Dokumentacja

PRAWO UE W DZIEDZINIE NIEPEŁNOSPRAWNOŚCI ORAZ KONWENCJIA NARODÓW ZJEDNOCZONYCH O PRAWACH OSÓB NIEPEŁNOSPRAWNYCH

SEMINARIUM DLA PRZEDSTAWICIELI WYMIARU SPRAWIEDLIWOŚCI: ZE SZCZEGÓLNYM UWZGLĘDNIENIEM POSTĘPOWAŃ W SPRAWACH CYWILNYCH I Z ZAKRESU PRAWA PRACY

413DV06 Kraków, 3-4 września 2013

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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) (dostępne tylko w jęz. angielskim)	
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WERSJA SKONSOLIDOWANA
TRAKTATU O UNII EUROPEJSKIEJ 30.3.2010

Dziennik Urz PL ędowy Unii Europejskiej, C 83, 30.3.2010

Artykuł 2

Unia opiera się na wartościach poszanowania godności osoby ludzkiej, wolności, demokracji, równości, państwa prawnego, jak również poszanowania praw człowieka, w tym praw osób należących do mniejszości. Wartości te są wspólne Państwom Członkowskim w społeczeństwie opartym na pluralizmie, niedyskryminacji, tolerancji, sprawiedliwości, solidarności oraz na równości kobiet i mężczyzn.

Artykuł 3
(dawny artykuł 2 TUE)

1. Celem Unii jest wspieranie pokoju, jej wartości i dobrobytu jej narodów.
2. Unia zapewnia swoim obywatelom przestrzeń wolności, bezpieczeństwa i sprawiedliwości bez granic wewnętrznych, w której zagwarantowana jest swoboda przepływu osób, w powiązaniu z właściwymi środkami w odniesieniu do kontroli granic zewnętrznych, azylu, imigracji, jak również zapobiegania i zwalczania przestępczości.
3. Unia ustanawia rynek wewnętrzny. Działa na rzecz trwałego rozwoju Europy, którego podstawą jest zrównoważony wzrost gospodarczy oraz stabilność cen, społeczna gospodarka rynkowa o wysokiej konkurencyjności zmierzająca do pełnego zatrudnienia i postępu społecznego oraz wysoki poziom ochrony i poprawy jakości środowiska. Wspiera postęp naukowo-techniczny.

Zwalcza wykluczenie społeczne i dyskryminację oraz wspiera sprawiedliwość społeczną i ochronę socjalną, równość kobiet i mężczyzn, solidarność między pokoleniami i ochronę praw dziecka.

Wspiera spójność gospodarczą, społeczną i terytorialną oraz solidarność między Państwami Członkowskimi.

Szanuje swoją bogatą różnorodność kulturową i językową oraz czuwa nad ochroną i rozwojem dziedzictwa kulturowego Europy.

1. Unia ustanawia unię gospodarczą i walutową, której walutą jest euro.
2. W stosunkach zewnętrznych Unia umacnia i propaguje swoje wartości i interesy oraz wnosi wkład w ochronę swoich obywateli. Przyczynia się do pokoju, bezpieczeństwa, trwałego rozwoju Ziemi, do solidarności i wzajemnego szacunku między narodami, do swobodnego i uczciwego handlu, do wyeliminowania ubóstwa oraz do ochrony praw człowieka, w szczególności praw dziecka, a także do ścisłego przestrzegania i rozwoju prawa międzynarodowego, w szczególności zasad Karty Narodów Zjednoczonych.

3. Unia dąży do osiągnięcia swoich celów właściwymi środkami odpowiednio do kompetencji przyznanych jej w Traktatach.

Artykuł 6
(dawny artykuł 6 TUE)

1. Unia uznaje prawa, wolności i zasady określone w Karcie praw podstawowych Unii Europejskiej z 7 grudnia 2000 roku, w brzmieniu dostosowanym 12 grudnia 2007 roku w Strasburgu, która ma taką samą moc prawną jak Traktaty.

Postanowienia Karty w żaden sposób nie rozszerzają kompetencji Unii określonych w Traktatach.

Prawa, wolności i zasady zawarte w Karcie są interpretowane zgodnie z postanowieniami ogólnymi określonymi w tytule VII Karty regulującymi jej interpretację i stosowanie oraz z należytym uwzględnieniem wyjaśnień, o których mowa w Karcie, które określają źródła tych postanowień.

1. Unia przystępuje do europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności. Przystąpienie do Konwencji nie ma wpływu na kompetencje Unii określone w Traktatach.
2. Prawa podstawowe, zagwarantowane w europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności oraz wynikające z tradycji konstytucyjnych wspólnych Państwom Członkowskim, stanowią część prawa Unii jako zasady ogólne prawa.

Artykuł 19

1. Trybunał Sprawiedliwości Unii Europejskiej obejmuje Trybunał Sprawiedliwości, Sąd i sądy wyspecjalizowane. Zapewnia on poszanowanie prawa w wykładni i stosowaniu Traktatów.

Państwa Członkowskie ustanawiają środki niezbędne do zapewnienia skutecznej ochrony prawnej w dziedzinach objętych prawem Unii.

2. W skład Trybunału Sprawiedliwości wchodzi jeden sędzia z każdego Państwa Członkowskiego. Trybunał Sprawiedliwości jest wspomagany przez rzeczników generalnych.

W skład Sądu wchodzi co najmniej jeden sędzia z każdego Państwa Członkowskiego.

Sędziowie i rzecznicy generalni Trybunału Sprawiedliwości oraz sędziowie Sądu są wybierani spośród osób o niekwestionowanej niezależności, spełniających warunki określone w artykułach 253 i 254 Traktatu o funkcjonowaniu Unii Europejskiej. Są oni mianowani za wspólnym porozumieniem przez rządy Państw Członkowskich na okres sześciu lat. Ustępujący sędziowie i rzecznicy generalni mogą być ponownie mianowani.

3. Trybunał Sprawiedliwości Unii Europejskiej orzeka zgodnie z Traktatami:
a) w zakresie skarg wniesionych przez Państwa Członkowskie, instytucje lub osoby fizyczne lub prawne;
b) w trybie prejudycjalnym, na wniosek sądów Państw Członkowskich, w sprawie wykładni prawa Unii lub ważności aktów przyjętych przez instytucje;
c) w innych sprawach przewidzianych w Traktatach.

WERSJA SKONSOLIDOWANA TRAKTATU O FUNKCJONOWANIU UNII EUROPEJSKIEJ

Dziennik Urz PL ędowy Unii Europejskiej, C 83, 30.3.2010

Artykuł 10

Przy określaniu i realizacji swoich polityk i działań Unia dąży do zwalczania wszelkiej dyskryminacji ze względu na płeć, rasę lub pochodzenie etniczne, religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną.

Artykuł 19
(dawny artykuł 13 TWE)

1. Bez uszczerbku dla innych postanowień Traktatów i w granicach kompetencji, które Traktaty powierzają Unii, Rada, stanowiąc jednomyślnie zgodnie ze specjalną procedurą ustawodawczą i po uzyskaniu zgody Parlamentu Europejskiego, może podjąć środki niezbędne w celu zwalczania wszelkiej dyskryminacji ze względu na płeć, rasę lub pochodzenie etniczne, religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną.
2. Na zasadzie odstępstwa od ustępu 1, dla wsparcia działania podjętego przez Państwa Członkowskie w celu przyczyniania się do osiągnięcia celów określonych w ustępie 1, Parlament Europejski i Rada, stanowiąc zgodnie ze zwykłą procedurą ustawodawczą, mogą przyjąć podstawowe zasady dotyczące unijnych środków zachęcających, z wyłączeniem harmonizacji przepisów ustawowych i wykonawczych Państw Członkowskich.

Artykuł 267
(dawny artykuł 234 TWE)

Trybunał Sprawiedliwości Unii Europejskiej jest właściwy do orzekania w trybie prejudycjalnym:
a) o wykładni Traktatów;
b) o ważności i wykładni aktów przyjętych przez instytucje, organy lub jednostki organizacyjne Unii;

W przypadku gdy pytanie z tym związane jest podniesione przed sądem jednego z Państw Członkowskich, sąd ten może, jeśli uzna, że decyzja w tej kwestii jest niezbędna do wydania wyroku, zwrócić się do Trybunału z wnioskiem o rozpatrzenie tego pytania.

W przypadku gdy takie pytanie jest podniesione w sprawie zawisłej przed sądem krajowym, którego orzeczenia nie podlegają zaskarżeniu według prawa wewnętrznego, sąd ten jest zobowiązany wnieść sprawę do Trybunału.

Jeżeli takie pytanie jest podniesione w sprawie zawisłej przed sądem krajowym dotyczącej osoby pozbawionej wolności, Trybunał stanowi w jak najkrótszym terminie.

KARTA PRAW PODSTAWOWYCH UNII EUROPEJSKIEJ

(2010/C 83/02)

Parlament Europejski, Rada i Komisja uroczyście ogłaszają Kartę praw podstawowych Unii Europejskiej w brzmieniu przedstawionym poniżej:

KARTA PRAW PODSTAWOWYCH UNII EUROPEJSKIEJ

Preambuła

Narody Europy, tworząc między sobą coraz ściślejszy związek, są zdecydowane dzielić ze sobą pokojową przyszłość opartą na wspólnych wartościach.

Świadoma swego duchowo-religijnego i moralnego dziedzictwa, Unia jest zbudowana na niepodzielnych, powszechnych wartościach godności osoby ludzkiej, wolności, równości i solidarności; opiera się na zasadach demokracji i państwa prawnego. Poprzez ustanowienie obywatelstwa Unii oraz stworzenie przestrzeni wolności, bezpieczeństwa i sprawiedliwości stawia jednostkę w centrum swych działań.

Unia przyczynia się do ochrony i rozwoju tych wspólnych wartości, szanując przy tym różnorodność kultur i tradycji narodów Europy, jak również tożsamość narodową Państw Członkowskich i organizację ich władz publicznych na poziomach: krajowym, regionalnym i lokalnym; dąży do wspierania zrównoważonego i stałego rozwoju oraz zapewnia swobodny przepływ osób, usług, towarów i kapitału oraz swobodę przedsiębiorczości.

W tym celu, w obliczu zmian w społeczeństwie, postępu społecznego oraz rozwoju naukowego i technologicznego, niezbędne jest wzmocnienie ochrony praw podstawowych poprzez wyszczególnienie tych praw w Karcie i przez to uczynienie ich bardziej widocznymi.

Niniejsza Karta potwierdza, przy poszanowaniu kompetencji i zadań Unii oraz zasady pomocniczości, prawa wynikające zwłaszcza z tradycji konstytucyjnych i zobowiązań międzynarodowych wspólnych Państwom Członkowskim, europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności, Kart Społecznych przyjętych przez Unię i Radę Europy oraz z orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej i Europejskiego Trybunału Praw Człowieka. W tym kontekście, sądy Unii i Państw Członkowskich będą interpretowały Kartę z należytym uwzględnieniem wyjaśnień sporządzonych pod kierownictwem Prezydium Konwentu, który opracował Kartę, i za których uaktualnienie odpowiada Prezydium Konwentu Europejskiego.

Korzystanie z tych praw rodzi odpowiedzialność i nakłada obowiązki wobec innych osób, wspólnoty ludzkiej i przyszłych pokoleń.

Unia uznaje zatem prawa, wolności i zasady wymienione poniżej.

TYTUŁ I

GODNOŚĆ

Artykuł 1

Godność człowieka

Godność człowieka jest nienaruszalna. Musi być szanowana i chroniona.

Artykuł 2

Prawo do życia

1. Każdy ma prawo do życia.

2. Nikt nie może być skazany na karę śmierci ani poddany jej wykonaniu.

Artykuł 3

Prawo człowieka do integralności

1. Każdy ma prawo do poszanowania jego integralności fizycznej i psychicznej.

2. W dziedzinach medycyny i biologii muszą być szanowane w szczególności:

a) swobodna i świadoma zgoda osoby zainteresowanej, wyrażona zgodnie z procedurami określonymi przez ustawę;

b) zakaz praktyk eugenicznych, w szczególności tych, których celem jest selekcja osób;

c) zakaz wykorzystywania ciała ludzkiego i jego poszczególnych części jako źródła zysku;

d) zakaz reprodukcyjnego klonowania istot ludzkich.

Artykuł 4

Zakaz tortur i nieludzkiego lub poniżającego traktowania albo karania

Nikt nie może być poddany torturom ani nieludzkiemu lub poniżającemu traktowaniu albo karaniu.

Artykuł 5

Zakaz niewolnictwa i pracy przymusowej

1. Nikt nie może być trzymany w niewoli lub w poddaństwie.

2. Nikt nie może być zmuszony do świadczenia pracy przymusowej lub obowiązkowej.

3. Handel ludźmi jest zakazany.

TYTUŁ II

WOLNOŚCI

Artykuł 6

Prawo do wolności i bezpieczeństwa osobistego

Każdy ma prawo do wolności i bezpieczeństwa osobistego.

Artykuł 7

Poszanowanie życia prywatnego i rodzinnego

Każdy ma prawo do poszanowania życia prywatnego i rodzinnego, domu i komunikowania się.

Artykuł 8

Ochrona danych osobowych

1. Każdy ma prawo do ochrony danych osobowych, które go dotyczą.

2. Dane te muszą być przetwarzane rzetelnie w określonych celach i za zgodą osoby zainteresowanej lub na innej uzasadnionej podstawie przewidzianej ustawą. Każdy ma prawo dostępu do zebranych danych, które go dotyczą, i prawo do dokonania ich sprostowania.

3. Przestrzeganie tych zasad podlega kontroli niezależnego organu.

Artykuł 9

Prawo do zawarcia małżeństwa i prawo do założenia rodziny

Prawo do zawarcia małżeństwa i prawo do założenia rodziny są gwarantowane zgodnie z ustawami krajowymi regulującymi korzystanie z tych praw.

Artykuł 10

Wolność myśli, sumienia i religii

1. Każdy ma prawo do wolności myśli, sumienia i religii. Prawo to obejmuje wolność zmiany religii lub przekonań oraz wolność uzewnętrzniania, indywidualnie lub wspólnie z innymi, publicznie lub prywatnie, swej religii lub przekonań poprzez uprawianie kultu, nauczanie, praktykowanie i uczestniczenie w obrzędach.

2. Uznaje się prawo do odmowy działania sprzecznego z własnym sumieniem, zgodnie z ustawami krajowymi regulującymi korzystanie z tego prawa.

Artykuł 11

Wolność wypowiedzi i informacji

1. Każdy ma prawo do wolności wypowiedzi. Prawo to obejmuje wolność posiadania poglądów oraz otrzymywania i przekazywania informacji i idei bez ingerencji władz publicznych i bez względu na granice państwowe.

2. Szanuje się wolność i pluralizm mediów.

Artykuł 12

Wolność zgromadzania się i stowarzyszania się

1. Każdy ma prawo do swobodnego, pokojowego zgromadzania się oraz do swobodnego stowarzyszania się na wszystkich poziomach, zwłaszcza w sprawach politycznych, związkowych i obywatelskich, z którego wynika prawo każdego do tworzenia związków zawodowych i przystępowania do nich dla obrony swoich interesów.

2. Partie polityczne na poziomie Unii przyczyniają się do wyrażania woli politycznej jej obywateli.

Artykuł 13

Wolność sztuki i nauki

Sztuka i badania naukowe są wolne od ograniczeń. Wolność akademicka jest szanowana.

Artykuł 14

Prawo do nauki

1. Każdy ma prawo do nauki i dostępu do kształcenia zawodowego i ustawicznego.

2. Prawo to obejmuje możliwość korzystania z bezpłatnej nauki obowiązkowej.

3. Wolność tworzenia placówek edukacyjnych z właściwym poszanowaniem zasad demokratycznych i prawo rodziców do zapewnienia wychowania i nauczania dzieci zgodnie z własnymi przekonaniami religijnymi, filozoficznymi i pedagogicznymi są szanowane, zgodnie z ustawami krajowymi regulującymi korzystanie z tej wolności i tego prawa.

Artykuł 15

Wolność wyboru zawodu i prawo do podejmowania pracy

1. Każdy ma prawo do podejmowania pracy oraz wykonywania swobodnie wybranego lub zaakceptowanego zawodu.

2. Każdy obywatel Unii ma swobodę poszukiwania zatrudnienia, wykonywania pracy, korzystania z prawa przedsiębiorczości oraz świadczenia usług w każdym Państwie Członkowskim.

3. Obywatele państw trzecich, którzy posiadają zezwolenie na pracę na terytorium Państw Członkowskich, mają prawo do takich samych warunków pracy, z jakich korzystają obywatele Unii.

Artykuł 16

Wolność prowadzenia działalności gospodarczej

Uznaje się wolność prowadzenia działalności gospodarczej zgodnie z prawem Unii oraz ustawodawstwami i praktykami krajowymi.

Artykuł 17

Prawo własności

1. Każdy ma prawo do władania, używania, rozporządzania i przekazania w drodze spadku mienia nabytego zgodnie z prawem. Nikt nie może być pozbawiony swojej własności, chyba że w interesie publicznym, w przypadkach i na warunkach przewidzianych w ustawie, za słusznym odszkodowaniem za jej utratę wypłaconym we właściwym terminie. Korzystanie z mienia może podlegać regulacji ustawowej w zakresie, w jakim jest to konieczne ze względu na interes ogólny.

2. Własność intelektualna podlega ochronie.

Artykuł 18

Prawo do azylu

Gwarantuje się prawo do azylu z poszanowaniem zasad Konwencji genewskiej z 28 lipca 1951 roku i Protokołu z 31 stycznia 1967 roku dotyczących statusu uchodźców oraz zgodnie z Traktatem o Unii Europejskiej i Traktatem o funkcjonowaniu Unii Europejskiej (zwanych dalej „Traktatami").

Artykuł 19

Ochrona w przypadku usunięcia z terytorium państwa, wydalenia lub ekstradycji

1. Wydalenia zbiorowe są zakazane.

2. Nikt nie może być usunięty z terytorium państwa, wydalony lub wydany w drodze ekstradycji do państwa, w którym istnieje poważne ryzyko, iż może być poddany karze śmierci, torturom lub innemu nieludzkiemu lub poniżającemu traktowaniu albo karaniu.

TYTUŁ III

RÓWNOŚĆ

Artykuł 20

Równość wobec prawa

Wszyscy są równi wobec prawa.

Artykuł 21

Niedyskryminacja

1. Zakazana jest wszelka dyskryminacja w szczególności ze względu na płeć, rasę, kolor skóry, pochodzenie etniczne lub społeczne, cechy genetyczne, język, religię lub przekonania, poglądy polityczne lub wszelkie inne poglądy, przynależność do mniejszości narodowej, majątek, urodzenie, niepełnosprawność, wiek lub orientację seksualną.

2. W zakresie zastosowania Traktatów i bez uszczerbku dla ich postanowień szczególnych zakazana jest wszelka dyskryminacja ze względu na przynależność państwową.

Artykuł 22

Różnorodność kulturowa, religijna i językowa

Unia szanuje różnorodność kulturową, religijną i językową.

Artykuł 23

Równość kobiet i mężczyzn

Należy zapewnić równość kobiet i mężczyzn we wszystkich dziedzinach, w tym w zakresie zatrudnienia, pracy i wynagrodzenia.

Zasada równości nie stanowi przeszkody w utrzymywaniu lub przyjmowaniu środków zapewniających specyficzne korzyści dla osób płci niedostatecznie reprezentowanej.

Artykuł 24

Prawa dziecka

1. Dzieci mają prawo do takiej ochrony i opieki, jaka jest konieczna dla ich dobra. Mogą one swobodnie wyrażać swoje poglądy. Poglądy te są brane pod uwagę w sprawach, które ich dotyczą, stosownie do ich wieku i stopnia dojrzałości.

2. We wszystkich działaniach dotyczących dzieci, zarówno podejmowanych przez władze publiczne, jak i instytucje prywatne, należy przede wszystkim uwzględnić najlepszy interes dziecka.

3. Każde dziecko ma prawo do utrzymywania stałego, osobistego związku i bezpośredniego kontaktu z obojgiem rodziców, chyba że jest to sprzeczne z jego interesami.

Artykuł 25

Prawa osób w podeszłym wieku

Unia uznaje i szanuje prawo osób w podeszłym wieku do godnego i niezależnego życia oraz do uczestniczenia w życiu społecznym i kulturalnym.

Artykuł 26

Integracja osób niepełnosprawnych

Unia uznaje i szanuje prawo osób niepełnosprawnych do korzystania ze środków mających zapewnić im samodzielność, integrację społeczną i zawodową oraz udział w życiu społeczności.

TYTUŁ IV

SOLIDARNOŚĆ

Artykuł 27

Prawo pracowników do informacji i konsultacji w ramach przedsiębiorstwa

Pracownikom i ich przedstawicielom należy zagwarantować, na właściwych poziomach, informację i konsultację we właściwym czasie, w przypadkach i na warunkach przewidzianych w prawie Unii oraz ustawodawstwach i praktykach krajowych.

Artykuł 28

Prawo do rokowań i działań zbiorowych

Pracownicy i pracodawcy, lub ich odpowiednie organizacje, mają, zgodnie z prawem Unii oraz ustawodawstwami i praktykami krajowymi, prawo do negocjowania i zawierania układów zbiorowych pracy na odpowiednich poziomach oraz do podejmowania, w przypadkach konfliktu interesów, działań zbiorowych, w tym strajku, w obronie swoich interesów.

Artykuł 29

Prawo dostępu do pośrednictwa pracy

Każdy ma prawo dostępu do bezpłatnego pośrednictwa pracy.

Artykuł 30

Ochrona w przypadku nieuzasadnionego zwolnienia z pracy

Każdy pracownik ma prawo do ochrony w przypadku nieuzasadnionego zwolnienia z pracy, zgodnie z prawem Unii oraz ustawodawstwami i praktykami krajowymi.

Artykuł 31

Należyte i sprawiedliwe warunki pracy

1. Każdy pracownik ma prawo do warunków pracy szanujących jego zdrowie, bezpieczeństwo i godność.

2. Każdy pracownik ma prawo do ograniczenia maksymalnego wymiaru czasu pracy, do okresów dziennego i tygodniowego odpoczynku oraz do corocznego płatnego urlopu.

Artykuł 32

Zakaz pracy dzieci i ochrona młodocianych w pracy

Praca dzieci jest zakazana. Minimalny wiek dopuszczenia do pracy nie może być niższy niż minimalny wiek zakończenia obowiązku szkolnego, bez uszczerbku dla uregulowań bardziej korzystnych dla młodocianych i z wyjątkiem ograniczonych odstępstw.

