education budget. On the contrary, it held that such a system is more flexible because the growth rate applied to the expenditure objective for services and establishments, depending on the social security system, is determined by public health needs and national priorities.

C. The alleged inadequacy of early intervention

32. Autism-Europe argued that early intervention to assist children with autism is virtually non-existent.

33. The Government considered that early medical-social action centers (CAMSPs) make specific provision for the early detection of disability, or risk of disability, and outpatient treatment by multidisciplinary teams for children under six with sensory, motor or mental disabilities. From 1996, the number of these centers has sharply increased: they are now 260 in all but one of the *departments,* and the 2001-2003 three-year plan for disabled children, young persons and adults has set aside € 3 million a year to finance their establishment and extension. The recently established four autism resource centers in Brest, Reims, Montpellier and Tours are responsible for carrying out diagnoses in particularly complex or sensitive cases. The complainant sustained that this information concerned disabled children as a whole rather than children with autism.

D. The alleged inadequacy of mainstream education

34. Notwithstanding the regulations in force, the complainant argued that the mainstreaming of autistic children and young people is still the exception rather than the rule and, even when it occurs, it is confined to an average of just a few hours per week. The complainant asserted that structures charged with integration – school integration classes (CLIS), educational integration units (UPI) and the domiciliary care and special education services (SESSAD), are generally and even officially acknowledged as insufficient in number[4]. The complainant cited official figures concerning mainstreaming. According to the report of the Senate, only 7% of children with disabilities (about 60,000 as a whole) are integrated into ordinary schools[5]. According to the Ministry of Education, mainstreamed disabled children and young people represent 1.3% of the total school population in each department, while the Court of Auditors rates their integration to less than 1%[6]. At the hearing, the complainant asserted that out of 6,000 children with autism who could be mainstreamed only 250 are individually integrated, that is about 5%. Another 400 are collectively integrated, making a total of 650 on a total school population of 15 million children, teenagers and students.

---

[4] Ministry of Employment and Solidarity (General Inspectorate of Social Affairs), Ministry of Education (General Inspectorate of Education), Report on access to education for children and young people with disabilities, March 1999; M. Fardeau , DGAS Report to the Ministry of Employment and Solidarity, Disability: a comparative and forward analysis of provision.

[5] Senate, P. Blanc, Report of the Social Affairs Commission on the policy for compensating disability.

[6] Court of Auditors, Life with a disability, Public report, June 2003.

35. The Government contested this argument and affirmed that for the State mainstreaming is a priority, both in legislation (Articles L.114-1 of the Social Action and Family Code in general terms and Articles L.112-1 and L.112-3 of the Education Code, Education Act, No. 89-486) and in relevant regulations (*Handiscol* circular), and also through the provision of the necessary resources.

36. The Government asserted that full-time or part-time integration may occur individually or collectively through the creation of special classes (CLIS and UPIS) within ordinary schools. In its written memorials, it indicated that, at the start of the 2001-2002 academic year there were 3381 CLIS (compared with 3170 the previous year) and 303 UPIS (compared with 202). At the hearing, the Government contested the complainant's figures about mainstreaming of persons with autism, but it was unable to offer precise data concerning them. It only affirmed that, in 2002-2003, the total number of disabled persons integrated into ordinary school amounted to 89 000 (67 000 at primary level and 22 000 at secondary level).

37. The Government pointed out that the *Handiscol* project assists in the integration process by providing information, assistance in improving access to school establishments, training of teachers, and the supply of support staff to accompany children who need it.

38. Finally, the Government indicated a new range of measures decided on 21 January 2003 for further improving the integration of pupils with disabilities by developing special classes in secondary schools and increasing the number of special auxiliary staff to 6,000 (Decree no. 40/2003 on auxiliary staff).

E. The alleged deficiencies in special education: administrative unwieldiness and teacher training

39. Autism-Europe alleged that persons with autism find it hard to receive adapted education in specialised institutions because administrative unwieldiness gets in the way of providing new specialised facilities. The long and time-consuming administrative process is also held to be at the origin of French persons with autism integrating Belgian special education institutions.

40. The complainant affirmed that there are no binding rules requiring the teaching staff of specialised education facilities to be specifically trained to cater for autistic persons[7] and the training for staff is in fact non-existent or ill-adapted. This appears to be confirmed by official sources[8].

41. The Government contested the allegation and indicated all measures implemented so far to train professionals working with autistic persons:

- for seven years the National training and study centre for maladjusted children (CNEIFEI) organises an autism module as part of its training for teachers studying for a specialised teaching certificate in educational adjustment and integration (CAPSAIS, option D). In 2002-2003, 12 specialist teacher trainees and 97 other persons (national education personnel and parents) took part in this module;

[7] There is only Circular no. 98/232 on training for staff working with persons with autism.

[8] Ministry of Employment and Solidarity (General Inspectorate of Social Affairs), Ministry of Education (General Inspectorate of Education), Report on access to education for children and young people with disabilities, March 1999.

- since 1998, seventy continuing training sessions have been held each year, attended by an average of 500 trainees, to form professional working with persons with autism;
- new measures announced by the Government include training for all staff and the development of specialist teacher training in university teacher training institutions (IUFM).

42. In addition, the Government held that Act No. 2002/2 on social and medical-social action should help reducing the number of steps and time required to set-up specialist establishments.

F. The alleged deficiencies in the educational placements of adults with autism

43. As a consequence of the lack of legal rules, Autism-Europe argued that educational provision for autistic adults is non-existent.

44. The Government contested the allegation and described all the different medical and medical-social establishments and services catering for adults with disabilities, thereby including adults with autism.