Młodociani dopuszczeni do pracy muszą mieć zapewnione warunki pracy odpowiednie dla ich wieku oraz być chronieni przed wyzyskiem ekonomicznym oraz jakąkolwiek pracą, która mogłaby szkodzić ich bezpieczeństwu, zdrowiu lub rozwojowi fizycznemu, psychicznemu, moralnemu i społecznemu albo utrudniać im edukację.

Artykuł 33

Życie rodzinne i zawodowe

1. Rodzina korzysta z ochrony prawnej, ekonomicznej i społecznej.

2. W celu pogodzenia życia rodzinnego z zawodowym każdy ma prawo do ochrony przed zwolnieniem z pracy z powodów związanych z macierzyństwem i prawo do płatnego urlopu macierzyńskiego oraz do urlopu wychowawczego po urodzeniu lub przysposobieniu dziecka.

Artykuł 34

Zabezpieczenie społeczne i pomoc społeczna

1. Unia uznaje i szanuje prawo do świadczeń z zabezpieczenia społecznego oraz do usług społecznych, zapewniających ochronę w takich przypadkach, jak: macierzyństwo, choroba, wypadki przy pracy, zależność lub podeszły wiek oraz w przypadku utraty zatrudnienia, zgodnie z zasadami ustanowionymi w prawie Unii oraz ustawodawstwach i praktykach krajowych.

2. Każdy mający miejsce zamieszkania i przemieszczający się legalnie w obrębie Unii Europejskiej ma prawo do świadczeń z zabezpieczenia społecznego i przywilejów socjalnych zgodnie z prawem Unii oraz ustawodawstwami i praktykami krajowymi.

3. W celu zwalczania wykluczenia społecznego i ubóstwa, Unia uznaje i szanuje prawo do pomocy społecznej i mieszkaniowej dla zapewnienia, zgodnie z zasadami ustanowionymi w prawie Unii oraz ustawodawstwach i praktykach krajowych, godnej egzystencji wszystkim osobom pozbawionym wystarczających środków.

Artykuł 35

Ochrona zdrowia

Każdy ma prawo dostępu do profilaktycznej opieki zdrowotnej i prawo do korzystania z leczenia na warunkach ustanowionych w ustawodawstwach i praktykach krajowych. Przy określaniu i realizowaniu wszystkich polityk i działań Unii zapewnia się wysoki poziom ochrony zdrowia ludzkiego.

Artykuł 36

Dostęp do usług świadczonych w ogólnym interesie gospodarczym

Unia uznaje i szanuje dostęp do usług świadczonych w ogólnym interesie gospodarczym, przewidziany w ustawodawstwach i praktykach krajowych, zgodnie z Traktatami, w celu wspierania spójności społecznej i terytorialnej Unii.

Artykuł 37

Ochrona środowiska

Wysoki poziom ochrony środowiska i poprawa jego jakości muszą być zintegrowane z politykami Unii i zapewnione zgodnie z zasadą zrównoważonego rozwoju.

Artykuł 38

Ochrona konsumentów

Zapewnia się wysoki poziom ochrony konsumentów w politykach Unii.

TYTUŁ V

PRAWA OBYWATELSKIE

Artykuł 39

Prawo głosowania i kandydowania w wyborach do Parlamentu Europejskiego

1. Każdy obywatel Unii ma prawo głosowania i kandydowania w wyborach do Parlamentu Europejskiego w Państwie Członkowskim, w którym ma miejsce zamieszkania, na takich samych warunkach jak obywatele tego państwa.

2. Członkowie Parlamentu Europejskiego są wybierani w powszechnych wyborach bezpośrednich, w głosowaniu wolnym i tajnym.

Artykuł 40

Prawo głosowania i kandydowania w wyborach lokalnych

Każdy obywatel Unii ma prawo głosowania i kandydowania w wyborach do władz lokalnych w Państwie Członkowskim, w którym ma miejsce zamieszkania, na takich samych warunkach jak obywatele tego państwa.

Artykuł 41

Prawo do dobrej administracji

1. Każdy ma prawo do bezstronnego i sprawiedliwego rozpatrzenia swojej sprawy w rozsądnym terminie przez instytucje, organy i jednostki organizacyjne Unii.

2. Prawo to obejmuje:

a) prawo każdego do bycia wysłuchanym, zanim zostaną podjęte indywidualne środki mogące negatywnie wpłynąć na jego sytuację;

b) prawo każdego do dostępu do akt jego sprawy, przy poszanowaniu uprawnionych interesów poufności oraz tajemnicy zawodowej i handlowej;

c) obowiązek administracji uzasadniania swoich decyzji.

3. Każdy ma prawo domagania się od Unii naprawienia, zgodnie z zasadami ogólnymi wspólnymi dla praw Państw Członkowskich, szkody wyrządzonej przez instytucje lub ich pracowników przy wykonywaniu ich funkcji.

4. Każdy może zwrócić się pisemnie do instytucji Unii w jednym z języków Traktatów i musi otrzymać odpowiedź w tym samym języku.

Artykuł 42

Prawo dostępu do dokumentów

Każdy obywatel Unii i każda osoba fizyczna lub prawna mająca miejsce zamieszkania lub statutową siedzibę w Państwie Członkowskim ma prawo dostępu do dokumentów instytucji, organów i jednostek organizacyjnych Unii, niezależnie od ich formy.

Artykuł 43

Europejski Rzecznik Praw Obywatelskich

Każdy obywatel Unii i każda osoba fizyczna lub prawna mająca miejsce zamieszkania lub statutową siedzibę w Państwie Członkowskim ma prawo zwracać się do Europejskiego Rzecznika Praw Obywatelskich w przypadkach niewłaściwego administrowania w działaniach instytucji, organów i jednostek organizacyjnych Unii, z wyłączeniem Trybunału Sprawiedliwości Unii Europejskiej wykonującego swoje funkcje sądowe.

Artykuł 44

Prawo petycji

Każdy obywatel Unii i każda osoba fizyczna lub prawna mająca miejsce zamieszkania lub statutową siedzibę w Państwie Członkowskim ma prawo petycji do Parlamentu Europejskiego.

Artykuł 45

Swoboda przemieszczania się i pobytu

1. Każdy obywatel Unii ma prawo do swobodnego przemieszczania się i przebywania na terytorium Państw Członkowskich.

2. Swoboda przemieszczania się i pobytu może zostać przyznana, zgodnie z Traktatami, obywatelom państw trzecich przebywającym legalnie na terytorium Państwa Członkowskiego.

Artykuł 46

Opieka dyplomatyczna i konsularna

Każdy obywatel Unii korzysta na terytorium państwa trzeciego, w którym Państwo Członkowskie, którego jest obywatelem, nie ma swojego przedstawicielstwa, z ochrony dyplomatycznej i konsularnej każdego z pozostałych Państw Członkowskich na takich samych warunkach jak obywatele tego państwa.

TYTUŁ VI

WYMIAR SPRAWIEDLIWOŚCI

Artykuł 47

Prawo do skutecznego środka prawnego i dostępu do bezstronnego sądu

Każdy, kogo prawa i wolności zagwarantowane przez prawo Unii zostały naruszone, ma prawo do skutecznego środka prawnego przed sądem, zgodnie z warunkami przewidzianymi w niniejszym artykule.

Każdy ma prawo do sprawiedliwego i jawnego rozpatrzenia jego sprawy w rozsądnym terminie przez niezawisły i bezstronny sąd ustanowiony uprzednio na mocy ustawy. Każdy ma możliwość uzyskania porady prawnej, skorzystania z pomocy obrońcy i przedstawiciela.

Pomoc prawna jest udzielana osobom, które nie posiadają wystarczających środków, w zakresie w jakim jest ona konieczna dla zapewnienia skutecznego dostępu do wymiaru sprawiedliwości.

Artykuł 48

Domniemanie niewinności i prawo do obrony

1. Każdego oskarżonego uważa się za niewinnego, dopóki jego wina nie zostanie stwierdzona zgodnie z prawem.

2. Każdemu oskarżonemu gwarantuje się poszanowanie prawa do obrony.

Artykuł 49

Zasady legalności oraz proporcjonalności kar do czynów zabronionych pod groźbą kary

1. Nikt nie może zostać skazany za popełnienie czynu polegającego na działaniu lub zaniechaniu, który według prawa krajowego lub prawa międzynarodowego nie stanowił czynu zabronionego pod groźbą kary w czasie jego popełnienia. Nie wymierza się również kary surowszej od tej, którą można było wymierzyć w czasie, gdy czyn zabroniony pod groźbą kary został popełniony. Jeśli ustawa, która weszła w życie po popełnieniu czynu zabronionego pod groźbą kary, przewiduje karę łagodniejszą, ta właśnie kara ma zastosowanie.

2. Niniejszy artykuł nie stanowi przeszkody w sądzeniu i karaniu osoby za działanie lub zaniechanie, które w czasie, gdy miało miejsce, stanowiło czyn zabroniony pod groźbą kary, zgodnie z ogólnymi zasadami uznanymi przez wspólnotę narodów.

3. Kary nie mogą być nieproporcjonalnie surowe w stosunku do czynu zabronionego pod groźbą kary.

Artykuł 50

Zakaz ponownego sądzenia lub karania w postępowaniu karnym za ten sam czyn zabroniony pod groźbą kary

Nikt nie może być ponownie sądzony lub ukarany w postępowaniu karnym za ten sam czyn zabroniony pod groźbą kary, w odniesieniu do którego zgodnie z ustawą został już uprzednio uniewinniony lub za który został już uprzednio skazany prawomocnym wyrokiem na terytorium Unii.

TYTUŁ VII

POSTANOWIENIA OGÓLNE DOTYCZĄCE WYKŁADNI I STOSOWANIA KARTY

Artykuł 51

Zakres zastosowania

1. Postanowienia niniejszej Karty mają zastosowanie do instytucji, organów i jednostek organizacyjnych Unii przy poszanowaniu zasady pomocniczości oraz do Państw Członkowskich wyłącznie w zakresie, w jakim stosują one prawo Unii. Szanują one zatem prawa, przestrzegają zasad i popierają ich stosowanie zgodnie ze swymi odpowiednimi uprawnieniami i w poszanowaniu granic kompetencji Unii powierzonych jej w Traktatach.

2. Niniejsza Karta nie rozszerza zakresu zastosowania prawa Unii poza kompetencje Unii, nie ustanawia nowych kompetencji ani zadań Unii, ani też nie zmienia kompetencji i zadań określonych w Traktatach.

Artykuł 52

Zakres i wykładnia praw i zasad

1. Wszelkie ograniczenia w korzystaniu z praw i wolności uznanych w niniejszej Karcie muszą być przewidziane ustawą i szanować istotę tych praw i wolności. Z zastrzeżeniem zasady proporcjonalności, ograniczenia mogą być wprowadzone wyłącznie wtedy, gdy są konieczne i rzeczywiście odpowiadają celom interesu ogólnego uznawanym przez Unię lub potrzebom ochrony praw i wolności innych osób.

2. Prawa uznane w niniejszej Karcie, które są przedmiotem postanowień Traktatów, są wykonywane na warunkach i w granicach w nich określonych.

3. W zakresie, w jakim niniejsza Karta zawiera prawa, które odpowiadają prawom zagwarantowanym w europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności, ich znaczenie i zakres są takie same jak praw przyznanych przez tę konwencję. Niniejsze postanowienie nie stanowi przeszkody, aby prawo Unii przyznawało szerszą ochronę.

4. W zakresie, w jakim niniejsza Karta uznaje prawa podstawowe wynikające ze wspólnych tradycji konstytucyjnych Państw Członkowskich, prawa te interpretuje się zgodnie z tymi tradycjami.

5. Postanowienia niniejszej Karty zawierające zasady mogą być wprowadzane w życie przez akty prawodawcze i wykonawcze przyjęte przez instytucje, organy i jednostki organizacyjne Unii oraz przez akty Państw Członkowskich, gdy wykonują one prawo Unii, korzystając ze swoich odpowiednich uprawnień. Można się na nie powoływać w sądzie jedynie w celu wykładni tych aktów i kontroli ich legalności.

6. Ustawodawstwa i praktyki krajowe uwzględnia się w pełni, jak przewiduje to niniejsza Karta.

7. Wyjaśnienia sporządzone w celu wskazania wykładni niniejszej Karty są należycie uwzględniane przez sądy Unii i Państw Członkowskich.

Artykuł 53

Poziom ochrony

Żadne z postanowień niniejszej Karty nie będzie interpretowane jako ograniczające lub naruszające prawa człowieka i podstawowe wolności uznane, we właściwych im obszarach zastosowania, przez prawo Unii i prawo międzynarodowe oraz konwencje międzynarodowe, których Unia lub wszystkie Państwa Członkowskie są stronami, w szczególności przez europejską Konwencję o ochronie praw człowieka i podstawowych wolności oraz przez konstytucje Państw Członkowskich.

Artykuł 54

Zakaz nadużycia praw

Żadne z postanowień niniejszej Karty nie może być interpretowane jako przyznające prawo do podejmowania jakiejkolwiek działalności lub dokonywania jakiegokolwiek czynu zmierzającego do zniweczenia praw i wolności uznanych w niniejszej Karcie lub ich ograniczenia w większym stopniu, aniżeli jest to przewidziane w niniejszej Karcie.

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Powyższy tekst przejmuje, z dostosowaniami, Kartę proklamowaną dnia 7 grudnia 2000 r. i zastępuje ją od dnia wejścia w życie Traktatu z Lizbony.

KOMISJA EUROPEJSKA

Bruksela, dnia 15.11.2010
KOM(2010) 636 wersja ostateczna

KOMUNIKAT KOMISJI DO PARLAMENTU EUROPEJSKIEGO, RADY, EUROPEJSKIEGO KOMITETU EKONOMICZNO-SPOŁECZNEGO I KOMITETU REGIONÓW

Europejska strategia w sprawie niepełnosprawności 2010-2020: Odnowione zobowiązanie do budowania Europy bez barier

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Europejska strategia w sprawie niepełnosprawności 2010-2020: Odnowione zobowiązanie do budowania Europy bez barier

SPIS TREŚCI

1. WPROWADZENIE

Jedna na sześć osób w Unii Europejskiej jest niepełnosprawna[1], w stopniu od lekkiego do znacznego, co oznacza, że około 80 mln Europejczyków często nie ma możliwości pełnego uczestniczenia w życiu społecznym i gospodarczym z powodu barier związanych ze środowiskiem i z postawami ich otoczenia. Wskaźnik ubóstwa osób niepełnosprawnych jest o 70% wyższy od średniej[2], także z powodu ograniczonego dostępu do zatrudnienia.

Ponad jedna trzecia osób w wieku powyżej 75 lat dotknięta jest niepełnosprawnością ograniczającą w pewnym stopniu ich możliwości, a w przypadku ponad 20 % ograniczenia te są znaczne[3]. Ponadto liczba tych osób zwiększy się wraz ze starzeniem się społeczeństwa UE.

Na Unii Europejskiej i państwach członkowskich spoczywa odpowiedzialność za poprawę społecznej i ekonomicznej sytuacji osób niepełnosprawnych.

- Artykuł 1 Karty Praw Podstawowych UE (zwanej dalej „Kartą") stanowi, że: „Godność człowieka jest nienaruszalna. Musi być szanowana i chroniona." Artykuł 26 stanowi: „Unia uznaje i szanuje prawo osób niepełnosprawnych do korzystania ze środków mających zapewnić im samodzielność, integrację społeczną i zawodową oraz udział w życiu społeczności." Ponadto art. 21 zakazuje wszelkiej dyskryminacji ze względu na niepełnosprawność.

- W Traktacie o Funkcjonowaniu Unii Europejskiej zawarty został wymóg zwalczania przez Unię przy określaniu i realizacji jej polityk i działań wszelkiej dyskryminacji ze względu na niepełnosprawność (art. 10) oraz możliwość dostosowywania w tym celu prawodawstwa Unii (art. 19).

- Konwencja praw osób niepełnosprawnych ONZ (zwana dalej „Konwencją ONZ"), będąca pierwszym prawnie wiążącym instrumentem w zakresie praw człowieka, którego stronami są UE i jej państwa członkowskie, wkrótce obowiązywać będzie w całej UE[4]. Konwencja ONZ zobowiązuje Państwa Strony do ochrony wszystkich praw człowieka i praw podstawowych osób niepełnosprawnych.

Zgodnie z Konwencją ONZ do osób niepełnosprawnych zalicza się te osoby, które mają długotrwale naruszoną sprawność fizyczną, umysłową, intelektualną lub sensoryczną, co może, w oddziaływaniu z różnymi barierami, utrudniać im pełne i skuteczne uczestnictwo w życiu społecznym, na równych zasadach z innymi osobami.

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1 Moduł ad hoc badania aktywności ekonomicznej ludności UE w zakresie zatrudnienia osób niepełnosprawnych (EU Labour Force Survey ad hoc module on employment of disabled people - LFS AHM), 2002.

2 Europejskie badanie warunków życia ludności (EU Statistics on Income and Living Conditions: EU-SILC), 2004 r.

3 LFS AHM i EU- SILC 2007.

4 Została ona uzgodniona i podpisana przez wszystkie państwa członkowskie oraz przez UE w 2007 r. W październiku 2010 r. ratyfikowało ją 16 państw członkowskich (BE, CZ, DK, DE, ES, FR, IT, LV, LT, HU, AT, PT, SI, SK, SE, UK), a pozostałe są w trakcie ratyfikacji. Konwencja ONZ będzie obowiązywać UE i stanowić część porządku prawnego UE.

Komisja wraz z państwami członkowskimi będzie się starać o znoszenie przeszkód na drodze do Europy bez barier, przyjmując nowe rezolucje Parlamentu Europejskiego i Rady[5]. Niniejsza strategia określa ramy działania na poziomie europejskim oraz działań krajowych w odniesieniu do odmiennych sytuacji niepełnosprawnych mężczyzn, kobiet i dzieci.

Pełny udział osób niepełnosprawnych w życiu społecznym i gospodarczym ma zasadnicze znaczenie dla powodzenia unijnej strategii „Europa 2020"[6] na rzecz inteligentnego i zrównoważonego wzrostu sprzyjającego włączeniu społecznemu. Budowa społeczeństwa zapewniającego pełne włączenie społeczne przynosi także nowe możliwości rozwoju rynku i stymuluje innowacyjność. Ze względu na rosnącą liczbę konsumentów w starszym wieku argumenty ekonomiczne przemawiają za udostępnieniem usług i produktów dla wszystkich. Na przykład europejski rynek urządzeń wspomagających, którego roczna wartość szacowana jest na ponad 30 mld EUR[7], nadal jest rozdrobniony, a dostępne urządzenia są drogie. Ramy polityczne i prawne, podobnie jak rozwijane produkty i usługi, nie odzwierciedlają odpowiednio potrzeb osób niepełnosprawnych. Wiele towarów, usług, a także budynków nadal nie jest dostatecznie dostępnych.

Kryzys gospodarczy negatywnie wpłynął na sytuację osób niepełnosprawnych i sprawił, że konieczne stało się szybkie podjęcie działań. Celem niniejszej strategii jest poprawa jakości życia poszczególnych osób oraz odniesienie korzyści przez społeczeństwo i gospodarkę bez powodowania zbędnych obciążeń dla przemysłu i administracji.

2. CELE I DZIAŁANIA

Ogólnym celem strategii jest zwiększenie możliwości osób niepełnosprawnych, tak aby mogły one w pełni korzystać ze swoich praw i uczestniczyć w życiu społecznym oraz w europejskiej gospodarce, zwłaszcza dzięki jednolitemu rynkowi. Osiągnięcie tych celów i skuteczne wprowadzenie w życie Konwencji ONZ w całej UE wymaga spójnych działań. Niniejsza strategia określa działania, które na poziomie UE mają uzupełniać działania krajowe i wyznacza mechanizmy[8] potrzebne do wdrożenia Konwencji ONZ na poziomie Unii Europejskiej, także w obrębie instytucji UE. Strategia określa także wsparcie jakiego wymagają dotacje, badania naukowe, kampanie informacyjne, opracowywanie statystyk i gromadzenie danych.

Eliminowanie barier znajduje się w centrum strategii[9]. Komisja określiła osiem podstawowych obszarów działania: **Dostępność, Uczestnictwo, Równość, Zatrudnienie, Kształcenie i szkolenie, Ochrona socjalna, Zdrowie i Działania zewnętrzne**. Dla każdego obszaru określono najważniejsze działania oraz nadrzędny cel na poziomie UE opisany w ramce. Powyższe obszary wybrano ze względu na ich potencjał dla osiągnięcia ogólnych celów strategii i Konwencji ONZ, powiązanych dokumentów politycznych instytucji UE oraz Rady Europy, a także wyników planu działania UE na rzecz osób niepełnosprawnych na lata 2003–2010 i konsultacji z państwami członkowskimi, zainteresowanymi stronami i obywatelami. Przywoływane działania na poziomie krajowym mają na celu uzupełnianie

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5 Rezolucje Rady SOC 375 z 2 czerwca 2010 r. oraz 2008/C 75/01 i rezolucja Parlamentu Europejskiego B6-0194/2009, P6_TA(2009)0334.

6 COM(2010) 2020

7 Deloitte & Touche: Dostęp do urządzeń wspomagających w UE, 2003 oraz Badania BCC, 2008.

8 Artykuł 33 Konwencji ONZ.

9 Zgodnie z Eurobaromentrem 2006 91 % respondentów uważa, że większe środki powinny być przeznaczane na eliminowanie fizycznych przeszkód dla osób niepełnosprawnych.

działania na poziomie UE, a nie objęcie wszystkich krajowych zobowiązań wynikających z Konwencji ONZ. Komisja będzie poprawiać sytuację osób niepełnosprawnych także poprzez swój projekt przewodni: strategię Europa 2020 oraz ponowne uruchomienie jednolitego rynku.

2.1. Obszary działania

1 — Dostępność

„Dostępność" oznacza, że osoby niepełnosprawne mają dostęp, na równych prawach z innymi, do środowiska fizycznego, transportu, technologii i systemów informacyjno-komunikacyjnych (TIK) oraz pozostałych obiektów i usług. We wszystkich tych obszarach nadal istnieją znaczne bariery. Dla przykładu w UE-27 jedynie 5 % stron internetowych w pełni odpowiada standardom dostępności sieci, nieco więcej jest dostępnych częściowo. Wielu nadawców telewizyjnych nadal emituje jedynie niewiele programów opatrzonych napisami lub komentarzem dla niesłyszących[10].

Dostępność jest warunkiem wstępnym uczestniczenia w życiu społecznym i gospodarczym, ale przed UE nadal długa droga do jej osiągnięcia. Komisja proponuje zastosowanie instrumentów prawnych i innych, takich jak standaryzacja, w celu zwiększenia dostępności budynków, transportu i TIK, zgodnie z projektami przewodnimi: Europejską agendą cyfrową i Unią innowacji. Zgodnie z zasadami inteligentniejszego stanowienia prawa Komisja przeanalizuje korzyści związane z przyjęciem środków prawnych zapewniających dostępność produktów i usług, w tym środków zwiększających stosowanie zamówień publicznych, które wykazały swoją skuteczność w USA[11]. Spowoduje to włączenie problematyki dostępności i „projektowania dla wszystkich" do programów kształcenia i szkolenia w odpowiednich sektorach. Pobudzi to także rozwój ogólnounijnego rynku urządzeń wspomagających. Po dalszych konsultacjach z państwami członkowskimi i innymi zainteresowanymi stronami Komisja rozważy przedstawienie w 2012 r. „Europejskiego aktu w sprawie dostępności" (ang. European Accessibility Act). Mógłby on obejmować opracowanie specyficznych norm dla poszczególnych sektorów, które w znaczny sposób poprawiłyby funkcjonowanie wewnętrznego rynku dostępnych produktów i usług.

Działanie UE będzie wspierać i uzupełniać krajowe działania na rzecz zapewniania dostępności i usuwania istniejących barier oraz poprawy dostępu do szerokiego asortymentu urządzeń wspomagających.

Zapewnienie dostępności towarów, usług, także publicznych, oraz urządzeń wspomagających dla osób niepełnosprawnych.

2 — Uczestnictwo

Nadal wiele przeszkód uniemożliwia osobom niepełnosprawnym pełne korzystanie z praw podstawowych – w tym praw obywateli Unii – i ogranicza ich udział w życiu społecznym na równych z innymi prawach. Do praw tych należy prawo do swobodnego przemieszczania się, wyboru miejsca i stylu życia oraz pełnego dostępu do kultury, rekreacji i sportu. Na przykład osoba o stwierdzonej niepełnosprawności przeprowadzająca się do innego państwa UE może stracić dostęp do krajowych świadczeń, takich jak bezpłatne lub ulgowe korzystanie z komunikacji publicznej.

Komisja podejmie działania w celu:

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[10] KE (2007), SEC(2007) 1469, s. 7.

[11] Dział 508 „Rehabilitation Act" i „Architectural Barriers Act".

– pokonania przeszkód w korzystaniu z praw przysługujących osobom niepełnosprawnym jako jednostkom, konsumentom, uczniom, uczestnikom życia gospodarczego i politycznego; pokonania problemów związanych z mobilnością w obrębie Unii i upowszechniania stosowania europejskiego modelu karty parkingowej dla niepełnosprawnych;

– działania na rzecz przechodzenia od instytucjonalnych do środowiskowych systemów opieki poprzez: wykorzystywanie funduszy strukturalnych oraz Funduszu Rolnego na rzecz Rozwoju Obszarów Wiejskich dla wspierania rozwijania środowiskowych systemów opieki i zwiększania w społeczeństwie wiedzy na temat sytuacji osób niepełnosprawnych żyjących w domach opieki, w szczególności dzieci i osób starszych;

– poprawy dostępności organizacji sportowych, hobbystycznych, kulturalnych i rekreacyjnych, ich działalności, imprez, lokali, produktów i usług, także audiowizualnych; upowszechniania uczestnictwa w wydarzeniach sportowych i organizowania tego rodzaju imprez dla osób niepełnosprawnych; badania możliwości ułatwienia stosowania języka migowego i alfabetu Braille'a w komunikowaniu się z instytucjami UE; poprawienia dostępności procesu głosowania, aby ułatwić korzystanie z praw wyborczych obywateli UE; usprawnienia transgranicznego przesyłania dzieł chronionych prawem autorskim w dostępnych formatach; promowania wykorzystywania możliwości odstępstw przewidzianych w dyrektywie w sprawie praw autorskich[12].

Działanie UE będzie wspierać działania krajowe w celu:

– przejścia od instytucjonalnych do środowiskowych systemów opieki, w tym także z wykorzystaniem funduszy strukturalnych i Funduszu na rzecz Rozwoju Obszarów Wiejskich w zakresie szkolenia pracowników i dostosowywania infrastruktury socjalnej, rozwijania systemów finansowania osobistej opieki, zapewniania odpowiednich warunków pracy zawodowych opiekunów, wsparcia dla rodzin i nieformalnych opiekunów;

– zapewnienia dostępności organizacji sportowych, hobbystycznych, kulturalnych i rekreacyjnych i ich działań oraz wykorzystania możliwości odstępstw przewidzianych w dyrektywie w sprawie praw autorskich.

Osiągnięcie pełnego udziału osób niepełnosprawnych w życiu społecznym poprzez: - umożliwienie im korzystania ze wszystkich korzyści płynących z obywatelstwa UE; - usunięcie barier administracyjnych i wynikających z postaw społecznych w celu osiągnięcia pełnego udziału w życiu społecznym na równych prawach; - zapewnienie usług środowiskowych wysokiej jakości, w tym także dostępu do osobistej opieki.

3 — Równość

[12] Dyrektywa 2001/29/WE. Protokół ustaleń zainteresowanych stron podpisany dnia 14.9.2009 r.

Ponad połowa Europejczyków uważa, że dyskryminacja ze względu na niepełnosprawność lub wiek jest powszechnie obecna w UE[13]. Zgodnie z art. 1, 21 i 26 Karty UE oraz art. 10 i 19 TFUE Komisja będzie działać na rzecz równego traktowania osób niepełnosprawnych z wykorzystaniem dwutorowego podejścia.. Obejmie ono wykorzystanie istniejących przepisów UE, aby zapewnić ochronę przed dyskryminacją, oraz wprowadzenie w życie aktywnej polityki zwalczania dyskryminacji i promowanie w polityce UE równości szans. Komisja będzie także zwracać uwagę na skumulowany wpływ dyskryminacji, której osoby niepełnosprawne doświadczać mogą w z innych względów, takich jak narodowość, wiek, rasa lub przynależność etniczna, płeć, religia lub przekonania oraz orientacja seksualna.

Komisja zagwarantuje także pełne wprowadzenie w życie dyrektywy 2000/78/WE[14] zakazującej dyskryminacji w dziedzinie zatrudnienia. Poprzez kampanie informacyjne na poziomie UE i krajowym Komisja będzie działać na rzecz różnorodności i zwalczania dyskryminacji, a także wspierać działania organizacji pozarządowych aktywnych w tej dziedzinie na poziomie UE.

Działanie UE będzie wspierać i uzupełniać polityki i programy krajowe na rzecz równości, przyczyniając się na przykład do uzyskiwania zgodności prawodawstwa państw członkowskich z Konwencją ONZ.

Wyeliminowanie w UE dyskryminacji ze względu na niepełnosprawność.

4 — Zatrudnienie

Dobra praca gwarantuje niezależność ekonomiczną, pobudza do osobistych osiągnięć i stanowi najlepszą ochronę przed biedą. Poziom zatrudnienia osób niepełnosprawnych wynosi jednak tylko około 50 %[15]. Aby osiągnąć cele UE w zakresie wzrostu gospodarczego więcej osób niepełnosprawnych musi pracować w ramach wolnego rynku pracy i uzyskiwać dochody. Komisja wykorzysta pełny potencjał strategii „Europa 2020" i Programu na rzecz nowych umiejętności i zatrudnienia, oferując państwom członkowskim analizy, wytyczne polityczne, wymianę informacji i inne wsparcie. Poprawi ona stan wiedzy na temat sytuacji zatrudnienia niepełnosprawnych kobiet i mężczyzn, określi istniejące wyzwania i zaproponuje rozwiązania. Komisja zwróci szczególną uwagę na sytuację młodych osób niepełnosprawnych w momencie ich przechodzenia od kształcenia do zatrudnienia. Zajmie się ona kwestią mobilności w ramach tego samego zawodu, na wolnym rynku pracy oraz w warsztatach pracy chronionej, poprzez wymianę informacji i wzajemne uczenie się. We współpracy z partnerami społecznymi Komisja podejmie także zagadnienie samozatrudnienia i dobrej jakości miejsc pracy, w takich aspektach jak warunki pracy i rozwój kariery. Komisja zintensyfikuje swoje wsparcie dla inicjatyw wolontariuszy promujących zarządzanie różnorodnością w miejscu pracy, takich jak karty różnorodności podpisywane przez pracodawców i Inicjatywę na rzecz przedsiębiorczości społecznej.

Działanie UE będzie wspierać działania krajowe w celu: analizowania sytuacji osób niepełnosprawnych na rynku pracy; walki z postawami i pułapkami związanymi z korzystaniem ze świadczeń, które zniechęcają osoby niepełnosprawne do wchodzenia na rynek pracy; pomocy w integracji na rynku pracy dzięki wykorzystaniu Europejskiego Funduszu Społecznego (EFS); rozwijania aktywnej polityki rynku pracy; zwiększania

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13 Eurobarometr, badanie specjalne 317:

14 Dyrektywa Rady 2000/78/WE (Dz.U. L 303 z 2.12.2000, s. 16).

15 LFS, AHM, 2002

dostępności miejsc pracy; rozwijania usług w dziedzinie zatrudnienia, wspierania struktur i szkoleń w miejscu pracy; promowania korzystania z ogólnego rozporządzenia w sprawie wyłączeń blokowych[16], które umożliwia przyznawanie pomocy państwa bez wcześniejszego powiadamiania Komisji.

Umożliwienie znacznie większej liczbie osób niepełnosprawnych zarabiania na życie na wolnym rynku pracy.

5 — Kształcenie i szkolenie

W grupie wiekowej 16-19 lat nie kształci się 37 % osób o znacznie ograniczonych możliwościach i 25 % ograniczonych w pewnym stopniu wobec 17 % osób w pełni sprawnych[17]. Dostęp do głównego nurtu edukacji dla dzieci o znacznym stopniu niepełnosprawności jest trudny i często podlegają one segregacji. Osoby niepełnosprawne, a w szczególności dzieci, muszą być w odpowiedni sposób integrowane w ogólnym systemie edukacyjnym i w ich najlepszym interesie leży zapewnienie im indywidualnego wsparcia. W pełni respektując odpowiedzialność państw członkowskich w zakresie treści nauczania i organizacji systemu edukacyjnego, Komisja wspierać będzie dążenie do osiągnięcia wysokiej jakości kształcenia i szkolenia zapewniającego włączenie społeczne w ramach inicjatywy „Mobilna młodzież". Komisja zwiększać będzie wiedzę o poziomach kształcenia i możliwościach dla osób niepełnosprawnych oraz mobilność tych osób, ułatwiając im uczestnictwo w programie „Uczenie się przez całe życie".

Działanie UE będzie wspierać krajowe wysiłki poprzez ET 2020: strategiczne ramy europejskiej współpracy w dziedzinie kształcenia i szkolenia[18], na rzecz usuwania barier prawnych i administracyjnych stojących na drodze osób niepełnosprawnych w dostępie do ogólnych systemów kształcenia i szkolenia przez całe życie; wspierać w odpowiednim czasie kształcenie dla wszystkich i zindywidualizowane uczenie się oraz wczesną identyfikację osób o szczególnych potrzebach; zapewniać odpowiednie szkolenie i wsparcie osobom zajmującym się kształceniem na wszystkich poziomach i przygotowywać sprawozdania na temat poziomu udziału w kształceniu oraz jego wyników.

Upowszechnienie otwartego dla wszystkich kształcenia i uczenia się przez całe życie dla niepełnosprawnych uczniów i studentów.

6 – Ochrona socjalna

Mniejsze uczestnictwo w ogólnym kształceniu oraz w rynku pracy doprowadziło do nierówności w poziomie dochodów oraz do zjawisk takich jak bieda osób niepełnosprawnych, wykluczenie społeczne i izolacja. Niepełnosprawni muszą mieć możliwość korzystania z systemów ochrony socjalnej i programów ograniczania ubóstwa, do pomocy w obszarach niepełnosprawności, mieszkalnictwa socjalnego i innych usług zwiększających ich możliwości, a także programów emerytalnych i rentowych. Komisja zajmie się tymi zagadnieniami wykorzystując Europejski program walki z ubóstwem. Oceni ona odpowiedniość i trwałość systemów ochrony socjalnej i wsparcia z EFS. W pełni respektując kompetencje państw członkowskich, UE wspierać będzie krajowe działania na rzecz jakości i

[16] Rozporządzenie Komisji (WE) nr 800/2008 (Dz.U. L 214 z 9.8.2008, s. 3).
[17] LFS, AHM, 2002
[18] Konkluzje Rady z dnia 12 maja 2009 w sprawie ET 2020 (Dz.U. C 119, z 28.5.2009, s. 2).

trwałości systemów ochrony socjalnej osób niepełnosprawnych, zwłaszcza poprzez wymianę praktyk i wzajemne uczenie się.

Działanie na rzecz godnych warunków życia osób niepełnosprawnych.

7 — Zdrowie

Osoby niepełnosprawne mają ograniczony dostęp do świadczeń zdrowotnych, w tym do rutynowego leczenia, co prowadzi do niezwiązanych z niepełnosprawnością nierówności dotyczących zdrowia. Osoby niepełnosprawne mają prawo do równego dostępu do opieki zdrowotnej, w tym do prewencji, oraz do specjalnych świadczeń zdrowotnych i rehabilitacyjnych wysokiej jakości i w dostępnych cenach, w których uwzględniane są ich potrzeby, także te związane z płcią. Zapewnienie dostępu jest przede wszystkim zadaniem państw członkowskich, które są odpowiedzialne za organizowanie i zapewnianie świadczeń zdrowotnych i opieki medycznej. Komisja będzie wspierać rozwój polityki na rzecz równego dostępu do opieki zdrowotnej, w tym świadczeń zdrowotnych i rehabilitacyjnych wysokiej jakości przeznaczonych dla osób niepełnosprawnych. Realizując politykę zapobiegającą nierównościom w obszarze zdrowia, Komisja będzie zwracać szczególną uwagę na osoby niepełnosprawne; będzie także wspierać działania w dziedzinie bezpieczeństwa i higieny pracy, aby zmniejszać ryzyko niepełnosprawności będącej wynikiem pracy zawodowej i ułatwić ponowną integrację niepełnosprawnych pracowników[19]; oraz działać na rzecz zapobiegania temu ryzyku.

Działanie UE będzie wspierać krajowe działania na rzecz zapewnienia dostępnych, niedyskryminacyjnych świadczeń i infrastruktury zdrowotnej; upowszechniania wiedzy o niepełnosprawności na uczelniach medycznych oraz w programach nauczania kierunków medycznych; zapewniania odpowiednich świadczeń rehabilitacyjnych; upowszechniania świadczeń w zakresie zdrowia psychicznego i działanie na rzecz rozwijania usług wczesnej interwencji i oceny potrzeb.

Zwiększenie równego dostępu osób niepełnosprawnych do świadczeń zdrowotnych i powiązanych usług.

8 — Działania zewnętrzne

UE i państwa członkowskie powinny promować prawa osób niepełnosprawnych w ramach swoich działań zewnętrznych, w tym rozszerzania UE oraz programów sąsiedztwa i rozwoju. W odpowiednich obszarach Komisja, w szerszym kontekście działań na rzecz niedyskryminacji, podkreślać będzie w działaniach zewnętrznych UE, że zagadnienie niepełnosprawności jest zagadnieniem z obszaru z praw człowieka; upowszechniać znajomość Konwencji ONZ i wiedzę o potrzebach osób niepełnosprawnych, w tym dostępności w dziedzinach pomocy kryzysowej i humanitarnej; doskonalić sieć korespondentów ds. niepełnosprawności, zwiększając świadomość zagadnień związanych z niepełnosprawnością w delegaturach UE; sprawić, by kraje kandydujące i potencjalne kraje kandydujące dokonywały postępów w upowszechnianiu praw osób niepełnosprawnych, a instrumenty finansowe pomocy przedakcesyjnej używane były do poprawy ich sytuacji.

Działanie UE będzie wspierać i uzupełniać krajowe inicjatywy dotyczące niepełnosprawności w dialogu z państwami trzecimi i w odpowiednich przypadkach łączyć niepełnosprawność i

[19] Strategia UE w dziedzinie zdrowia i bezpieczeństwa w pracy 2007-2012 - COM(2007) 62

realizację Konwencji ONZ, uwzględniając zobowiązania podjęte w Akrze odnoszące się do skuteczności pomocy. Doprowadzi to do uzgodnienia stanowisk i zaangażowania w zagadnienia dotyczące niepełnosprawności na forum międzynarodowym (ONZ, Rada Europy, OECD).

Promowanie praw osób niepełnosprawnych w ramach działań zewnętrznych UE.

2.2. Realizacja strategii

Strategia wymaga wspólnego i odnowionego zaangażowania instytucji UE i wszystkich państw członkowskich. Działanie w wymienionych powyżej głównych obszarach muszą być wspierane z użyciem następujących ogólnych instrumentów:

1 — Podnoszenie świadomości

Komisja będzie podejmować starania aby zagwarantować, że osoby niepełnosprawne znają przysługujące im prawa, zwracając szczególną uwagę na dostępność materiałów i kanałów informacyjnych. Będzie ona upowszechniać koncepcję „projektowania dla wszystkich" w odniesieniu do produktów, usług i środowiska.

Działanie UE będzie wspierać i uzupełniać krajowe kampanie świadomości społecznej w zakresie możliwości i wkładu osób niepełnosprawnych oraz promować wymianę dobrych praktyk w ramach grupy wysokiego szczebla ds. niepełnosprawności (DHLG).

Zwiększenie świadomości społecznej w zakresie niepełnosprawności i wiedzy osób niepełnosprawnych o przysługujących im prawach i sposobach ich egzekwowania.

2 — Wsparcie finansowe

Komisja będzie dążyć do zagwarantowania, że programy UE w obszarach polityki istotnych dla osób niepełnosprawnych zawierają możliwości finansowania, na przykład programów badawczych. Koszt działań podejmowanych w celu umożliwienia osobom niepełnosprawnym udziału w programach UE powinien być kwalifikowalny do zwrotu. Unijne instrumenty finansowania, a w szczególności Fundusze Strukturalne, muszą być stosowane w dostępny i niedyskryminacyjny sposób.

Działanie UE będzie wspierać i uzupełniać krajowe wysiłki na rzecz osób niepełnosprawnych i zwalczać dyskryminację poprzez finansowanie w ramach głównego nurtu, właściwe stosowanie art. 16 rozporządzenia ogólnego w sprawie funduszy strukturalnych[20] oraz zwiększanie wymogów dotyczących dostępności zamówień publicznych. Wszystkie środki powinny być wprowadzane w życie zgodnie z europejskim prawem konkurencji, w szczególności przepisami dotyczącymi pomocy państwa.

Optymalizowanie wykorzystania instrumentów finansowania UE na rzecz dostępności i niedyskryminacji oraz zwiększenie widoczności możliwości finansowania związanych z niepełnosprawnością w programach po 2013 r.

3 — Gromadzenie statystyk i danych oraz monitorowanie

[20] Rozporządzenie Rady (WE) nr 1083/2006 (Dz.U. L 210 z 31.7.2006, s. 25).

Komisja będzie działać na rzecz usprawnienia przepływu informacji na temat niepełnosprawności gromadzonej w ramach badań społecznych UE (Europejskie badanie warunków życia ludności, moduł ad hoc badania aktywności ekonomicznej ludności, europejskie badanie zdrowia), opracowania specjalnego badania dotyczącego przeszkód w integracji społecznej osób niepełnosprawnych oraz przedstawienia zestawu wskaźników służących monitorowaniu ich sytuacji w odniesieniu do najważniejszych celów strategii „Europa 2020" (kształcenie, zatrudnienie i ograniczenie ubóstwa). O udział w tych pracach poprzez gromadzenie danych oraz prowadzenie badań naukowych i analiz zwrócono się do Agencji Praw Podstawowych Unii Europejskiej w ramach jej mandatu.

Komisja opracuje także narzędzie internetowe umożliwiające przegląd praktycznych działań i prawodawstwa służącego wprowadzaniu w życie Konwencji ONZ.

Działanie UE będzie wspierać i uzupełniać krajowe działania w ramach gromadzenia statystyk i innych danych, zawierających informacje o barierach uniemożliwiających osobom niepełnosprawnym korzystanie z przysługujących im praw.

Uzupełnianie gromadzenia okresowych danych statystycznych dotyczących niepełnosprawności w celu monitorowania sytuacji osób niepełnosprawnych.

4 — Mechanizmy wymagane w Konwencji ONZ

Ramy zarządzania określone w art. 33 Konwencji ONZ (punkty koordynacji, mechanizm koordynowania, niezależny mechanizm i udział osób niepełnosprawnych i ich organizacji) muszą zostać wprowadzone na dwóch poziomach: w państwach członkowskich, w ramach wielu polityk UE oraz w instytucjach UE. Na poziomie UE w oparciu o istniejącą strukturę stworzone zostaną mechanizmy koordynowania zarówno pomiędzy służbami Komisji a instytucjami UE, jak i pomiędzy UE a państwami członkowskimi. Wprowadzanie w życie niniejszej strategii oraz Konwencji ONZ będzie regularnie dyskutowane w ramach grupy wysokiego szczebla ds. niepełnosprawności z udziałem przedstawicieli państw członkowskich oraz ich krajowych punktów koordynacji, Komisji, osób niepełnosprawnych i ich organizacji oraz innych zainteresowanych stron. Grupa nadal przygotowywać będzie sprawozdania okresowe na nieformalne spotkania ministrów.

Ustanowione zostaną także ramy monitorowania obejmujące jeden lub więcej niezależnych mechanizmów w celu wspierania, ochrony i monitorowania wprowadzania w życie Konwencji ONZ. Po zawarciu Konwencji ONZ i przeanalizowaniu możliwej roli niektórych organów i instytucji Komisja zaproponuje ramy zarządzania bez zbędnych obciążeń administracyjnych w celu ułatwienia wprowadzania w życie w Europie Konwencji ONZ.

Z końcem 2013 r. Komisja przedstawi sprawozdanie z postępów osiągniętych dzięki niniejszej strategii, obejmujących realizację działań, postęp na poziomie krajowym i sprawozdanie UE dla Komitetu ONZ ds. Praw Osób Niepełnosprawnych[21]. Komisja będzie wykorzystywać gromadzone dane statystyczne i inne dane do zilustrowania zmian w różnicach między sytuacją osób niepełnosprawnych a reszty społeczeństwa oraz do ustanawiania wskaźników związanych z niepełnosprawnością, powiązanych z celami strategii „Europa 2020" w zakresie kształcenia, zatrudnienia i ograniczania ubóstwa. Pozwoli to na rewizję strategii i działań. Kolejne sprawozdanie przewidziane jest na 2016 r.