G. Reliance on Hospitalisation of Children and Adults with Autism

45. Autism-Europe alleged that, as a consequence of the lack of places, persons with autism seek care abroad, mainly in Belgium, and that hospitals cannot be considered "sufficient and adequate" institutions and services for educational provision of autistic persons. This latter aspect, the complainant added, is confirmed by official sources[9].

46. The Government contested the allegation and indicated that the newly planned places already referred to are particularly concerned with offering autistic persons local accommodation so that they are not cut off from their families. Moreover, placement in psychiatric hospital occurs when specialist care, which like all medical care is prescribed by doctors, is necessary for persons with autism, as for anyone else.

II. ASSESSMENT OF THE COMMITTEE

47. The Committee considers that the arguments of the complainant alleging the violation of Articles 15§1and 17§1 and of Article E are so intertwined as to be inseparable. Its assessment, therefore, will deal with the question whether the situation in France is in conformity with Articles 15§1 and 17§1 whether alone or when read in combination with Article E of the Revised Charter.

48. As emphasised in the General Introduction to its Conclusions of 2003 (p. 10), the Committee views Article 15 of the Revised Charter as both reflecting and advancing a profound shift of values in all European countries over the past decade away from treating them as objects of pity and towards respecting them as equal citizens – an approach that the Council of Europe contributed to promote, with the adoption by the Committee of Ministers of Recommendation (92) 6 of 1992 on a coherent policy for people with disabilities. The underlying vision of Article 15 is one of equal citizenship for persons with

[9] Ministry of Employment and Solidarity (General Inspectorate of Social Affairs), Ministry of Education (General Inspectorate of Education), Report on access to education for children and young people with disabilities, March 1999.

disabilities and, fittingly, the primary rights are those of "independence, social integration and participation in the life of the community". Securing a right to education for children and others with disabilities plays an obviously important role in advancing these citizenship rights. This explains why education is now specifically mentioned in the revised Article 15 and why such an emphasis is placed on achieving that education "in the framework of general schemes, wherever possible". It should be noted that Article 15 applies to all persons with disabilities regardless of the nature and origin of their disability and irrespective of their age. It thus clearly covers both children and adults with autism.

49. Article 17 is predicated on the need to ensure that children and young persons grow up in an environment which encourages the "full development of their personality and of their physical and mental capacities". This approach is just as important for children with disabilities as it is for others and arguably more in circumstances where the effects of ineffective or untimely intervention are ever likely to be undone. The Committee views Article 17, which deals more generally, *inter alia,* with the right to education for all, as also embodying the modern approach of mainstreaming. Article 17§1, in particular, requires the establishment and maintenance of sufficient and adequate institutions and services for the purpose of education. Since Article 17§1 deals only with children and young persons it is important to read it in conjunction with Article 15§1 as far as adults are concerned.

50. Autism-Europe also argued that Article E of the Revised Charter is violated since the net result of alleged shortfalls is that persons with autism do not benefit, as effectively as other citizens, from a right to education as embodied both in Articles 15§1 and 17§1.

51. The Committee considers that the insertion of Article E into a separate Article in the Revised Charter indicates the heightened importance the drafters paid to the principle of non-discrimination with respect to the achievement of the various substantive rights contained therein. It further considers that its function is to help secure the equal effective enjoyment of all the rights concerned regardless of difference. Therefore, it does not constitute an autonomous right which could in itself provide independent grounds for a complaint. It follows that the Committee understands the arguments of the complainant as implying that the situation as alleged violates Articles 15§1 and 17§1 when read in combination with Article E of the Revised Charter.

Although disability is not explicitly listed as a prohibited ground of discrimination under Article E, the Committee considers that it is adequately covered by the reference to "other status". Such an interpretative approach, which is justified in its own rights, is fully consistent with both the letter and the spirit of the Political Declaration adopted by the 2nd European conference of ministers responsible for integration policies for people with disabilities (Malaga, April, 2003), which reaffirmed the anti-discriminatory and human rights framework as the appropriate one for development of European policy in this field.

52. The Committee observes further that the wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in interpreting Article 14 and most recently in the Thlimmenos case [*Thlimmenos c. Grèce* [GC], n° 34369/97, CEDH 2000-IV, § 44)], the principle of equality that is reflected therein means treating equals equally and unequals unequally. In particular it is said in the above mentioned case:

> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.

In this regard, the Committee considers that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.

53. The Committee recalls, as stated in its decision relative to Complaint No.1/1998 (International Commission of Jurist v. Portugal, § 32), that the implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.

54. In the light of the afore-mentioned, the Committee notes that in the case of autistic children and adults, notwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required, and even after the enactment of the Disabled Persons Policy Act of 30 June 1975, France has failed to achieve sufficient progress in advancing the provision of education for persons with autism. It specifically notes that most of the French official documents, in particular those submitted during the procedure, still use a more restrictive definition of autism than that adopted by the World Heath Organisation and that there are still insufficient official statistics with which to rationally measure progress through time. The Committee considers that the fact that the establishments specialising in the education and care of disabled children (particularly those with autism) are not in general financed from the same budget as normal schools, does not in itself amount to discrimination, since it is primarily for States themselves to decide on the modalities of funding.

Nevertheless, it considers, as the authorities themselves acknowledge, and whether a broad or narrow definition of autism is adopted, that the proportion of children with autism being educated in either general or specialist schools is much lower than in the case of other children, whether or not disabled. It is also established, and not contested by the authorities, that there is a chronic shortage of care and support facilities for autistic adults.

CONCLUSION

For these reasons, the Committee concludes by 11 votes to 2 that the situation constitutes a violation of Articles 15§1 and 17§1 whether alone or read in combination with Article E of the revised European Social Charter.

Gerard QUINN	Jean-Michel BELORGEY	Régis BRILLAT
Rapporteur	President	Executive Secretary