[21] Artykuły 35 i 36 Konwencji ONZ.

3. PODSUMOWANIE

Celem niniejszej strategii jest wykorzystanie połączonego potencjału Karty Praw Podstawowych UE, Traktatu o funkcjonowaniu Unii Europejskiej i Konwencji ONZ oraz pełne wykorzystanie strategii „Europa 2020” i jej instrumentów. Inicjuje ona proces zwiększania możliwości osób niepełnosprawnych, tak aby mogły one w pełni uczestniczyć w życiu społecznym, na równych z innymi zasadach. Wraz ze starzeniem się populacji Europy działania te będą miały wymierny wpływ na jakość życia coraz większej części społeczeństwa. Strategia stanowi adresowane do instytucji UE i państw członkowskich wezwanie do wspólnego działania w jej ramach na rzecz budowania dla wszystkich Europy bez barier.

IV

(Akty przyjęte przed dniem 1 grudnia 2009 r. na mocy Traktatu WE, Traktatu o UE i Traktatu Euratom)

DECYZJA RADY

z dnia 26 listopada 2009 r.

w sprawie zawarcia przez Wspólnotę Europejską Konwencji Narodów Zjednoczonych o prawach osób niepełnosprawnych

(2010/48/WE)

RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat ustanawiający Wspólnotę Europejską, w szczególności jego art. 13 i 95 w związku z art. 300 ust. 2 akapit pierwszy zdanie drugie i art. 300 ust. 3 akapit pierwszy,

uwzględniając wniosek Komisji,

uwzględniając opinię Parlamentu Europejskiego [1],

a także mając na uwadze, co następuje:

(1) W maju 2004 r. Rada upoważniła Komisję do przeprowadzenia w imieniu Wspólnoty Europejskiej negocjacji w sprawie Konwencji Narodów Zjednoczonych o ochronie i promowaniu praw i godności osób niepełnosprawnych (zwanej dalej „konwencją").

(2) Konwencja została przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych w dniu 13 grudnia 2006 r. i weszła w życie w dniu 3 maja 2008 r.

(3) W imieniu Wspólnoty konwencję podpisano w dniu 30 marca 2007 r. z zastrzeżeniem możliwości jej zawarcia w późniejszym terminie.

(4) Konwencja jest ważnym i skutecznym narzędziem pozwalającym promować i chronić prawa osób niepełnosprawnych w Unii Europejskiej, do czego zarówno Wspólnota, jak i jej państwa członkowskie przywiązują dużą wagę.

(5) Konwencję należy zatem jak najszybciej zatwierdzić w imieniu Wspólnoty.

(6) Zatwierdzeniu temu powinno jednak towarzyszyć zastrzeżenie Wspólnoty Europejskiej do art. 27 ust. 1 konwencji, stwierdzające, że Wspólnota zawiera konwencję bez uszczerbku dla prawa, które wynika z prawodawstwa Wspólnoty, a mianowicie z art. 3 ust. 4 dyrektywy Rady 2000/78/WE [2], i które pozwala państwom członkowskim nie stosować zasady równego traktowania ze względu na niepełnosprawność w przypadku sił zbrojnych.

(7) Zarówno Wspólnota, jak i jej państwa członkowskie mają kompetencje w dziedzinach objętych konwencją. Wspólnota i państwa członkowskie powinny zatem stać się umawiającymi się stronami konwencji, tak aby w sytuacji kompetencji mieszanych móc w spójny sposób wspólnie wypełniać zobowiązania wynikające z konwencji i korzystać z praw z niej wypływających.

(8) Składając dokument formalnego zatwierdzenia, Wspólnota powinna złożyć również deklarację, o której mowa w art. 44 ust. 1 konwencji, wskazując w niej, w jakich sprawach regulowanych konwencją państwa członkowskie przekazały swoje kompetencje Wspólnocie,

STANOWI, CO NASTĘPUJE:

Artykuł 1

1. Niniejszym zatwierdza się w imieniu Wspólnoty Konwencję Narodów Zjednoczonych o prawach osób niepełnosprawnych, z zastrzeżeniem co do jej art. 27 ust. 1.

2. Tekst konwencji zostaje dołączony w załączniku I do niniejszej decyzji.

Tekst zastrzeżenia zamieszczono w załączniku III do niniejszej decyzji.

[1] Opinia z dnia 27 kwietnia 2009 r. (dotychczas nieopublikowana w Dzienniku Urzędowym).

[2] Dz.U. L 303 z 2.12.2000, s. 16.

Artykuł 2

1. Niniejszym upoważnia się Przewodniczącego Rady do wyznaczenia osoby lub osób upoważnionych do złożenia Sekretarzowi Generalnemu Organizacji Narodów Zjednoczonych w imieniu Wspólnoty Europejskiej – zgodnie z art. 41 i 43 konwencji – dokumentu jej formalnego zatwierdzenia.

2. Składając dokument formalnego zatwierdzenia, wyznaczona osoba lub wyznaczone osoby, zgodnie z art. 44 ust. 1 konwencji, składają deklarację w sprawie kompetencji zamieszczoną w załączniku II do niniejszej decyzji oraz zastrzeżenie zamieszczone w załączniku III do niniejszej decyzji.

Artykuł 3

W sprawach wchodzących w zakres kompetencji Wspólnoty i bez uszczerbku dla stosownych kompetencji państw członkowskich punktem kontaktowym w sprawach dotyczących wdrażania konwencji – zgodnie z art. 33 ust. 1 konwencji – jest Komisja. Szczegółowe zadania punktu kontaktowego w tym zakresie zostaną przedstawione w stosownym kodeksie postępowania, zanim złożony zostanie w imieniu Wspólnoty dokument formalnego zatwierdzenia.

Artykuł 4

1. W sprawach wchodzących w zakres wyłącznych kompetencji Wspólnoty Komisja reprezentuje Wspólnotę na posiedzeniach organów utworzonych na mocy konwencji, w szczególności na posiedzeniach Konferencji Państw Stron, o której mowa w art. 40, i działa w jej imieniu w sprawach wchodzących w zakres kompetencji tych organów.

2. W sprawach wchodzących w zakres kompetencji dzielonych między Wspólnotę a państwa członkowskie Komisja i państwa członkowskie z wyprzedzeniem dokonują stosownych ustaleń co do prezentacji stanowiska Wspólnoty na posiedzeniach organów utworzonych na mocy konwencji. Szczegóły takiej prezentacji zostaną przedstawione w kodeksie postępowania, który zostanie zatwierdzony przed złożeniem w imieniu Wspólnoty instrumentu formalnego zatwierdzenia.

3. Na posiedzeniach, o których mowa w ust. 1 i 2, Komisja i państwa członkowskie – w razie potrzeby po konsultacji z innymi zainteresowanymi instytucjami Wspólnoty – ściśle współpracują, zwłaszcza w sprawach uzgodnień co do monitorowania, sprawozdawczości i głosowania. Sposoby zapewnienia ścisłej współpracy są określane w kodeksie postępowania, o którym mowa w ust. 2.

Artykuł 5

Niniejsza decyzja zostaje opublikowana w *Dzienniku Urzędowym Unii Europejskiej*.

Sporządzono w Brukseli dnia 26 listopada 2009 r.

W imieniu Rady
J. BJÖRKLUND
Przewodniczący

ZAŁĄCZNIK I

KONWENCJA O PRAWACH OSÓB NIEPEŁNOSPRAWNYCH

Preambuła

PAŃSTWA STRONY NINIEJSZEJ KONWENCJI,

a) przywołując zasady ogłoszone w Karcie Narodów Zjednoczonych, które uznają przyrodzoną godność i wartość oraz równe i niezbywalne prawa wszystkich członków wspólnoty ludzkiej za podstawę wolności, sprawiedliwości i pokoju na świecie,

b) uznając, że Narody Zjednoczone, w Powszechnej deklaracji praw człowieka oraz w międzynarodowych paktach praw człowieka, ogłosiły i uzgodniły, że każdy ma prawo do korzystania ze wszystkich praw i wolności ustanowionych w tych dokumentach, bez jakiegokolwiek rozróżnienia,

c) potwierdzając powszechność, niepodzielność, współzależność i wzajemne powiązanie wszystkich praw człowieka i podstawowych wolności oraz potrzebę zagwarantowania osobom niepełnosprawnym pełnego z nich korzystania, bez jakiejkolwiek dyskryminacji,

d) przywołując Międzynarodowy pakt praw gospodarczych, społecznych i kulturalnych, Międzynarodowy pakt praw obywatelskich i politycznych, Międzynarodową konwencję w sprawie likwidacji wszelkich form dyskryminacji rasowej, Konwencję w sprawie likwidacji wszelkich form dyskryminacji kobiet, Konwencję w sprawie zakazu stosowania tortur oraz innego okrutnego, nieludzkiego lub poniżającego traktowania albo karania, Konwencję o prawach dziecka oraz Międzynarodową konwencję o ochronie praw wszystkich pracowników migrujących i członków ich rodzin,

e) uznając, że niepełnosprawność jest pojęciem ewoluującym i że niepełnosprawność wynika z interakcji między osobami z dysfunkcjami a barierami wynikającymi z postaw ludzkich i barierami środowiskowymi, które utrudniają tym osobom pełne i skuteczne uczestnictwo w życiu społecznym, na równych warunkach z innymi osobami,

f) uznając znaczenie wpływu zasad i wytycznych zawartych w Światowym programie działań na rzecz osób niepełnosprawnych oraz w Standardowych zasadach wyrównywania szans osób niepełnosprawnych na popieranie, formułowanie i ocenę polityki, planów, programów i działań na szczeblu krajowym, regionalnym i międzynarodowym w celu dalszego wyrównywania szans osób niepełnosprawnych,

g) podkreślając wagę włączania kwestii niepełnosprawności do odpowiednich strategii zrównoważonego rozwoju, jako ich integralnej części,

h) uznając także, że dyskryminacja jakiejkolwiek osoby ze względu na jej niepełnosprawność jest pogwałceniem przyrodzonej godności i wartości osoby ludzkiej,

i) uznając również różnorodność osób niepełnosprawnych,

j) uznając potrzebę popierania i ochrony praw człowieka wszystkich osób niepełnosprawnych, w tym osób wymagających bardziej intensywnego wsparcia,

k) zaniepokojone, że pomimo istnienia tych różnych rozwiązań i przedsięwzięć, osoby niepełnosprawne w dalszym ciągu napotykają bariery w udziale w życiu społecznym jako równoprawni członkowie społeczeństwa oraz doświadczają naruszania ich praw człowieka we wszystkich częściach świata,

l) uznając znaczenie współpracy międzynarodowej dla poprawy warunków życia osób niepełnosprawnych w każdym kraju, szczególnie w krajach rozwijających się,

m) uznając cenny wkład, obecny i potencjalny, osób niepełnosprawnych w ogólny dobrobyt i różnorodność społeczności, w których żyją, oraz uznając, że popieranie pełnego korzystania przez osoby niepełnosprawne z praw człowieka i podstawowych wolności, a także pełnego uczestnictwa osób niepełnosprawnych wzmocni ich poczucie przynależności oraz znacznie przyczyni się do rozwoju zasobów ludzkich oraz postępu społecznego i gospodarczego oraz wykorzenienia ubóstwa,

n) uznając znaczenie dla osób niepełnosprawnych ich indywidualnej samodzielności i niezależności, w tym swobody dokonywania przez nie własnych wyborów,

o) zważywszy, że osoby niepełnosprawne powinny mieć możliwość aktywnego udziału w procesie podejmowania decyzji dotyczących polityki i programów, włączając te, które ich bezpośrednio dotyczą,

p) zaniepokojone trudnościami, jakie napotykają osoby niepełnosprawne, które są narażone na wielorakie lub wzmocnione formy dyskryminacji ze względu na przynależność rasową, kolor skóry, płeć, język, religię, poglądy polityczne lub inne, pochodzenie narodowe, etniczne, tubylcze lub społeczne, sytuację majątkową, status wynikający z urodzenia, wiek czy inne okoliczności,

q) świadome tego, że niepełnosprawne kobiety i dziewczęta są często narażone, zarówno w środowisku rodzinnym, jak i poza nim, na większe ryzyko przemocy, naruszania nietykalności osobistej lub znieważania, opuszczenia lub zaniedbywania, znęcania się lub wykorzystywania,

r) uznając, że niepełnosprawne dzieci powinny w pełni korzystać ze wszystkich praw człowieka i podstawowych wolności na równych zasadach z innymi dziećmi oraz przywołując zobowiązania w tym zakresie przyjęte przez Państwa Strony Konwencji o prawach dziecka,

s) podkreślając potrzebę włączenia kwestii równouprawnienia płci do wszelkich działań zmierzających do zapewnienia osobom niepełnosprawnym pełnego korzystania z praw człowieka i podstawowych wolności,

t) podkreślając fakt, że większość osób niepełnosprawnych żyje w warunkach ubóstwa i uznając, w związku z tym, pilną potrzebę zajęcia się problemem negatywnego wpływu ubóstwa na osoby niepełnosprawne,

u) mając na uwadze fakt, że dla pełnej ochrony osób niepełnosprawnych, w szczególności podczas konfliktów zbrojnych i obcej okupacji, konieczne jest stworzenie warunków pokoju i bezpieczeństwa w oparciu o pełne poszanowanie celów i zasad zawartych w Karcie Narodów Zjednoczonych oraz przestrzeganie odpowiednich dokumentów dotyczących praw człowieka,

v) uznając wagę dostępności środowiska fizycznego, społecznego, gospodarczego i kulturalnego, dostępu do opieki zdrowotnej i edukacji oraz do informacji i środków komunikacji celem umożliwienia osobom niepełnosprawnym pełnego korzystania ze wszystkich praw człowieka i podstawowych wolności,

w) świadome, że jednostka mająca obowiązki w stosunku do innych osób i w stosunku do społeczności, do której należy, jest zobowiązana dążyć do popierania i przestrzegania praw uznanych w Międzynarodowej karcie praw człowieka,

x) przekonane, że rodzina jest naturalną i podstawową komórką społeczną i jest uprawniona do ochrony przez społeczeństwo i państwo, a osoby niepełnosprawne i członkowie ich rodzin powinni otrzymywać niezbędną ochronę i pomoc umożliwiającą rodzinom przyczynianie się do pełnego i równego korzystania z praw przez osoby niepełnosprawne,

y) wyrażając przekonanie, że całościowa i integralna konwencja międzynarodowa, mająca na celu popieranie oraz ochronę praw i godności osób niepełnosprawnych istotnie przyczyni się do poprawy głęboko niekorzystnej sytuacji społecznej osób niepełnosprawnych i będzie promować ich aktywność w sferze obywatelskiej, politycznej, gospodarczej, społecznej i kulturalnej, na zasadzie równych szans, zarówno w krajach rozwijających się, jak i rozwiniętych,

UZGODNIŁY, CO NASTĘPUJE:

Artykuł 1

Cel

Celem niniejszej konwencji jest wspieranie i ochrona wszystkich praw człowieka i podstawowych wolności oraz zapewnienie trwałego i równego korzystania z nich przez wszystkie osoby niepełnosprawne oraz popieranie poszanowania ich przyrodzonej godności.

Do osób niepełnosprawnych zalicza się te osoby, które mają długotrwale naruszoną sprawność fizyczną, umysłową, intelektualną lub sensoryczną, co może, w oddziaływaniu z różnymi barierami, utrudniać im pełne i skuteczne uczestnictwo w życiu społecznym, na równych zasadach z innymi osobami.

Artykuł 2

Definicje

Do celów niniejszej konwencji:

„Komunikacja" obejmuje języki, wyświetlanie tekstu, alfabet Braille'a, komunikację poprzez dotyk, druk dużą czcionką, dostępne multimedia, a także sposoby, środki i formy komunikowania się na piśmie, przy pomocy słuchu, języka uproszczonego, lektora oraz wspomagające (augmentatywne) i alternatywne, włączając dostępne technologie informacyjno-komunikacyjne.

„Język" obejmuje język mówiony i język migowy oraz inne formy przekazu niewerbalnego.

„Dyskryminacja ze względu na niepełnosprawność" oznacza jakiekolwiek różnicowanie, wykluczanie lub ograniczanie ze względu na niepełnosprawność, którego celem lub skutkiem jest naruszenie lub zniweczenie uznania wszelkich praw człowieka i podstawowych wolności, korzystania z nich lub ich wykonywania na równych zasadach z innymi osobami, w dziedzinie polityki, gospodarki, społecznej, kulturalnej, obywatelskiej lub w jakiejkolwiek innej. Obejmuje to wszelkie przejawy dyskryminacji, w tym odmowę racjonalnego usprawnienia.

„Racjonalne usprawnienie" oznacza konieczne i odpowiednie zmiany i dostosowania, niepociągające za sobą nieproporcjonalnego lub nadmiernego obciążenia, jeśli jest to potrzebne w konkretnym przypadku, w celu zapewnienia osobom niepełnosprawnym możliwości korzystania z wszelkich praw człowieka i podstawowych wolności oraz ich wykonywania na równych zasadach z innymi osobami.

„Projektowanie uniwersalne" oznacza projektowanie produktów, środowisk, programów i usług w taki sposób, by były użyteczne dla wszystkich, w możliwie największym stopniu, bez potrzeby adaptacji lub projektowania specjalistycznego. „Projektowanie uniwersalne" nie wyklucza urządzeń wspomagających przeznaczonych dla szczególnych grup osób niepełnosprawnych, tam gdzie jest to potrzebne.

Artykuł 3

Zasady ogólne

Niniejsza konwencja opiera się na następujących zasadach:

a) poszanowanie przyrodzonej godności, autonomii osoby, w tym swobody dokonywania własnych wyborów, a także poszanowanie niezależności osoby;

b) niedyskryminacja;

c) pełne i skuteczne uczestnictwo w społeczeństwie i integracja społeczna;

d) poszanowanie odmienności i akceptacja osób niepełnosprawnych, jako mających wkład w różnorodność rodziny ludzkiej i będących częścią ludzkości;

e) równość szans;

f) dostępność;

g) równość mężczyzn i kobiet;

h) poszanowanie rozwijającego się potencjału niepełnosprawnych dzieci oraz poszanowanie prawa dzieci niepełnosprawnych do zachowania tożsamości.

Artykuł 4

Obowiązki ogólne

1. Państwa Strony zobowiązują się do zapewnienia i popierania pełnej realizacji wszystkich praw człowieka i podstawowych wolności wszystkich osób niepełnosprawnych, bez jakiejkolwiek dyskryminacji ze względu na niepełnosprawność. W tym celu Państwa Strony zobowiązują się do:

a) przyjęcia wszelkich odpowiednich środków ustawodawczych, administracyjnych i innych w celu wykonywania praw uznanych w niniejszej konwencji;

b) podejmowania wszelkich odpowiednich środków, w tym ustawodawczych, w celu zmiany lub uchylenia obowiązujących ustaw, rozporządzeń, zwyczajów i praktyk, które dyskryminują osoby niepełnosprawne;

c) uwzględniania wymogu ochrony i popierania praw człowieka w odniesieniu do osób niepełnosprawnych we wszystkich politykach i programach działania;

d) powstrzymywania się od angażowania się w jakiekolwiek działania lub praktyki, które są niezgodne z niniejszą konwencją, i do zapewnienia zgodności działań władz i instytucji publicznych z niniejszą konwencją;

e) podejmowania wszelkich odpowiednich działań w celu likwidacji dyskryminacji ze względu na niepełnosprawność przez jakąkolwiek osobę, organizację lub prywatne przedsiębiorstwo;

f) podejmowania lub popierania badań i rozwoju oraz dostępności i korzystania z towarów, usług, wyposażenia i urządzeń uniwersalnie zaprojektowanych, zgodnie z definicją zawartą w artykule 2 niniejszej konwencji, które powinny wymagać możliwie jak najmniejszych dostosowań i ponoszenia jak najmniejszych kosztów, w celu zaspokojenia szczególnych potrzeb osób niepełnosprawnych, a także do popierania zasady projektowania uniwersalnego przy tworzeniu norm i wytycznych;

g) podejmowania lub popierania badań i rozwoju oraz popierania dostępności i wykorzystania nowych technologii, w tym technologii informacyjno-komunikacyjnych, przyrządów ułatwiających poruszanie się, urządzeń i wspomagających technologii, odpowiednich dla osób niepełnosprawnych, traktując priorytetowo technologie przystępne cenowo;

h) zapewniania osobom niepełnosprawnym dostępnych informacji o przyrządach ułatwiających poruszanie się, urządzeniach i wspomagających technologiach, w tym nowych technologiach, a także o innych formach pomocy, usług pomocniczych i ułatwień;

i) popierania szkoleń specjalistów i personelu pracującego z osobami niepełnosprawnymi w zakresie praw uznanych w niniejszej konwencji, tak aby lepiej świadczone były pomoc i usługi gwarantowane przez te prawa.

2. W odniesieniu do praw gospodarczych, społecznych i kulturalnych, każde z Państw Stron zobowiązuje się podjąć działania, wykorzystując maksymalnie dostępne mu środki i, w razie potrzeby, w ramach współpracy międzynarodowej, w celu stopniowego osiągnięcia pełnej realizacji tych praw, bez uszczerbku dla tych zobowiązań zawartych w niniejszej konwencji, które mają skutek natychmiastowy, zgodnie z prawem międzynarodowym.

3. Przy tworzeniu i wdrażaniu ustawodawstwa i polityki celem wprowadzenia w życie niniejszej konwencji, a także w innych procesach decyzyjnych dotyczących spraw związanych z osobami niepełnosprawnymi, Państwa Strony ściśle współpracują z osobami niepełnosprawnymi, a także angażują te osoby, w tym dzieci niepełnosprawne, w wymienione procesy, za pośrednictwem reprezentujących je organizacji.

4. Żadne z postanowień niniejszej konwencji nie narusza jakichkolwiek rozwiązań, które bardziej sprzyjają realizacji praw osób niepełnosprawnych, a które przewiduje ustawodawstwo Państwa Strony lub prawo międzynarodowe obowiązujące to Państwo. Żadne z praw człowieka i podstawowych wolności uznanych lub istniejących w którymkolwiek z Państw Stron niniejszej konwencji na podstawie ustaw, konwencji, rozporządzeń lub zwyczaju nie może być ograniczone lub uchylone pod pretekstem, że niniejsza konwencja nie uznaje takich praw lub wolności, lub uznaje je w węższym zakresie.

5. Postanowienia niniejszej konwencji rozciągają się na wszystkie części państw federalnych, bez jakichkolwiek ograniczeń lub wyjątków.

Artykuł 5

Równość i niedyskryminacja

1. Państwa Strony uznają, że wszyscy ludzie są równi wobec prawa i są uprawnieni, bez jakiejkolwiek dyskryminacji, do jednakowej ochrony prawnej i jednakowych korzyści wynikających z prawa.

2. Państwa Strony zakazują jakiejkolwiek dyskryminacji ze względu na niepełnosprawność i gwarantują osobom niepełnosprawnym jednakową dla wszystkich i skuteczną ochronę przed dyskryminacją z jakichkolwiek względów.

3. W celu popierania równości i likwidacji dyskryminacji Państwa Strony podejmują wszelkie odpowiednie kroki celem zapewnienia racjonalnych usprawnień.

4. Za dyskryminację w rozumieniu niniejszej konwencji nie są uważane szczególne środki, które są niezbędne celem przyśpieszenia osiągnięcia lub zagwarantowania faktycznej równości osób niepełnosprawnych.

Artykuł 6

Niepełnosprawne kobiety

1. Państwa Strony uznają, że niepełnosprawne kobiety i dziewczęta są narażone na wieloraką dyskryminację i, w związku z tym, podejmują środki w celu zapewnienia pełnego i równego korzystania przez nie ze wszystkich praw człowieka i podstawowych wolności.

2. Państwa Strony podejmują wszelkie odpowiednie środki, aby zapewnić pełen rozwój, awans i wzmocnienie pozycji kobiet, w celu zagwarantowania im możliwości wykonywania i korzystania z praw człowieka i podstawowych wolności ustanowionych w niniejszej konwencji.

Artykuł 7

Niepełnosprawne dzieci

1. Państwa Strony podejmują wszelkie niezbędne środki w celu zapewnienia pełnego korzystania przez niepełnosprawne dzieci ze wszystkich praw człowieka i podstawowych wolności, na równych zasadach z innymi dziećmi.

2. We wszystkich działaniach dotyczących dzieci niepełnosprawnych należy przede wszystkim kierować się najlepiej pojętym interesem dziecka.

3. Państwa Strony zapewniają dzieciom niepełnosprawnym prawo swobodnego wyrażania poglądów we wszystkich sprawach ich dotyczących, traktując je z należytą powagą, stosownie do wieku i dojrzałości dzieci, na równych zasadach z innymi dziećmi oraz zapewniają dzieciom pomoc w wykonywaniu tego prawa, odpowiadającą ich niepełnosprawności i wiekowi.

Artykuł 8

Podnoszenie świadomości

1. Państwa Strony zobowiązują się podjąć natychmiastowe, skuteczne i odpowiednie działania w celu:

a) podniesienia świadomości społeczeństwa w sprawach dotyczących osób niepełnosprawnych, w tym na poziomie rodziny, a także działania na rzecz wzmacniania poszanowania praw i godności osób niepełnosprawnych;

b) zwalczania stereotypów, uprzedzeń i szkodliwych praktyk wobec osób niepełnosprawnych, w tym ze względu na płeć i wiek, we wszystkich dziedzinach życia;

c) promowania świadomości potencjału i wkładu osób niepełnosprawnych w życie społeczne.

2. Do działań podejmowanych w tym celu należy:

a) inicjowanie i prowadzenie skutecznych kampanii skierowanych na podnoszenie poziomu świadomości społecznej, aby:

(i) pielęgnować wrażliwość na prawa osób niepełnosprawnych;

(ii) promować pozytywne postrzeganie i większą świadomość społeczną wobec osób niepełnosprawnych;

(iii) popierać uznawanie umiejętności, zasług i zdolności osób niepełnosprawnych oraz ich wkładu w miejscu pracy i na rynku pracy;

b) kształtowanie, na wszystkich szczeblach systemu edukacji, z uwzględnieniem wszystkich dzieci od najwcześniejszych lat, postawy poszanowania praw osób niepełnosprawnych;

c) zachęcanie wszystkich środków masowego przekazu do przedstawiania wizerunku osób niepełnosprawnych w sposób zgodny z celem niniejszej konwencji;

d) rozwijanie programów podnoszenia świadomości w sprawach dotyczących osób niepełnosprawnych i praw osób niepełnosprawnych.

Artykuł 9

Dostępność

1. Aby umożliwić osobom niepełnosprawnym samodzielne funkcjonowanie i pełne uczestnictwo we wszystkich aspektach życia, Państwa Strony podejmują odpowiednie środki w celu zapewnienia osobom niepełnosprawnym, na równych zasadach z innymi osobami, dostępu do środowiska fizycznego, środków transportu, informacji i komunikacji, w tym technologii i systemów informacyjnych i komunikacyjnych, a także do innych urządzeń i usług, powszechnie dostępnych lub powszechnie zapewnianych, zarówno na obszarach miejskich, jak i wiejskich. Środki te, obejmujące rozpoznanie i eliminację przeszkód i barier w zakresie dostępności, stosuje się między innymi do:

a) budynków, dróg, transportu oraz innych urządzeń wewnętrznych i zewnętrznych, w tym szkół, mieszkań, instytucji zapewniających opiekę medyczną i miejsc pracy;

b) informacji, komunikacji i innych usług, w tym usług elektronicznych i służb ratowniczych.

2. Państwa Strony podejmują również odpowiednie środki w celu:

a) opracowywania, ogłaszania i monitorowania wdrażania norm minimalnych i wytycznych w sprawie dostępności urządzeń i usług ogólnie dostępnych lub powszechnie zapewnianych;

b) zapewnienia, by instytucje prywatne, które oferują urządzenia i usługi ogólnie dostępne lub powszechnie zapewniane, uwzględniały wszystkie aspekty ich dostępności dla osób niepełnosprawnych;

c) zapewnienia szkolenia wszystkich zainteresowanych na temat kwestii związanych z dostępnością dla osób niepełnosprawnych;

d) zapewnienia w ogólnodostępnych budynkach i innych obiektach oznakowania w alfabecie Braille'a oraz w czytelnej i zrozumiałej formie;

e) zapewnienia pomocy i pośrednictwa ze strony innych osób lub zwierząt, w tym przewodników, lektorów i profesjonalnych tłumaczy języka migowego, w celu ułatwienia dostępu do ogólnodostępnych budynków i innych obiektów;

f) popierania innych odpowiednich form pomocy i wsparcia dla osób niepełnosprawnych w celu zapewnienia im dostępu do informacji;

g) popierania dostępu osób niepełnosprawnych do nowych technologii i systemów informacyjno-komunikacyjnych, w tym do Internetu;

h) popierania, począwszy od etapu wstępnego, projektowania, rozwoju, produkcji i dystrybucji dostępnych technologii i systemów informacyjno-komunikacyjnych, tak aby te technologie i systemy były dostępne po minimalnych kosztach.

Artykuł 10

Prawo do życia

Państwa Strony potwierdzają, że każda istota ludzka ma przyrodzone prawo do życia, i podejmują wszelkie niezbędne środki w celu zapewnienia osobom niepełnosprawnym skutecznego korzystania z tego prawa, na równych zasadach z innymi osobami.

Artykuł 11

Sytuacje zagrożenia i sytuacje wymagające pomocy humanitarnej

Państwa Strony podejmują, zgodnie ze swoimi zobowiązaniami wynikającymi z prawa międzynarodowego, w tym międzynarodowego prawa humanitarnego oraz międzynarodowego prawa praw człowieka, wszelkie niezbędne środki w celu zapewnienia ochrony i bezpieczeństwa osób niepełnosprawnych w sytuacjach zagrożenia, w tym w sytuacjach konfliktu zbrojnego, sytuacjach wymagających pomocy humanitarnej i w przypadku klęsk żywiołowych.

Artykuł 12

Równość wobec prawa

1. Państwa Strony potwierdzają, że osoby niepełnosprawne mają prawo do tego, by wszędzie uznawano ich podmiotowość prawną.

2. Państwa Strony uznają, że osoby niepełnosprawne mają zdolność prawną i zdolność do czynności prawnych, na równych zasadach z innymi osobami, we wszystkich aspektach życia.

3. Państwa Strony podejmują odpowiednie środki w celu zapewnienia osobom niepełnosprawnym dostępu do wsparcia, którego mogą potrzebować przy wykonywaniu zdolności prawnej i zdolności do czynności prawnych.

4. Państwa Strony gwarantują uwzględnienie we wszelkich środkach związanych z wykonywaniem zdolności prawnej i zdolności do czynności prawnych odpowiednich i skutecznych zabezpieczeń w celu zapobiegania nadużyciom, zgodnie z międzynarodowym prawem praw człowieka. Celem takich zabezpieczeń jest zagwarantowanie, aby środki związane z wykonywaniem zdolności prawnej i zdolności do czynności prawnych respektowały prawa, wolę i preferencje osoby, były wolne od konfliktu interesów i bezprawnych nacisków, były proporcjonalne i dostosowane do sytuacji danej osoby, były stosowane przez możliwie najkrótszy czas i podlegały stałemu przeglądowi przez właściwe, niezależne i bezstronne władze lub organ sądowy. Zabezpieczenia są proporcjonalne do stopnia, w jakim takie środki wpływają na prawa i interesy danej osoby.

5. Państwa Strony podejmują wszelkie odpowiednie i efektywne środki, z uwzględnieniem postanowień niniejszego artykułu, celem zagwarantowania równego prawa osób niepełnosprawnych do posiadania i dziedziczenia własności, kontroli nad własnymi sprawami finansowymi oraz do jednakowego dostępu do pożyczek bankowych, hipotecznych i innych form kredytów, oraz zapewniają, że osoby niepełnosprawne nie będą samowolnie pozbawiane własności.

Artykuł 13

Dostęp do wymiaru sprawiedliwości

1. Państwa Strony zapewniają osobom niepełnosprawnym, na równych zasadach z innymi osobami, skuteczny dostęp do wymiaru sprawiedliwości, w tym poprzez zapewnienie dostosowań proceduralnych i dostosowań odpowiednio do ich wieku, w celu ułatwienia pełnienia efektywnej roli bezpośrednich i pośrednich uczestników, w tym w charakterze świadków, we wszelkich postępowaniach prawnych, włącznie ze śledztwem i innymi formami postępowania przygotowawczego.

2. Aby zapewnić osobom niepełnosprawnym skuteczny dostęp do wymiaru sprawiedliwości, na równych zasadach z innymi osobami, Państwa Strony wspierają odpowiednie szkolenie osób pracujących w administracji wymiaru sprawiedliwości, w tym pracowników policji i więziennictwa.

Artykuł 14

Wolność i bezpieczeństwo osobiste

1. Państwa Strony zapewniają, aby osoby niepełnosprawne, na równych zasadach z innymi osobami:

a) korzystały z prawa do wolności i bezpieczeństwa osobistego;

b) nie były pozbawiane wolności bezprawnie lub samowolnie, a także by każde pozbawienie wolności było zgodne z prawem oraz by niepełnosprawność w żadnym przypadku nie uzasadniała pozbawienia wolności.

2. Państwa Strony zapewniają osobom niepełnosprawnym, pozbawionym wolności w drodze jakiegokolwiek postępowania, na równych zasadach z innymi osobami, prawo do gwarancji zgodnych z międzynarodowym prawem praw człowieka i traktowanie zgodne z celami i zasadami niniejszej konwencji, włączając w to zapewnienie racjonalnych usprawnień.

Artykuł 15

Wolność od tortur lub okrutnego, nieludzkiego albo poniżającego traktowania lub karania

1. Nikt nie może być poddany torturom ani okrutnemu, nieludzkiemu lub poniżającemu traktowaniu lub karaniu. W szczególności nikt nie może być poddany, bez swobodnie wyrażonej zgody, eksperymentom medycznym lub naukowym.

2. Państwa Strony podejmują wszelkie skuteczne środki ustawodawcze, administracyjne, sądowe i inne w celu zapobiegania, na równych zasadach z innymi osobami, poddawaniu osób niepełnosprawnych torturom lub okrutnemu, nieludzkiemu lub poniżającemu traktowaniu lub karaniu.

Artykuł 16

Wolność od wykorzystywania, przemocy i nadużyć

1. Państwa Strony podejmują wszelkie odpowiednie środki ustawodawcze, administracyjne, społeczne, w dziedzinie edukacji i inne, w celu ochrony osób niepełnosprawnych, zarówno w domu, jak i poza nim, przed wszelkimi formami wykorzystywania, przemocy i nadużyć, z uwzględnieniem aspektów związanych z płcią.

2. Państwa Strony podejmują również wszelkie odpowiednie środki w celu zapobiegania wszelkim formom wykorzystywania, przemocy i nadużyć, poprzez zapewnienie osobom niepełnosprawnym, ich rodzinom oraz opiekunom, między innymi, właściwych form pomocy i wsparcia odpowiednich ze względu na płeć i wiek, w tym poprzez zapewnienie informacji i edukacji na temat unikania, rozpoznawania i zgłaszania przypadków wykorzystywania, przemocy i nadużyć. Państwa Strony zapewniają dostosowanie usług w zakresie ochrony do wieku, płci i niepełnosprawności.

3. Aby zapobiegać wszelkim formom wykorzystywania, przemocy i nadużyć, Państwa Strony zapewniają efektywne monitorowanie przez niezależne władze wszelkich ułatwień i programów mających służyć osobom niepełnosprawnym.

4. Państwa Strony podejmują wszelkie odpowiednie środki w celu wspierania powrotu do zdrowia fizycznego i psychicznego oraz odzyskania zdolności poznawczych, a także wspierania rehabilitacji i społecznej reintegracji osób niepełnosprawnych, które stały się ofiarami jakiejkolwiek formy wykorzystywania, przemocy lub nadużyć, w tym poprzez zapewnienie usług w zakresie ochrony. Proces powrotu do zdrowia i reintegracja odbywają się w środowisku sprzyjającym zdrowiu, dobrobytowi, szacunkowi do samego siebie, godności i samodzielności osoby oraz uwzględniają potrzeby wynikające z płci i wieku.

5. Państwa Strony ustanawiają skuteczne ustawodawstwo i politykę, w tym ustawodawstwo i politykę na rzecz kobiet i dzieci, aby zapewnić identyfikację, badanie i, w stosownych przypadkach, ściganie przypadków wykorzystywania, przemocy i nadużyć wobec osób niepełnosprawnych.

Artykuł 17

Ochrona integralności osobistej

Każda osoba niepełnosprawna ma prawo do poszanowania jej integralności fizycznej i psychicznej, na równych zasadach z innymi osobami.

Artykuł 18

Swoboda przemieszczania się i obywatelstwo

1. Państwa Strony uznają prawo osób niepełnosprawnych do swobody przemieszczania się, swobody wyboru miejsca zamieszkania i do obywatelstwa, na równych zasadach z innymi osobami, między innymi poprzez zapewnienie, aby osoby niepełnosprawne:

a) miały prawo nabyć i zmienić obywatelstwo i nie były pozbawiane obywatelstwa samowolnie lub ze względu na niepełnosprawność;

b) nie były pozbawiane, ze względu na niepełnosprawność, zdolności do uzyskania, posiadania i korzystania z dokumentu poświadczającego obywatelstwo lub innego dokumentu tożsamości, ani zdolności do korzystania z odpowiednich procedur, takich jak procedury imigracyjne, które mogą być konieczne do ułatwienia korzystania z prawa do swobody przemieszczania się;

c) mogły swobodnie opuścić jakikolwiek kraj, włączając w to swój własny;

d) nie były pozbawiane, samowolnie lub ze względu na niepełnosprawność, prawa wjazdu do własnego kraju.

2. Dzieci niepełnosprawne są rejestrowane niezwłocznie po urodzeniu i od urodzenia mają prawo do nazwiska, prawo do nabycia obywatelstwa oraz, w miarę możliwości, mają prawo znać rodziców i podlegać ich opiece.

Artykuł 19

Życie samodzielne i integracja społeczna

Państwa Strony niniejszej konwencji uznają równe prawo wszystkich osób niepełnosprawnych do życia w społeczności, wraz z prawem dokonywania takich samych wyborów, jakie przysługuje innym osobom, oraz podejmują efektywne i odpowiednie środki w celu ułatwienia pełnego korzystania przez osoby niepełnosprawne z tego prawa oraz w celu pełnej integracji i uczestnictwa w życiu społeczności, w tym zapewniają, aby:

a) osoby niepełnosprawne miały możliwość wyboru miejsca zamieszkania i podjęcia decyzji co do tego, gdzie i z kim mieszkają, na równych zasadach z innymi osobami, a także aby nie były zobowiązane do mieszkania w szczególnych warunkach;

b) osoby niepełnosprawne miały dostęp do szerokiego zakresu usług świadczonych w domu, w miejscu zamieszkania i do innych usług wsparcia świadczonych w ramach społeczności lokalnej, w tym do pomocy osobistej niezbędnej do życia i integracji społecznej oraz do zapobiegania izolacji lub segregacji społecznej;

c) świadczone w społeczności lokalnej usługi i urządzenia dla ogółu ludności były dostępne dla osób niepełnosprawnych, na równych zasadach z innymi osobami, oraz uwzględniały ich potrzeby.

Artykuł 20

Mobilność osobista

Państwa Strony podejmują skuteczne środki celem umożliwienia osobom niepełnosprawnym mobilności osobistej i możliwie największej samodzielności w tym zakresie, między innymi poprzez:

a) ułatwianie mobilności osób niepełnosprawnych, w sposób i w czasie przez nie wybranym i po przystępnej cenie;

b) ułatwianie osobom niepełnosprawnym dostępu do wysokiej jakości przyrządów ułatwiających poruszanie się, urządzeń, wspomagających technologii oraz do różnych form opieki i pośrednictwa, w tym poprzez ich udostępnianie po przystępnej cenie;

c) zapewnianie osobom niepełnosprawnym i wyspecjalizowanemu personelowi pracującemu z osobami niepełnosprawnymi szkolenia w zakresie umiejętności poruszania się;

d) zachęcanie jednostek wytwarzających przyrządy ułatwiające poruszanie się, urządzenia i technologie wspomagające, do uwzględniania wszystkich aspektów mobilności osób niepełnosprawnych.

Artykuł 21

Wolność wypowiadania się i wyrażania opinii oraz dostęp do informacji

Państwa Strony podejmują wszelkie odpowiednie środki, aby osoby niepełnosprawne mogły korzystać z prawa do wolności wypowiadania się i wyrażania opinii, w tym wolności poszukiwania, otrzymywania i przekazywania informacji i poglądów, na równych zasadach z innymi osobami i poprzez dowolnie wybrane formy komunikacji, zgodnie z definicją zawartą w artykule 2 niniejszej konwencji, między innymi poprzez:

a) dostarczanie osobom niepełnosprawnym informacji przeznaczonych dla ogółu ludzi, w dostępnych dla nich formach i technologiach, odpowiednio do różnych rodzajów niepełnosprawności, bez opóźnienia i dodatkowych kosztów;

b) akceptowanie i ułatwianie korzystania przez osoby niepełnosprawne w stosunkach urzędowych z języków migowych, alfabetu Braille'a, komunikacji wspomagającej (augmentatywnej) i alternatywnej oraz wszelkich innych dostępnych środków, sposobów i form komunikowania się wybranych przez osoby niepełnosprawne;

c) nakłanianie podmiotów prywatnych, które świadczą usługi dla ogółu ludzi, w tym przez Internet, do dostarczania informacji i usług w formie dostępnej i użytecznej dla osób niepełnosprawnych;

d) zachęcanie środków masowego przekazu, w tym dostawców informacji przez Internet, do udostępnienia ich usług osobom niepełnosprawnym;

e) uznanie i popieranie korzystania z języków migowych.

Artykuł 22

Poszanowanie prywatności

1. Żadna osoba niepełnosprawna, bez względu na jej miejsce zamieszkania lub warunki mieszkaniowe, nie może być narażona na samowolną lub bezprawną ingerencję w jej życie prywatne, sprawy rodzinne, dom lub korespondencję, czy innego typu komunikację międzyludzką, ani też na bezprawne zamachy na jej cześć i reputację. Osoby niepełnosprawne mają prawo do ochrony prawnej przed tego rodzaju ingerencjami i zamachami.

2. Państwa Strony chronią poufność informacji osobistych, dotyczących zdrowia i rehabilitacji osób niepełnosprawnych, na równych zasadach z innymi osobami.

Artykuł 23

Poszanowanie domu i rodziny

1. Państwa Strony podejmują efektywne i odpowiednie środki w celu likwidacji dyskryminacji osób niepełnosprawnych we wszystkich sprawach dotyczących małżeństwa, rodziny, rodzicielstwa i związków, na równych zasadach z innymi osobami, w taki sposób, aby zapewnić:

a) uznanie prawa wszystkich osób niepełnosprawnych będących w odpowiednim wieku do zawarcia małżeństwa i założenia rodziny, na podstawie swobodnie wyrażonej i pełnej zgody przyszłych małżonków;

b) uznanie praw osób niepełnosprawnych do podejmowania swobodnych i odpowiedzialnych decyzji o liczbie i czasie urodzenia dzieci oraz do dostępu do dostosowanych do wieku informacji i edukacji dotyczących reprodukcji i planowania rodziny, a także do środków umożliwiających im korzystanie z tych praw;

c) zachowanie zdolności rozrodczych przez osoby niepełnosprawne, w tym przez dzieci, na równych zasadach z innymi osobami.

2. Państwa Strony gwarantują prawa i obowiązki osób niepełnosprawnych w zakresie opieki nad dziećmi, kurateli, powiernictwa, adopcji lub podobnych instytucji, jeśli takie instytucje przewiduje ustawodawstwo krajowe; we wszystkich przypadkach nadrzędne jest dobro dziecka. Państwa Strony zapewniają osobom niepełnosprawnym odpowiednią pomoc w wykonywaniu obowiązków związanych z wychowywaniem dzieci.

3. Państwa Strony zapewniają dzieciom niepełnosprawnym równe prawa w zakresie życia rodzinnego. Mając na uwadze realizację tych praw i w celu zapobiegania ukrywaniu, porzucaniu, zaniedbywaniu i segregacji dzieci niepełnosprawnych, Państwa Strony dostarczają odpowiednio wcześnie wszechstronne informacje, usługi i pomoc dzieciom niepełnosprawnym i ich rodzinom.

4. Państwa Strony zapewniają, aby dziecko nie było odłączane od rodziców bez ich zgody, z wyjątkiem sytuacji, kiedy właściwe władze, podlegające kontroli sądowej, postanowią, zgodnie z obowiązującym prawem i procedurami, że takie odłączenie jest konieczne ze względu na najlepszy interes dziecka. W żadnym przypadku nie można odłączać dziecka od rodziców z powodu jego niepełnosprawności lub niepełnosprawności jednego lub obojga rodziców.

5. W przypadku gdy najbliższa rodzina nie jest w stanie sprawować opieki nad dzieckiem niepełnosprawnym, Państwa Strony podejmują wszelkie wysiłki, aby zapewnić alternatywną opiekę przez dalszą rodzinę, a jeżeli okaże się to niemożliwe, opiekę w środowisku rodzinnym w ramach społeczności.

Artykuł 24

Edukacja

1. Państwa Strony uznają prawo osób niepełnosprawnych do edukacji. W celu realizacji tego prawa bez dyskryminacji i na zasadach równych szans Państwa Strony zapewniają integracyjny system kształcenia na wszystkich poziomach edukacji i możliwość uczenia się przez całe życie, zmierzające do:

a) pełnego rozwoju potencjału ludzkiego oraz poczucia godności i własnej wartości, a także wzmocnienia poszanowania praw człowieka, podstawowych wolności i różnorodności ludzkiej;

b) rozwijania przez osoby niepełnosprawne ich osobowości, talentów i kreatywności, a także zdolności umysłowych i fizycznych, przy pełnym wykorzystaniu ich możliwości;

c) umożliwienia osobom niepełnosprawnym efektywnego uczestnictwa w wolnym społeczeństwie.

2. Realizując to prawo, Państwa Strony zapewniają, aby:

a) osoby niepełnosprawne nie były wykluczane z powszechnego systemu edukacji ze względu na niepełnosprawność, a także aby dzieci niepełnosprawne nie były wykluczane, ze względu na niepełnosprawność, z bezpłatnego i obowiązkowego nauczania na poziomie podstawowym lub z nauczania na poziomie średnim;

b) osoby niepełnosprawne miały dostęp do integracyjnego, bezpłatnego nauczania wysokiej jakości, na poziomie podstawowym i średnim, na równych zasadach z innymi osobami, w społecznościach, w których żyją;

c) wprowadzane były racjonalne usprawnienia, zgodnie z indywidualnymi potrzebami;

d) osoby niepełnosprawne uzyskiwały niezbędne wsparcie, w ramach powszechnego systemu edukacji, celem ułatwienia ich skutecznego kształcenia;

e) zapewnić skuteczne środki zindywidualizowanego wsparcia w środowisku, które maksymalizuje rozwój edukacyjny i społeczny, zgodnie z celem pełnej integracji.

3. Państwa Strony umożliwiają osobom niepełnosprawnym zdobycie umiejętności życiowych i społecznych, aby ułatwić im pełny i równy udział w edukacji i w życiu społecznym. W tym celu Państwa Strony podejmują odpowiednie środki, w tym:

a) ułatwiają naukę pisma Braille'a, pisma alternatywnego, wspomagających (augmentatywnych) i alternatywnych sposobów, środków i form komunikacji i orientacji oraz umiejętności poruszania się, a także ułatwiają wzajemne wsparcie udzielane przez osoby niepełnosprawne i doradztwo;

b) ułatwiają naukę języka migowego i popierają tożsamość językową społeczności osób głuchych;

c) zapewniają, aby edukacja osób, w szczególności dzieci, które są niewidome, głuche lub głuchoniewidome była prowadzona w najodpowiedniejszych językach i za pomocą zindywidualizowanych sposobów i środków komunikacji, a także w środowisku, które maksymalizuje rozwój edukacyjny i społeczny.

4. Aby wesprzeć realizację tego prawa, Państwa Strony podejmują odpowiednie środki w celu zatrudnienia nauczycieli, w tym nauczycieli niepełnosprawnych, którzy mają kwalifikacje w zakresie używania języka migowego lub alfabetu Braille'a, oraz w celu wyszkolenia specjalistów i personelu pracujących na wszystkich szczeblach edukacji. Takie szkolenie obejmuje wiedzę na temat problemów niepełnosprawności i korzystanie ze wspomagających (augmentatywnych) i alternatywnych sposobów, środków i form komunikacji, technik i materiałów edukacyjnych, w celu wspierania osób niepełnosprawnych.

5. Państwa Strony zapewniają osobom niepełnosprawnym dostęp do powszechnego szkolnictwa wyższego, szkolenia zawodowego, kształcenia dorosłych i uczenia się przez całe życie, bez dyskryminacji i na równych zasadach z innymi osobami. W tym celu Państwa Strony zapewniają racjonalne usprawnienia dla osób niepełnosprawnych.

Artykuł 25

Zdrowie

Państwa Strony uznają, że osoby niepełnosprawne mają prawo do korzystania z najwyższego osiągalnego poziomu ochrony zdrowia, bez dyskryminacji ze względu na niepełnosprawność. Państwa Strony podejmują wszelkie odpowiednie środki w celu zapewnienia osobom niepełnosprawnym dostępu do usług zdrowotnych uwzględniających szczególne wymogi związane z płcią, w tym do rehabilitacji zdrowotnej. W szczególności, Państwa Strony:

a) zapewniają osobom niepełnosprawnym taki sam jak w przypadku innych osób zakres, jakość i standard bezpłatnej lub świadczonej po przystępnych cenach opieki zdrowotnej i programów zdrowotnych, w tym w zakresie zdrowia reprodukcyjnego i seksualnego oraz adresowanych do całej populacji programów w zakresie zdrowia publicznego;

b) zapewniają te usługi zdrowotne, które są potrzebne osobom niepełnosprawnym ze względu na ich niepełnosprawność, w tym wczesne rozpoznawanie i leczenie, jeżeli jest potrzebne, a także usługi mające na celu ograniczenie i zapobieganie dalszej niepełnosprawności, w tym wśród dzieci i osób starszych;

c) zapewniają świadczenie tych usług zdrowotnych, możliwie blisko społeczności, w których żyją osoby niepełnosprawne, w tym na obszarach wiejskich;

d) zobowiązują osoby wykonujące zawody medyczne do zapewniania osobom niepełnosprawnym, w tym na podstawie swobodnie wyrażonej i świadomej zgody, opieki takiej samej jakości jak innym osobom poprzez, między innymi, podnoszenie świadomości w zakresie praw człowieka, godności, niezależności i potrzeb osób niepełnosprawnych poprzez szkolenia i rozpowszechnianie norm etycznych w publicznej i prywatnej opiece zdrowotnej;

e) zakazują dyskryminacji osób niepełnosprawnych w zakresie ubezpieczenia zdrowotnego, a także ubezpieczenia na życie, jeśli takie ubezpieczenie jest dozwolone przez ustawodawstwo krajowe, zaś ubezpieczenia te zapewniane są w sposób sprawiedliwy i rozsądny;

f) zapobiegają dyskryminacyjnym przypadkom odmowy udzielenia, ze względu na niepełnosprawność, opieki zdrowotnej lub usług zdrowotnych, albo pożywienia i płynów.

Artykuł 26

Habilitacja i rehabilitacja

1. Państwa Strony podejmują skuteczne i odpowiednie środki, uwzględniając wzajemne wsparcie udzielane sobie przez osoby niepełnosprawne, w celu umożliwienia osobom niepełnosprawnym uzyskania i utrzymania możliwie największej niezależności, pełnych zdolności fizycznych, umysłowych, społecznych i zawodowych oraz pełnej integracji i udziału we wszystkich aspektach życia społecznego. W tym celu Państwa Strony organizują, wzmacniają i rozwijają usługi i programy w zakresie wszechstronnej habilitacji i rehabilitacji, w szczególności w obszarze zdrowia, zatrudnienia, edukacji i usług socjalnych, w taki sposób, aby te usługi i programy:

a) były dostępne od możliwie najwcześniejszego etapu i były oparte na multidyscyplinarnej ocenie indywidualnych potrzeb i możliwości;

b) wspierały uczestnictwo i integrację w społeczności oraz włączenie we wszystkie aspekty życia społecznego, były dobrowolne i dostępne dla osób niepełnosprawnych możliwie blisko ich społeczności, w tym na obszarach wiejskich.

2. Państwa Strony wspierają rozwój szkolenia wstępnego i ustawicznego specjalistów i personelu pracującego w usługach habilitacji i rehabilitacji.

3. Państwa Strony promują dostępność, znajomość i korzystanie z urządzeń i technologii wspomagających, zaprojektowanych dla osób niepełnosprawnych, w zakresie habilitacji i rehabilitacji.

Artykuł 27

Praca i zatrudnienie

1. Państwa Strony uznają prawo osób niepełnosprawnych do pracy, na równych zasadach z innymi osobami; obejmuje to prawo do możliwości pozyskiwania środków na życie poprzez pracę swobodnie wybraną lub przyjętą na rynku pracy oraz w otwartym, integracyjnym i dostępnym dla osób niepełnosprawnych środowisku pracy. Państwa Strony chronią i wspierają realizację prawa do pracy, również tych osób, które w okresie zatrudnienia utraciły pełną sprawność, poprzez podjęcie odpowiednich kroków, w tym na drodze ustawodawczej, między innymi w celu:

a) zakazania dyskryminacji ze względu na niepełnosprawność w odniesieniu do wszelkich kwestii dotyczących wszystkich form zatrudnienia, w tym w zakresie warunków rekrutacji, przyjmowania do pracy i zatrudnienia, kontynuacji zatrudnienia, awansu zawodowego oraz bezpiecznych i higienicznych warunków pracy;

b) ochrony praw osób niepełnosprawnych, na równych zasadach z innymi osobami, do sprawiedliwych i korzystnych warunków pracy, w tym do równych szans i jednakowego wynagrodzenia za pracę jednakowej wartości, bezpiecznych i higienicznych warunków pracy, włączając w to ochronę przed molestowaniem i zadośćuczynienie za doznane krzywdy;

c) zapewnienia osobom niepełnosprawnym możliwości korzystania z prawa do pracy i z prawa do organizowania się w związki zawodowe, na równych zasadach z innymi osobami;

d) umożliwienia osobom niepełnosprawnym skutecznego dostępu do powszechnych programów poradnictwa technicznego i zawodowego, usług pośrednictwa pracy oraz szkolenia zawodowego i kształcenia ustawicznego;

e) popierania możliwości zatrudnienia i rozwoju zawodowego osób niepełnosprawnych na rynku pracy oraz pomocy w znalezieniu, uzyskaniu i utrzymaniu zatrudnienia oraz powrocie do zatrudnienia;

f) popierania możliwości pracy na własny rachunek, przedsiębiorczości, rozwoju spółdzielni i zakładania własnego przedsiębiorstwa;

g) zatrudniania osób niepełnosprawnych w sektorze publicznym;

h) popierania zatrudniania osób niepełnosprawnych w sektorze prywatnym, poprzez odpowiednią politykę i środki, które mogą obejmować programy działań pozytywnych, zachęty i inne środki;

i) zapewnienia wprowadzania racjonalnych usprawnień dla osób niepełnosprawnych w miejscu pracy;

j) popierania zdobywania przez osoby niepełnosprawne doświadczenia zawodowego na otwartym rynku pracy;

k) popierania programów rehabilitacji zawodowej, utrzymania pracy i powrotu do pracy, adresowanych do osób niepełnosprawnych.

2. Państwa Strony gwarantują, że osoby niepełnosprawne nie mogą być trzymane w niewoli lub w poddaństwie i są chronione, na równych zasadach z innymi osobami, przed pracą przymusową lub obowiązkową.

Artykuł 28

Odpowiedni poziom życia i ochrona socjalna

1. Państwa Strony uznają prawo osób niepełnosprawnych do odpowiedniego poziomu życia ich samych i ich rodzin, włączając w to odpowiednie wyżywienie, odzież i mieszkanie, oraz do stałego polepszania warunków życia, i podejmują odpowiednie kroki w celu zagwarantowania i popierania realizacji tego prawa bez dyskryminacji ze względu na niepełnosprawność.

2. Państwa Strony uznają prawo osób niepełnosprawnych do ochrony socjalnej i do korzystania z tego prawa bez dyskryminacji ze względu na niepełnosprawność oraz podejmują odpowiednie kroki w celu zagwarantowania i popierania realizacji tego prawa, włączając w to środki w celu zapewnienia osobom niepełnosprawnym:

a) równego dostępu do usług w zakresie dostarczania czystej wody oraz do odpowiednich i przystępnych cenowo usług, urządzeń i innego rodzaju pomocy w zaspokajaniu potrzeb związanych z niepełnosprawnością, po przystępnych cenach;

b) w szczególności niepełnosprawnym kobietom i dziewczętom oraz niepełnosprawnym osobom w starszym wieku, dostępu do ochrony socjalnej i programów ograniczania ubóstwa;

c) i ich rodzinom, żyjącym w ubóstwie, dostępu do pomocy państwa w pokrywaniu wydatków związanych z niepełnosprawnością, w tym wydatków na odpowiednie szkolenia, doradztwo, pomoc finansową i opiekę zastępczą;

d) dostępu do mieszkań komunalnych;

e) równego dostępu do programów i świadczeń emerytalnych.

Artykuł 29

Uczestnictwo w życiu politycznym i publicznym

Państwa Strony gwarantują osobom niepełnosprawnym prawa polityczne i możliwość korzystania z nich, na równych zasadach z innymi osobami, oraz zobowiązują się do:

a) zapewnienia osobom niepełnosprawnym możliwości efektywnego i pełnego uczestnictwa w życiu politycznym i publicznym, na równych zasadach z innymi osobami, bezpośrednio lub za pośrednictwem swobodnie wybranych przedstawicieli, włączając w to prawo i możliwość korzystania z czynnego i biernego prawa wyborczego, między innymi poprzez:

   (i) zapewnienie odpowiednich, dostępnych i zrozumiałych procedur wyborczych, urządzeń i materiałów związanych z głosowaniem,

   (ii) ochronę praw osób niepełnosprawnych do tajnego głosowania w wyborach i referendach publicznych bez zastraszania, a także do kandydowania w wyborach, efektywnego sprawowania urzędu i pełnienia wszelkich funkcji publicznych na wszystkich szczeblach administracji, ułatwianie, w stosownych przypadkach, korzystania ze wspomagających i nowych technologii;

   (iii) gwarancje swobodnego wyrażania woli przez osoby niepełnosprawne występujące jako wyborcy i, w tym celu, tam gdzie to konieczne, zezwalanie osobom niepełnosprawnym, na ich życzenie, na korzystanie przy głosowaniu z pomocy wybranej przez nie osoby;

b) aktywnego promowania środowiska, w którym osoby niepełnosprawne mogą efektywnie i w pełni uczestniczyć w kierowaniu sprawami publicznymi, bez dyskryminacji i na równych zasadach z innymi osobami, i zachęcanie ich do uczestnictwa w życiu publicznym, w tym do:

   (i) udziału w organizacjach pozarządowych i stowarzyszeniach uczestniczących w życiu publicznym i politycznym kraju, a także w działalności partii politycznych i administrowaniu nimi;

   (ii) tworzenia organizacji osób niepełnosprawnych w celu reprezentowania osób niepełnosprawnych na szczeblu międzynarodowym, krajowym, regionalnym i lokalnym oraz przystępowania do takich organizacji.

Artykuł 30

Uczestnictwo w życiu kulturalnym, rekreacji, wypoczynku i sporcie

1. Państwa Strony uznają prawo osób niepełnosprawnych do udziału, na równych zasadach z innymi osobami, w życiu kulturalnym i podejmują wszelkie odpowiednie środki w celu zapewnienia osobom niepełnosprawnym dostępu do:

a) materiałów dotyczących kultury w dostępnych dla nich formach;

b) programów telewizyjnych, filmów, teatru i innego rodzaju działalności kulturalnej, w dostępnych dla nich formach;

c) miejsc związanych z działalnością lub usługami kulturalnymi, takich jak teatry, muzea, kina, biblioteki i usługi turystyczne oraz, w miarę możliwości, mają dostęp do zabytków i miejsc ważnych dla kultury narodowej.

2. Państwa Strony podejmują odpowiednie środki w celu zapewnienia osobom niepełnosprawnym możliwości rozwoju i wykorzystywania potencjału twórczego, artystycznego i intelektualnego, nie tylko dla własnej korzyści, ale także dla wzbogacenia społeczeństwa.

3. Państwa Strony podejmują odpowiednie kroki, zgodne z prawem międzynarodowym, aby przepisy chroniące prawa autorskie nie stanowiły nieuzasadnionej lub dyskryminacyjnej bariery w dostępie osób niepełnosprawnych do materiałów w dziedzinie kultury.

4. Osoby niepełnosprawne mają prawo, na równych warunkach z innymi osobami, do uznania ich szczególnej tożsamości kulturowej i językowej, w tym języków migowych i kultury osób głuchych, a także do uzyskania wsparcia w tym zakresie.

5. W celu umożliwienia osobom niepełnosprawnym udziału, na równych zasadach z innymi osobami, w działalności rekreacyjnej, wypoczynkowej i sportowej, Państwa Strony podejmują odpowiednie środki w celu:

a) zachęcania osób niepełnosprawnych do udziału, w możliwie najszerszym zakresie, w powszechnej działalności sportowej na wszystkich poziomach i popierania tego udziału;

b) zapewnienia osobom niepełnosprawnym możliwości organizacji i rozwoju działalności sportowej i rekreacyjnej uwzględniającej niepełnosprawność oraz możliwości udziału w takiej działalności i, w tym celu, zachęcania do zapewniania, na równych zasadach z innymi osobami, odpowiedniego instruktażu, szkolenia i zasobów;

c) zapewnienia osobom niepełnosprawnym dostępu do miejsc uprawiania sportu, rekreacji i turystyki;

d) zapewnienia dzieciom niepełnosprawnym dostępu, na równych zasadach z innymi dziećmi, do udziału w zabawie, rekreacji i wypoczynku oraz działalności sportowej, włączając taką działalność w ramy systemu szkolnego;

e) zapewnienia osobom niepełnosprawnym dostępu do usług świadczonych przez organizatorów działalności w zakresie rekreacji, turystyki, wypoczynku i sportu.

Artykuł 31

Statystyka i gromadzenie danych

1. Państwa Strony zobowiązują się gromadzić odpowiednie informacje, w tym dane statystyczne i pochodzące z badań, które umożliwią im formułowanie i wdrażanie polityki wprowadzającej w życie niniejszą konwencję. Proces zbierania i przechowywania tych informacji jest zgodny z:

a) prawnie określonymi gwarancjami, w tym z ustawodawstwem w zakresie ochrony danych, w celu zagwarantowania poufności i poszanowania prywatności osób niepełnosprawnych;

b) przyjętymi na szczeblu międzynarodowym normami w zakresie ochrony praw człowieka i podstawowych wolności oraz zasadami etycznymi w zakresie zbierania danych statystycznych i korzystania z nich.

2. Informacje zbierane zgodnie z niniejszym artykułem są odpowiednio segregowane i służą pomocą w ocenie realizacji przez Państwa Strony zobowiązań wynikających z niniejszej konwencji oraz w rozpoznawaniu i likwidowaniu barier, które napotykają osoby niepełnosprawne przy korzystaniu z przysługujących im praw.

3. Państwa Strony przyjmują odpowiedzialność za rozpowszechnianie danych statystycznych oraz zapewniają ich dostępność dla osób niepełnosprawnych i innych osób.

Artykuł 32

Współpraca międzynarodowa

1. Państwa Strony uznają znaczenie współpracy międzynarodowej i jej promowania dla wspierania krajowych wysiłków na rzecz realizacji celów niniejszej konwencji oraz podejmą odpowiednie i efektywne środki w tym celu, razem z innymi państwami i, jeżeli to właściwe, w partnerstwie z odpowiednimi organizacjami międzynarodowymi i regionalnymi oraz społeczeństwem obywatelskim, w szczególności z organizacjami osób niepełnosprawnych. Takie środki mogą między innymi obejmować:

a) zapewnienie integracyjnego charakteru współpracy międzynarodowej, w tym międzynarodowych programów rozwoju, i jej dostępności dla osób niepełnosprawnych;

b) ułatwianie i wspieranie budowania potencjału, w tym poprzez wymianę i udostępnianie informacji, doświadczeń, programów szkoleniowych i najlepszych praktyk;

c) ułatwianie współpracy w zakresie badań i dostępu do wiedzy naukowo-technicznej;

d) zapewnianie, jeżeli to właściwe, pomocy technicznej i ekonomicznej, w tym poprzez ułatwianie dostępu i dzielenie się technologiami dotyczącymi dostępności i wspomagania oraz poprzez transfer technologii.

2. Postanowienia niniejszego artykułu pozostają bez uszczerbku dla obowiązku każdego Państwa Strony do wypełniania jego zobowiązań wynikających z niniejszej konwencji.

Artykuł 33

Wdrażanie i monitorowanie na szczeblu krajowym

1. Państwa Strony, zgodnie ze swoim systemem organizacyjnym, wyznaczają w ramach rządu jeden lub więcej punktów kontaktowych w sprawach dotyczących wdrażania niniejszej konwencji, poświęcając należytą uwagę ustanowieniu lub wyznaczeniu mechanizmu koordynacji w ramach rządu, w celu ułatwienia działań związanych z wdrażaniem konwencji w różnych sektorach i na różnych szczeblach.

2. Państwa Strony, zgodnie ze swoim systemem prawnym i administracyjnym, utrzymują, wzmacniają, wyznaczają lub ustanawiają strukturę, obejmującą jeden lub więcej niezależnych mechanizmów, zależnie od potrzeb, w celu popierania, ochrony i monitorowania wdrażania niniejszej konwencji. Wyznaczając lub ustanawiając taki mechanizm, Państwa Strony uwzględniają zasady dotyczące statusu i funkcjonowania krajowych instytucji zajmujących się ochroną i popieraniem praw człowieka.

3. Społeczeństwo obywatelskie, w szczególności osoby niepełnosprawne i reprezentujące je organizacje, są włączone w proces monitorowania i w pełni w nim uczestniczą.

Artykuł 34

Komitet ds. Praw Osób Niepełnosprawnych

1. Ustanawia się Komitet ds. Praw Osób Niepełnosprawnych (zwany dalej „Komitetem"), który sprawuje funkcje wymienione poniżej.

2. W chwili wejścia w życie niniejszej konwencji Komitet będzie się składać z dwunastu ekspertów. Po dodatkowych sześćdziesięciu ratyfikacjach lub przystąpieniach do konwencji liczba członków Komitetu wzrośnie o sześciu, osiągając maksymalną liczbę osiemnastu członków.

3. Członkowie Komitetu działają we własnym imieniu, mają wysokie kwalifikacje moralne oraz uznane kompetencje i doświadczenie w dziedzinie objętej zakresem niniejszej konwencji. Przy nominowaniu kandydatów Państwa Strony proszone są o poświęcenie należytej uwagi postanowieniom artykułu 4 ustęp 3 niniejszej konwencji.

4. Członkowie Komitetu są wybierani przez Państwa Strony, z uwzględnieniem sprawiedliwej reprezentacji geograficznej, reprezentacji różnych form cywilizacji i głównych systemów prawnych, zrównoważonej reprezentacji obu płci i uczestnictwa ekspertów niepełnosprawnych.

5. Członkowie Komitetu są wybierani w tajnym głosowaniu, z listy osób nominowanych przez Państwa Strony spośród swoich obywateli, na posiedzeniach Konferencji Państw Stron. Na posiedzeniach tych, dla których kworum wynosi dwie trzecie liczby Państw Stron, do Komitetu wybrane zostają osoby, które uzyskają największą liczbę głosów i absolutną większość głosów obecnych i głosujących przedstawicieli Państw Stron.

6. Pierwsze wybory odbędą się nie później niż w terminie sześciu miesięcy od dnia wejścia w życie niniejszej konwencji. Co najmniej na cztery miesiące przed terminem każdych wyborów Sekretarz Generalny Organizacji Narodów Zjednoczonych kieruje do Państw Stron pisemne zaproszenie do zgłaszania, w ciągu dwóch miesięcy, kandydatów na członków Komitetu. Sekretarz Generalny Organizacji Narodów Zjednoczonych sporządza listę, w porządku alfabetycznym, wszystkich zgłoszonych w ten sposób kandydatów, ze wskazaniem Państw, które ich zgłosiły, oraz przedkłada ją Państwom Stronom niniejszej konwencji.

7. Członkowie Komitetu są wybierani na cztery lata. Mogą oni być ponownie wybrani jeden raz. Jednakże mandat sześciu spośród członków wybranych w pierwszych wyborach wygasa po upływie dwóch lat; niezwłocznie po pierwszych wyborach nazwiska tych sześciu członków są wybrane drogą losowania przez przewodniczącego posiedzenia, o którym mowa w ustępie 5 niniejszego artykułu.

8. Wybór dodatkowych sześciu członków dokonywany jest przy okazji regularnych wyborów, zgodnie z odpowiednimi postanowieniami niniejszego artykułu.

9. W przypadku śmierci członka Komitetu lub gdy rezygnuje on, lub oświadcza, że z jakiejkolwiek innej przyczyny nie jest w stanie dłużej wykonywać swoich obowiązków, Państwo Strona, które wysunęło kandydaturę tego członka, wyznacza innego eksperta posiadającego kwalifikacje i spełniającego wymogi określone w odpowiednich postanowieniach niniejszego artykułu, aby pełnił funkcję przez okres pozostały do zakończenia kadencji.

10. Komitet ustanawia własny regulamin wewnętrzny.

11. Sekretarz Generalny Organizacji Narodów Zjednoczonych zapewnia niezbędny personel i ułatwienia konieczne do skutecznego wykonywania funkcji Komitetu przewidzianych w niniejszej konwencji oraz zwołuje jego pierwsze posiedzenie.

12. Członkowie Komitetu ustanowionego na mocy niniejszej konwencji otrzymują, za zgodą Zgromadzenia Ogólnego, honorarium z funduszy Organizacji Narodów Zjednoczonych, na zasadach i warunkach ustalonych przez Zgromadzenie Ogólne, uwzględniając wagę zadań Komitetu.

13. Członkowie Komitetu korzystają z ułatwień, przywilejów i immunitetów, jakie przysługują ekspertom działającym z ramienia Organizacji Narodów Zjednoczonych, zgodnie z postanowieniami odpowiednich rozdziałów konwencji dotyczącej przywilejów i immunitetów Organizacji Narodów Zjednoczonych.

Artykuł 35

Sprawozdania przedkładane przez Państwa Strony

1. Każde Państwo Strona przedkłada Komitetowi, za pośrednictwem Sekretarza Generalnego Organizacji Narodów Zjednoczonych, szczegółowe sprawozdanie dotyczące środków podjętych w celu realizacji zobowiązań wynikających z niniejszej konwencji oraz postępu dokonanego w tym zakresie, w terminie dwóch lat od daty wejścia w życie niniejszej konwencji w stosunku do danego Państwa Strony.

2. Następnie Państwa Strony składają kolejne sprawozdania przynajmniej co cztery lata oraz wówczas, gdy Komitet o to wystąpi.

3. Komitet ustala wszelkie wytyczne dotyczące treści sprawozdań.

4. Państwo Strona, po przedłożeniu Komitetowi szczegółowego sprawozdania wstępnego, w kolejnych sprawozdaniach nie jest zobowiązane do powtarzania wcześniej udzielonych informacji. Państwa Strony proszone są o rozważenie możliwości przygotowywania sprawozdania w otwartej i przejrzystej procedurze oraz proszone są o poświęcenie należytej uwagi postanowieniom artykułu 4 ustęp 3 niniejszej konwencji.

5. Sprawozdania mogą wskazywać czynniki i trudności wpływające na stopień realizacji zobowiązań wynikających z niniejszej konwencji.

Artykuł 36

Rozpatrywanie sprawozdań

1. Każde sprawozdanie rozpatrywane jest przez Komitet, który formułuje w stosunku do sprawozdania uwagi i zalecenia ogólne, jakie uznaje za właściwe, i przekazuje je zainteresowanemu Państwu Stronie. Państwo Strona może odpowiedzieć Komitetowi, przekazując mu informacje, jakie uzna za stosowne. Komitet może zwrócić się do Państw Stron z prośbą o dalsze informacje dotyczące wdrażania niniejszej konwencji.

2. Jeśli Państwo Strona znacznie spóźnia się z przedłożeniem sprawozdania, Komitet może powiadomić dane Państwo Stronę o potrzebie zbadania wdrażania niniejszej konwencji przez to Państwo Stronę na podstawie rzetelnych informacji dostępnych Komitetowi, o ile odpowiednie sprawozdanie nie zostanie przedłożone w ciągu trzech miesięcy od daty powiadomienia. Komitet zwraca się do danego Państwa Strony z prośbą o udział w takim badaniu. Jeżeli w odpowiedzi na to Państwo Strona przedłoży odpowiednie sprawozdanie, stosuje się postanowienia ustępu 1 niniejszego artykułu.

3. Sekretarz Generalny Organizacji Narodów Zjednoczonych udostępnia sprawozdania wszystkim Państwom Stronom.

4. Państwa Strony udostępniają swoje sprawozdania opinii publicznej w swoich krajach oraz ułatwiają dostęp do uwag i ogólnych zaleceń dotyczących tych sprawozdań.

5. Jeżeli Komitet uzna to za właściwe, może przesłać sprawozdania Państw Stron wyspecjalizowanym agencjom, funduszom i programom Organizacji Narodów Zjednoczonych oraz innym właściwym organom, na zawartą w tych sprawozdaniach prośbę lub zgodnie ze wskazaniem potrzeby uzyskania porady technicznej lub pomocy, wraz z ewentualnymi uwagami i zaleceniami Komitetu dotyczącymi takich próśb lub wskazań.

Artykuł 37

Współpraca między Państwami Stronami a Komitetem

1. Każde Państwo Strona współpracuje z Komitetem i udziela jego członkom pomocy w sprawowaniu ich mandatu.

2. W kontaktach z Państwami Stronami Komitet poświęca należytą uwagę metodom i sposobom zwiększania zdolności krajowych w zakresie wdrażania niniejszej konwencji, w tym poprzez współpracę międzynarodową.

Artykuł 38

Stosunki Komitetu z innymi organami

W celu sprzyjania skutecznemu wdrażaniu niniejszej konwencji i zachęcania do współpracy międzynarodowej w dziedzinie objętej zakresem niniejszej konwencji:

a) wyspecjalizowane agencje i inne organy Organizacji Narodów Zjednoczonych mają prawo być reprezentowane przy rozpatrywaniu wykonywania tych postanowień niniejszej konwencji, które objęte są ich mandatem. Komitet może zwracać się do wyspecjalizowanych agencji i innych właściwych organów, które uzna za odpowiednie, o specjalistyczną poradę na temat stosowania konwencji w obszarach leżących w zakresie ich mandatu. Komitet może zwracać się do wyspecjalizowanych agencji i innych organów Organizacji Narodów Zjednoczonych o przedłożenie sprawozdań na temat stosowania konwencji w obszarach należących do zakresu ich działań,

b) w ramach sprawowania swojego mandatu, w stosownych przypadkach, Komitet prowadzi konsultacje z innymi odpowiednimi organami powołanymi przez umowy międzynarodowe dotyczące praw człowieka, w celu zapewnienia spójności odpowiednich wytycznych dotyczących przedkładania sprawozdań, uwag i ogólnych zaleceń oraz w celu unikania dublowania i pokrywania się realizowanych przez nie funkcji.

Artykuł 39

Sprawozdanie Komitetu

Co dwa lata Komitet składa sprawozdanie ze swojej działalności Zgromadzeniu Ogólnemu oraz Radzie Gospodarczo-Społecznej, a także może przekazywać uwagi i ogólne zalecenia wynikające z badania sprawozdań i informacji otrzymywanych od Państw Stron. Takie uwagi i ogólne zalecenia dołączone są do sprawozdania Komitetu, wraz z ewentualnymi uwagami Państw Stron.

Artykuł 40

Konferencja Państw Stron

1. Państwa Strony spotykają się regularnie na Konferencji Państw Stron w celu rozważenia każdej sprawy związanej z wdrażaniem niniejszej konwencji.

2. Sekretarz Generalny Organizacji Narodów Zjednoczonych zwołuje Konferencję Państw Stron nie później niż w terminie sześciu miesięcy od dnia wejścia w życie niniejszej konwencji. Kolejne posiedzenia są zwoływane przez Sekretarza Generalnego Organizacji Narodów Zjednoczonych co dwa lata lub zgodnie z decyzją Konferencji Państw Stron.

Artykuł 41

Depozytariusz

Depozytariuszem niniejszej konwencji jest Sekretarz Generalny Narodów Zjednoczonych.

Artykuł 42

Podpisanie

Niniejsza konwencja będzie otwarta do podpisu dla wszystkich państw i dla organizacji integracji regionalnej w siedzibie Organizacji Narodów Zjednoczonych w Nowym Jorku od dnia 30 marca 2007 r.

Artykuł 43

Zgoda na związanie się konwencją

Niniejsza konwencja podlega ratyfikacji przez Państwa Sygnatariuszy i formalnemu zatwierdzeniu przez organizacje integracji regionalnej, które ją podpisały. Jest ona otwarta do przystąpienia dla każdego państwa lub każdej organizacji integracji regionalnej, która nie podpisała konwencji.

Artykuł 44

Organizacje integracji regionalnej

1. „Organizacja integracji regionalnej" oznacza organizację powołaną przez suwerenne państwa danego regionu, której państwa członkowskie przekazały kompetencje w zakresie spraw regulowanych przez niniejszą konwencję. W dokumencie formalnego zatwierdzenia lub przystąpienia organizacje takie deklarują zakres kompetencji w sprawach regulowanych przez niniejszą konwencję. Następnie informują one depozytariusza o wszelkich istotnych zmianach zakresu swoich kompetencji.

2. Odniesienia do „Państw Stron" w niniejszej konwencji stosuje się do takich organizacji, w granicach ich kompetencji.

3. Do celów artykułu 45 ustęp 1 oraz artykułu 47 ustępy 2 i 3 nie jest uwzględniany jakikolwiek dokument złożony przez organizację integracji regionalnej.

4. Organizacje integracji regionalnej, w sprawach należących do ich kompetencji, mogą korzystać z przysługującego im prawa głosu na Konferencji Państw Stron, dysponując liczbą głosów równą liczbie państw członkowskich tych organizacji będących stronami niniejszej konwencji. Organizacja taka nie może korzystać z prawa głosu, jeżeli którekolwiek z jej państw członkowskich korzysta ze swego prawa głosu, i odwrotnie.

Artykuł 45

Wejście w życie

1. Niniejsza konwencja wchodzi w życie trzydziestego dnia od dnia złożenia dwudziestego dokumentu ratyfikacyjnego lub dokumentu przystąpienia.

2. Dla wszystkich państw lub organizacji integracji regionalnej ratyfikujących, formalnie zatwierdzających lub przystępujących do niniejszej konwencji po złożeniu dwudziestego dokumentu, niniejsza konwencja wchodzi w życie trzydziestego dnia od dnia złożenia przez to państwo lub organizację odpowiedniego dokumentu.

Artykuł 46

Zastrzeżenia

1. Nie są dopuszczalne zastrzeżenia niezgodne z przedmiotem i celem niniejszej konwencji.

2. Zastrzeżenia mogą zostać wycofane w każdej chwili.

Artykuł 47

Poprawki

1. Każde z Państw Stron niniejszej konwencji może zaproponować poprawkę do niniejszej konwencji i przedłożyć ją Sekretarzowi Generalnemu Organizacji Narodów Zjednoczonych. Sekretarz Generalny przekazuje każdą zaproponowaną poprawkę Państwom Stronom, z prośbą o powiadomienie go, czy opowiadają się one za zwołaniem konferencji Państw Stron w celu rozważenia propozycji i podjęcia decyzji w jej sprawie. Jeżeli w ciągu czterech miesięcy od daty takiego przekazania przynajmniej jedna trzecia Państw Stron opowie się za zwołaniem konferencji, Sekretarz Generalny zwołuje ją pod auspicjami Organizacji Narodów Zjednoczonych. Każda poprawka przyjęta większością dwóch trzecich głosów Państw Stron obecnych i głosujących jest przedkładana przez Sekretarza Generalnego Zgromadzeniu Ogólnemu do zatwierdzenia, a następnie wszystkim Państwom Stronom do przyjęcia.

2. Poprawka, przyjęta i zatwierdzona zgodnie z ustępem 1 niniejszego artykułu, wchodzi w życie trzydziestego dnia od dnia, kiedy liczba złożonych dokumentów przystąpienia osiągnie dwie trzecie liczby Państw Stron według stanu na dzień przyjęcia poprawki. Następnie poprawka wchodzi w życie w odniesieniu do każdego Państwa Strony trzydziestego dnia od daty złożenia jego dokumentu przyjęcia. Poprawka jest wiążąca tylko w stosunku do Państw Stron, które ją przyjęły.

3. Jeśli Konferencja Państw Stron tak postanowi w drodze konsensusu, poprawka, która dotyczy wyłącznie artykułów 34, 38, 39 i 40, przyjęta i zatwierdzona zgodnie z ustępem 1 niniejszego artykułu, wchodzi w życie w stosunku do wszystkich Państw Stron trzydziestego dnia od dnia, kiedy liczba złożonych dokumentów przystąpienia osiągnie dwie trzecie liczby Państw Stron według stanu na dzień przyjęcia poprawki.

Artykuł 48

Wypowiedzenie

Państwo Strona może wypowiedzieć niniejszą konwencję w drodze pisemnego powiadomienia Sekretarza Generalnego Organizacji Narodów Zjednoczonych. Wypowiedzenie wchodzi w życie po upływie jednego roku od daty otrzymania powiadomienia przez Sekretarza Generalnego.

Artykuł 49

Dostępna forma

Tekst niniejszej konwencji jest udostępniany w formach dostępnych dla osób niepełnosprawnych.

Artykuł 50

Teksty autentyczne

Teksty angielski, arabski, chiński, francuski, hiszpański i rosyjski niniejszej konwencji są jednakowo autentyczne.

NA DOWÓD CZEGO niżej podpisani pełnomocnicy, należycie upoważnieni w tym celu przez swoje rządy, podpisali niniejszą konwencję.

ZAŁĄCZNIK II

DEKLARACJA W SPRAWIE KOMPETENCJI WSPÓLNOTY EUROPEJSKIEJ W SPRAWACH REGULOWANYCH KONWENCJĄ NARODÓW ZJEDNOCZONYCH O PRAWACH OSÓB NIEPEŁNOSPRAWNYCH

(Deklaracja sporządzona na mocy artykułu 44 ustęp 1 konwencji)

W artykule 44 ustęp 1 Konwencji Narodów Zjednoczonych o prawach osób niepełnosprawnych (zwanej dalej „konwencją") przewidziano, że organizacje integracji regionalnej w dokumencie formalnego zatwierdzenia lub przystąpienia deklarują zakres kompetencji w sprawach regulowanych przez konwencję.

Do Wspólnoty Europejskiej należą obecnie Królestwo Belgii, Republika Bułgarii, Republika Czeska, Królestwo Danii, Republika Federalna Niemiec, Republika Estońska, Irlandia, Republika Grecka, Królestwo Hiszpanii, Republika Francuska, Republika Włoska, Republika Cypryjska, Republika Łotewska, Republika Litewska, Wielkie Księstwo Luksemburga, Republika Węgierska, Republika Malty, Królestwo Niderlandów, Republika Austrii, Rzeczpospolita Polska, Republika Portugalska, Rumunia, Republika Słowenii, Republika Słowacka, Republika Finlandii, Królestwo Szwecji oraz Zjednoczone Królestwo Wielkiej Brytanii i Irlandii Północnej.

Wspólnota Europejska zwraca uwagę na fakt, że na użytek konwencji termin „państwa strony" ma zastosowanie do organizacji integracji regionalnej w granicach ich kompetencji.

W ramach kompetencji Wspólnoty Europejskiej Konwencja Narodów Zjednoczonych o prawach osób niepełnosprawnych ma zastosowanie do terytoriów, na których stosuje się Traktat ustanawiający Wspólnotę Europejską, na warunkach określonych w tym Traktacie, w szczególności w jego artykule 299.

Zgodnie z artykułem 299 niniejsza deklaracja nie dotyczy tych terytoriów państw członkowskich, do których wyżej wymieniony Traktat nie ma zastosowania, i pozostaje bez uszczerbku dla wszelkich aktów i stanowisk przyjętych na mocy konwencji przez zainteresowane państwa członkowskie w imieniu i w interesie takich terytoriów.

Zgodnie z artykułem 44 ustęp 1 konwencji w niniejszej deklaracji wskazano kompetencje przekazane Wspólnocie przez państwa członkowskie na mocy Traktatu ustanawiającego Wspólnotę Europejską w dziedzinach objętych konwencją.

Zakres i sposób wykonywania kompetencji przez Wspólnotę z natury rzeczy podlega ciągłym zmianom, Wspólnota będzie zatem w miarę potrzeb uzupełniać lub zmieniać niniejszą deklarację zgodnie z artykułem 44 ustęp 1 konwencji.

W niektórych sprawach Wspólnota Europejska ma kompetencje wyłączne, w innych zaś dzieli je z państwami członkowskimi. Państwa członkowskie mają kompetencje we wszystkich sprawach, w których nie przekazały kompetencji Wspólnocie Europejskiej.

Obecnie:

1. Wspólnota ma kompetencje wyłączne w zakresie zgodności pomocy państwa ze wspólnym rynkiem i ze wspólną taryfą celną.

   Jeżeli postanowienia konwencji wpływają na prawo wspólnotowe, Wspólnocie Europejskiej przysługuje wyłączna kompetencja w zakresie przyjęcia takich obowiązków w odniesieniu do własnej administracji publicznej. W związku z tym Wspólnota oświadcza, że odpowiada za nabór, warunki pełnienia służby, wynagrodzenie, szkolenie itp. urzędników niepochodzących z wyboru – na mocy regulaminu pracowniczego i jego przepisów wykonawczych ([1]).

2. Wspólnota dzieli kompetencje z państwami członkowskimi w następujących obszarach: działania służące zwalczaniu dyskryminacji ze względu na niepełnosprawność; swobodny przepływ towarów, osób, usług i kapitału; rolnictwo, transport kolejowy, drogowy, morski i lotniczy, podatki, rynek wewnętrzny, równe płace dla pracujących kobiet i mężczyzn, polityka sieci transeuropejskich oraz statystyka.

([1]) Rozporządzenie Rady (EWG, Euratom, EWWiS) nr 259/68 z dnia 29 lutego 1968 r. ustanawiające regulamin pracowniczy urzędników Wspólnot Europejskich i warunki zatrudnienia innych pracowników Wspólnot Europejskich (Dz.U. L 56 z 4.3.1968, s. 1).

Wspólnocie Europejskiej przysługują wyłączne kompetencje do przystąpienia do konwencji w odniesieniu do wspomnianych spraw wyłącznie w zakresie, w jakim postanowienia konwencji lub akty prawne przyjęte podczas jej wdrażania wpływają na przepisy uprzednio przyjęte przez Wspólnotę Europejską. Jeżeli przepisy Wspólnoty istnieją, ale wspomniane postanowienia i akty nie mają na nie wpływu, w szczególności gdy przepisy Wspólnoty służą tylko ustanowieniu minimalnych norm, kompetencję mają państwa członkowskie – bez uszczerbku dla kompetencji Wspólnoty do podejmowania działań w tej dziedzinie. W pozostałych sytuacjach kompetencje przysługują państwom członkowskim. Wykaz stosownych aktów przyjętych przez Wspólnotę Europejską znajduje się w dodatku. Oceniając, jaki zakres kompetencji Wspólnoty Europejskiej wynika z tych aktów, należy odwołać się do dokładnych przepisów każdego z nich, a w szczególności do tego, w jakim stopniu przepisy te ustanawiają wspólne zasady.

3. Dla konwencji istotne mogą być także następujące polityki WE: państwa członkowskie i Wspólnota pracują nad tworzeniem skoordynowanej strategii zatrudnienia. Wspólnota przyczynia się do rozwoju edukacji o wysokiej jakości przez zachęcanie państw członkowskich do współpracy, a w razie potrzeby przez wspieranie i uzupełnianie ich działań. Wspólnota wdraża politykę szkolenia zawodowego wspierającą i uzupełniającą działania państw członkowskich. Wspierając harmonijny rozwój całej Wspólnoty, rozwija ona i prowadzi działania służące zwiększeniu spójności gospodarczej i społecznej. Wspólnota prowadzi politykę współpracy rozwojowej oraz współpracę gospodarczą, finansową i techniczną z państwami trzecimi bez uszczerbku dla stosownych kompetencji państw członkowskich.

Dodatek

AKTY WSPÓLNOTOWE ODNOSZĄCE SIĘ DO SPRAW REGULOWANYCH KONWENCJĄ

Wymienione poniżej akty wspólnotowe ilustrują zakres kompetencji Wspólnoty wynikający z Traktatu ustanawiającego Wspólnotę Europejską. W niektórych sprawach Wspólnota Europejska ma kompetencje wyłączne, w innych zaś dzieli kompetencje z państwami członkowskimi. Oceniając, jaki zakres kompetencji Wspólnoty wynika z poniższych aktów, należy odwołać się do dokładnych przepisów każdego z nich, a w szczególności do tego, w jakim stopniu przepisy te ustanawiają wspólne zasady, na które mają wpływ postanowienia konwencji.

— Dostępność

Dyrektywa Parlamentu Europejskiego i Rady 1999/5/WE z dnia 9 marca 1999 r. w sprawie urządzeń radiowych i końcowych urządzeń telekomunikacyjnych oraz wzajemnego uznawania ich zgodności (Dz.U. L 91 z 7.4.1999, s. 10)

Dyrektywa 2001/85/WE Parlamentu Europejskiego i Rady z dnia 20 listopada 2001 r. odnosząca się do przepisów szczególnych dotyczących pojazdów wykorzystywanych do przewozu pasażerów i mających więcej niż osiem siedzeń poza siedzeniem kierowcy oraz zmieniająca dyrektywy 70/156/EWG i 97/27/WE (Dz.U. L 42 z 13.2.2002, s. 1)

Dyrektywa Rady 96/48/WE z dnia 23 lipca 1996 r. w sprawie interoperacyjności transeuropejskiego systemu kolei dużych prędkości (Dz.U. L 235 z 17.9.1996, s. 6), zmieniona dyrektywą 2004/50/WE Parlamentu Europejskiego i Rady (Dz.U. L 164 z 30.4.2004, s. 114)

Dyrektywa 2001/16/WE Parlamentu Europejskiego i Rady z dnia 19 marca 2001 r. w sprawie interoperacyjności transeuropejskiego systemu kolei konwencjonalnych (Dz.U. L 110 z 20.4.2001, s. 1), zmieniona dyrektywą 2004/50/WE Parlamentu Europejskiego i Rady (Dz.U. L 164 z 30.4.2004, s. 114)

Dyrektywa 2006/87/WE Parlamentu Europejskiego i Rady z dnia 12 grudnia 2006 r. ustanawiająca wymagania techniczne dla statków żeglugi śródlądowej i uchylająca dyrektywę Rady 82/714/EWG (Dz.U. L 389 z 30.12.2006, s. 1)

Dyrektywa 2003/24/WE Parlamentu Europejskiego i Rady z dnia 14 kwietnia 2003 r. zmieniająca dyrektywę Rady 98/18/WE w sprawie reguł i norm bezpieczeństwa statków pasażerskich (Dz.U. L 123 z 17.5.2003, s. 18)

Dyrektywa 2007/46/WE Parlamentu Europejskiego i Rady z dnia 5 września 2007 r. ustanawiająca ramy dla homologacji pojazdów silnikowych i ich przyczep oraz układów, części i oddzielnych zespołów technicznych przeznaczonych do tych pojazdów (dyrektywa ramowa) (Dz.U. L 263 z 9.10.2007, s. 1)

Decyzja Komisji 2008/164/WE z dnia 21 grudnia 2007 r. dotycząca technicznej specyfikacji interoperacyjności w zakresie aspektu „Osoby o ograniczonej możliwości poruszania się" transeuropejskiego systemu kolei konwencjonalnych i transeuropejskiego systemu kolei dużych prędkości (Dz.U. L 64 z 7.3.2008, s. 72)

Dyrektywa 95/16/WE Parlamentu Europejskiego i Rady z dnia 29 czerwca 1995 r. w sprawie zbliżenia ustawodawstw państw członkowskich dotyczących dźwigów (Dz.U. L 213 z 7.9.1995, s. 1), zmieniona dyrektywą 2006/42/WE Parlamentu Europejskiego i Rady z dnia w sprawie maszyn, zmieniającą dyrektywę 95/16/WE (Dz.U. L 157 z 9.6.2006, s. 24)

Dyrektywa 2002/21/WE Parlamentu Europejskiego i Rady z dnia 7 marca 2002 r. w sprawie wspólnych ram regulacyjnych sieci i usług łączności elektronicznej (dyrektywa ramowa) (Dz.U. L 108 z 24.4.2002, s. 33)

Dyrektywa 2002/22/WE Parlamentu Europejskiego i Rady z dnia 7 marca 2002 r. w sprawie usługi powszechnej i związanych z sieciami i usługami łączności elektronicznej praw użytkowników (dyrektywa o usłudze powszechnej) (Dz.U. L 108 z 24.4.2002, s. 51)

Dyrektywa 97/67/WE Parlamentu Europejskiego i Rady z dnia 15 grudnia 1997 r. w sprawie wspólnych zasad rozwoju rynku wewnętrznego usług pocztowych Wspólnoty oraz poprawy jakości usług (Dz.U. L 15 z 21.1.1998, s. 14), zmieniona dyrektywą 2002/39/WE Parlamentu Europejskiego i Rady z dnia 10 czerwca 2002 r. zmieniającą dyrektywę 97/67/WE w zakresie dalszego otwarcia na konkurencję wspólnotowych usług pocztowych (Dz.U. L 176 z 5.7.2002, s. 21) oraz dyrektywą Parlamentu Europejskiego i Rady 2008/6/WE z dnia 20 lutego 2008 r. zmieniająca dyrektywę 97/67/WE w odniesieniu do pełnego urzeczywistnienia rynku wewnętrznego usług pocztowych Wspólnoty (Dz.U. L 52 z 27.2.2008, s. 3)

Rozporządzenie Rady (WE) nr 1083/2006 z dnia 11 lipca 2006 r. ustanawiające przepisy ogólne dotyczące Europejskiego Funduszu Rozwoju Regionalnego, Europejskiego Funduszu Społecznego oraz Funduszu Spójności i uchylające rozporządzenie (WE) nr 1260/1999 (Dz.U. L 210 z 31.7.2006, s. 25)

Dyrektywa 2004/17/WE Parlamentu Europejskiego i Rady z dnia 31 marca 2004 r. koordynująca procedury udzielania zamówień przez podmioty działające w sektorach gospodarki wodnej, energetyki, transportu i usług pocztowych (Dz.U. L 134 z 30.4.2004, s. 1)

Dyrektywa 2004/18/WE Parlamentu Europejskiego i Rady z dnia 31 marca 2004 r. w sprawie koordynacji procedur udzielania zamówień publicznych na roboty budowlane, dostawy i usługi (Dz.U. L 134 z 30.4.2004, s. 114)

Dyrektywa Rady 92/13/EWG z dnia 25 lutego 1992 r. koordynująca przepisy ustawowe, wykonawcze i administracyjne odnoszące się do stosowania przepisów wspólnotowych w procedurach zamówień publicznych podmiotów działających w sektorach gospodarki wodnej, energetyki, transportu i telekomunikacji (Dz.U. L 76 z 23.3.1992, s. 14), zmieniona dyrektywą 2007/66/WE Parlamentu Europejskiego i Rady z dnia 11 grudnia 2007 r. zmieniającą dyrektywy Rady 89/665/EWG i 92/13/EWG w zakresie poprawy skuteczności procedur odwoławczych w dziedzinie udzielania zamówień publicznych (Dz.U. L 335 z 20.12.2007, s. 31)

Dyrektywa Rady 89/665/EWG z dnia 21 grudnia 1989 r. w sprawie koordynacji przepisów ustawowych, wykonawczych i administracyjnych odnoszących się do stosowania procedur odwoławczych w zakresie udzielania zamówień publicznych na dostawy i roboty budowlane (Dz.U. L 395 z 30.12.1989, s. 33), zmieniona dyrektywą Parlamentu Europejskiego i Rady 2007/66/WE z dnia 11 grudnia 2007 r. zmieniającą dyrektywy Rady 89/665/EWG i 92/13/EWG w zakresie poprawy skuteczności procedur odwoławczych w dziedzinie udzielania zamówień publicznych (Dz.U. L 335 z 20.12.2007, s. 31).

— Samodzielne życie, włączenie społeczne, praca i zatrudnienie

Dyrektywa Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiająca ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy (Dz.U. L 303 z 2.12.2000, s. 16)

Rozporządzenie Komisji (WE) nr 800/2008 z dnia 6 sierpnia 2008 r. uznające niektóre rodzaje pomocy za zgodne ze wspólnym rynkiem w zastosowaniu art. 87 i 88 Traktatu (ogólne rozporządzenie w sprawie wyłączeń blokowych) (Dz.U. L 214 z 9.8.2008, s. 3)

Rozporządzenie Komisji (EWG) nr 2289/83 z dnia 29 lipca 1983 r. ustanawiające przepisy w celu wykonania art. 70–78 rozporządzenia Rady (EWG) nr 918/83 ustanawiającego wspólnotowy system zwolnień celnych (Dz.U. L 220 z 11.8.1983, s. 15)

Dyrektywa Rady 83/181/EWG z dnia 28 marca 1983 r. określająca zakres art. 14 ust. 1 lit. d) dyrektywy 77/388/EWG w odniesieniu do zwolnienia z podatku od wartości dodanej na przywóz finalny niektórych towarów (Dz.U. L 105 z 23.4.1983, s. 38)

Dyrektywa 2006/54/WE Parlamentu Europejskiego i Rady z dnia 5 lipca 2006 r. w sprawie wprowadzenia w życie zasady równości szans oraz równego traktowania kobiet i mężczyzn w dziedzinie zatrudnienia i pracy (Dz.U. L 204 z 26.7.2006, s. 23)

Rozporządzenie Rady (EWG) nr 918/83 z dnia 28 marca 1983 r. ustanawiające wspólnotowy system zwolnień celnych (Dz.U. L 105 z 23.4.1983, s. 1)

Dyrektywa Rady 2006/112/WE z dnia 28 listopada 2006 r. w sprawie wspólnego systemu podatku od wartości dodanej (Dz.U. L 347 z 11.12.2006, s. 1), zmieniona dyrektywą Rady 2009/47/WE z dnia 5 maja 2009 r. zmieniającą dyrektywę 2006/112/WE w zakresie stawek obniżonych podatku od wartości dodanej (Dz.U. L 116 z 9.5.2009, s. 18)

Rozporządzenie Rady (WE) nr 1698/2005 z dnia 20 września 2005 r. w sprawie wsparcia rozwoju obszarów wiejskich przez Europejski Fundusz Rolny na rzecz Rozwoju Obszarów Wiejskich (EFRROW) (Dz.U. L 277 z 21.10.2005, s. 1)

Dyrektywa Rady 2003/96/WE z dnia 27 października 2003 r. w sprawie restrukturyzacji wspólnotowych przepisów ramowych dotyczących opodatkowania produktów energetycznych i energii elektrycznej (Dz.U. L 283 z 31.10.2003, s. 51).

— Mobilność osobista

Dyrektywa Rady 91/439/EWG z dnia 29 lipca 1991 r. w sprawie praw jazdy (Dz.U. L 237 z 24.8.1991, s. 1)

Dyrektywa 2006/126/WE Parlamentu Europejskiego i Rady z dnia 20 grudnia 2006 r. w sprawie praw jazdy (Dz.U. L 403 z 30.12.2006, s. 18)

Dyrektywa 2003/59/WE Parlamentu Europejskiego i Rady z dnia 15 lipca 2003 r. w sprawie wstępnej kwalifikacji i okresowego szkolenia kierowców niektórych pojazdów drogowych do przewozu rzeczy lub osób, zmieniająca rozporządzenie Rady (EWG) nr 3820/85 oraz dyrektywę Rady 91/439/EWG i uchylająca dyrektywę Rady 76/914/EWG (Dz.U. L 226 z 10.9.2003, s. 4)

Rozporządzenie (WE) nr 261/2004 Parlamentu Europejskiego i Rady z dnia 11 lutego 2004 r. ustanawiające wspólne zasady odszkodowania i pomocy dla pasażerów w przypadku odmowy przyjęcia na pokład albo odwołania lub dużego opóźnienia lotów, uchylające rozporządzenie (EWG) nr 295/91 (Dz.U. L 46 z 17.2.2004, s. 1)

Rozporządzenie (WE) nr 1107/2006 Parlamentu Europejskiego i Rady z dnia 5 lipca 2006 r. w sprawie praw osób niepełnosprawnych oraz osób o ograniczonej sprawności ruchowej podróżujących drogą lotniczą (Dz.U. L 204 z 26.7.2006, s. 1)

Rozporządzenie (WE) nr 1899/2006 Parlamentu Europejskiego i Rady z dnia 12 grudnia 2006 r. zmieniające rozporządzenie Rady (EWG) nr 3922/91 w sprawie harmonizacji wymagań technicznych i procedur administracyjnych w dziedzinie lotnictwa cywilnego (Dz.U. L 377 z 27.12.2006, s. 1)

Rozporządzenie (WE) nr 1371/2007 Parlamentu Europejskiego i Rady z dnia 23 października 2007 r. dotyczące praw i obowiązków pasażerów w ruchu kolejowym (Dz.U. L 315 z 3.12.2007, s. 14).

Rozporządzenie (WE) nr 1370/2007 Parlamentu Europejskiego i Rady z dnia 23 października 2007 r. dotyczące usług publicznych w zakresie kolejowego i drogowego transportu pasażerskiego oraz uchylające rozporządzenia Rady (EWG) nr 1191/69 i (EWG) nr 1107/70 (Dz.U. L 315 z 3.12.2007, s. 1)

Rozporządzenie Komisji (WE) nr 8/2008 z dnia 11 grudnia 2007 r. zmieniające rozporządzenie Rady (EWG) nr 3922/91 w odniesieniu do wspólnych wymagań technicznych i procedur administracyjnych mających zastosowanie do komercyjnego transportu lotniczego (Dz.U. L 10 z 12.1.2008, s. 1).

— Dostęp do informacji

Dyrektywa 2001/83/WE Parlamentu Europejskiego i Rady z dnia 6 listopada 2001 r. w sprawie wspólnotowego kodeksu odnoszącego się do produktów leczniczych stosowanych u ludzi (Dz.U. L 311 z 28.11.2001, s. 67), zmieniona dyrektywą 2004/27/WE Parlamentu Europejskiego i Rady (Dz.U. L 136 z 30.4.2004, s. 34)

Dyrektywa 2007/65/WE Parlamentu Europejskiego i Rady z dnia 11 grudnia 2007 r. zmieniająca dyrektywę Rady 89/552/EWG w sprawie koordynacji niektórych przepisów ustawowych, wykonawczych i administracyjnych państw członkowskich, dotyczących wykonywania telewizyjnej działalności transmisyjnej (Dz.U. L 332 z 18.12.2007, s. 27)

Dyrektywa 2000/31/WE Parlamentu Europejskiego i Rady z dnia 8 czerwca 2000 r. w sprawie niektórych aspektów prawnych usług społeczeństwa informacyjnego, w szczególności handlu elektronicznego w ramach rynku wewnętrznego (dyrektywa o handlu elektronicznym) (Dz.U. L 178 z 17.7.2000, s. 1)

Dyrektywa 2001/29/WE Parlamentu Europejskiego i Rady z dnia 22 maja 2001 r. w sprawie harmonizacji niektórych aspektów praw autorskich i praw pokrewnych w społeczeństwie informacyjnym (Dz.U. L 167 z 22.6.2001, s. 10)

Dyrektywa 2005/29/WE Parlamentu Europejskiego i Rady z dnia 11 maja 2005 r. dotycząca nieuczciwych praktyk handlowych stosowanych przez przedsiębiorstwa wobec konsumentów na rynku wewnętrznym oraz zmieniająca dyrektywę Rady 84/450/EWG, dyrektywy 97/7/WE, 98/27/WE i 2002/65/WE Parlamentu Europejskiego i Rady oraz rozporządzenie (WE) nr 2006/2004 Parlamentu Europejskiego i Rady (dyrektywa o nieuczciwych praktykach handlowych) (Dz.U. L 149 z 11.6.2005, s. 22).

— Statystyka i gromadzenie danych

Dyrektywa 95/46/WE Parlamentu Europejskiego i Rady z dnia 24 października 1995 r. w sprawie ochrony osób fizycznych w zakresie przetwarzania danych osobowych i swobodnego przepływu tych danych (Dz.U. L 281 z 23.11.1995, s. 31)

Rozporządzenie Rady (WE) nr 577/98 z dnia 9 marca 1998 r. w sprawie organizacji badania prób losowych dotyczącego siły roboczej we Wspólnocie (Dz.U. L 77 z 14.3.1998, s. 3) oraz towarzyszące mu rozporządzenia wykonawcze

Rozporządzenie (WE) nr 1177/2003 Parlamentu Europejskiego i Rady z dnia 16 czerwca 2003 r. dotyczące statystyk Wspólnoty w sprawie dochodów i warunków życia (EU-SILC) (Dz.U. L 165 z 3.7.2003, s. 1) oraz towarzyszące mu rozporządzenia wykonawcze

Rozporządzenie (WE) nr 458/2007 Parlamentu Europejskiego i Rady z dnia 25 kwietnia 2007 r. w sprawie europejskiego systemu zintegrowanych statystyk na temat ochrony socjalnej (ESSPROS) (Dz.U. L 113 z 30.4.2007, s. 3) oraz towarzyszące mu rozporządzenia wykonawcze

Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 1338/2008 z dnia 16 grudnia 2008 r. w sprawie statystyk Wspólnoty w zakresie zdrowia publicznego oraz zdrowia i bezpieczeństwa w pracy (Dz.U. L 354 z 31.12.2008, s. 70).

— Współpraca międzynarodowa

Rozporządzenie (WE) nr 1905/2006 Parlamentu Europejskiego i Rady z dnia 18 grudnia 2006 r. ustanawiające instrument finansowania współpracy na rzecz rozwoju (Dz.U. L 378 z 27.12.2006, s. 41).

Rozporządzenie (WE) nr 1889/2006 Parlamentu Europejskiego i Rady z dnia 20 grudnia 2006 r. w sprawie ustanowienia instrumentu finansowego na rzecz wspierania demokracji i praw człowieka na świecie (Dz.U. L 386 z 29.12.2006, s. 1)

Rozporządzenie Komisji (WE) nr 718/2007 z dnia 12 czerwca 2007 r. wdrażające rozporządzenie Rady (WE) nr 1085/2006 ustanawiające instrument pomocy przedakcesyjnej (IPA) (Dz.U. L 170 z 29.6.2007, s. 1).

ZAŁĄCZNIK III

ZASTRZEŻENIE WSPÓLNOTY EUROPEJSKIEJ DO ART. 27 UST. 1 KONWENCJI NARODÓW ZJEDNOCZONYCH O PRAWACH OSÓB NIEPEŁNOSPRAWNYCH

Wspólnota Europejska stwierdza, że na mocy prawa wspólnotowego (zwłaszcza na mocy dyrektywy Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy) państwa członkowskie mogą – w stosownych przypadkach – zgłaszać swoje zastrzeżenia do art. 27 ust. 1 konwencji o prawach osób niepełnosprawnych, w zakresie w jakim art. 3 ust. 4 wspomnianej dyrektywy pozwala im wyłączyć z zakresu tej dyrektywy stosowanie zasady niedyskryminacji ze względu na niepełnosprawność w przypadku zatrudnienia w siłach zbrojnych. Wspólnota stwierdza zatem, że zawiera konwencję bez uszczerbku dla powyższego uprawnienia, przyznanego jej państwom członkowskim na mocy prawa wspólnotowego.

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.

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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.

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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.

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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.

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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.

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[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:

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[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).

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[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.

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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.

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[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.

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[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]

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[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.

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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]

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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.

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DYREKTYWA RADY 2000/78/WE
z dnia 27 listopada 2000 r.
ustanawiająca ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy

RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat ustanawiający Wspólnotę Europejską, w szczególności jego art. 13,

uwzględniając wniosek Komisji [1],

uwzględniając opinię Parlamentu Europejskiego [2],

uwzględniając opinię Komitetu Ekonomiczno-Społecznego [3],

uwzględniając opinię Komitetu Regionów [4],

a także mając na uwadze, co następuje:

(1) Zgodnie z art. 6 Traktatu o Unii Europejskiej, Unia Europejska opiera się na zasadach wolności, demokracji, poszanowania praw człowieka i podstawowych wolności oraz zasadach państwa prawa, zasadach, które są wspólne dla wszystkich Państw Członkowskich, i przestrzega podstawowych praw, zagwarantowanych w Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności oraz wynikających z tradycji konstytucyjnych wspólnych dla Państw Członkowskich, jako zasad ogólnych prawa wspólnotowego.

(2) Zasada równego traktowania mężczyzn i kobiet jest wyraźnie ustanowiona w znaczącej części prawa wspólnotowego, w szczególności w dyrektywie Rady 76/207/EWG z dnia 9 lutego 1976 r. w sprawie wprowadzenia w życie zasady równego traktowania kobiet i mężczyzn w zakresie dostępu do zatrudnienia, kształcenia i awansu zawodowego oraz warunków pracy [5].

(3) Wprowadzając w życie zasadę równego traktowania, Wspólnota powinna, zgodnie z art. 3 ustęp 2 Traktatu WE, podejmować działania mające na celu likwidację nierówności oraz wspierać równość mężczyzn i kobiet, w szczególności ze względu na fakt, iż kobiety są często ofiarami różnego rodzaju dyskryminacji.

(4) Prawo wszystkich osób do równości wobec prawa i ochrony przed dyskryminacją jest powszechnym prawem uznanym przez Powszechną Deklarację Praw Człowieka, Konwencję Narodów Zjednoczonych w sprawie Likwidacji Wszelkich Form Dyskryminacji Kobiet, Pakty Narodów Zjednoczonych dotyczące praw obywatelskich i politycznych oraz praw gospodarczych, społecznych i kulturalnych oraz przez Europejską Konwencją o Ochronie Praw Człowieka i Podstawowych Wolności, których sygnatariuszami są wszystkie Państwa Członkowskie. Konwencja nr 111 Międzynarodowej Organizacji Pracy (MOP) zakazuje dyskryminacji w zakresie zatrudnienia i pracy.

(5) Istotne znaczenie ma przestrzeganie podstawowych praw i wolności. Niniejsza dyrektywa nie narusza wolności zrzeszania się, włącznie z prawem do tworzenia z innymi osobami związków zawodowych i wstępowania do takich związków w celu obrony swoich interesów.

(6) Wspólnotowa Karta Socjalnych Podstawowych Praw Pracowników uznaje znaczenie walki z dyskryminacją we wszystkich jej postaciach, włącznie z potrzebą podjęcia właściwych działań na rzecz integracji społecznej i gospodarczej osób starszych i niepełnosprawnych.

(7) Wśród celów Traktatu WE znajduje się wspieranie koordynacji polityk zatrudnienia poszczególnych Państw Członkowskich. W tym celu do Traktatu WE został dodany nowy rozdział dotyczący zatrudnienia w celu rozwinięcia skoordynowanej europejskiej strategii zatrudnienia, która zakłada wspieranie wykwalifikowanej, przeszkolonej i zdolnej do dostosowania się siły roboczej.

(8) Wytyczne dotyczące zatrudnienia na rok 2000, przyjęte przez Radę Europejską w Helsinkach w dniach 10 i 11 grudnia 1999 r., podkreślają potrzebę wspierania rynku pracy przychylnego dla integracji społecznej, formułując spójną całość polityk, których celem jest walka z dyskryminacją takich grup jak osoby niepełnosprawne. Wytyczne te podkreślają również potrzebę zwrócenia szczególnej uwagi na pomoc starszym pracownikom, aby mogli oni w szerszym zakresie uczestniczyć w życiu zawodowym.

(9) Zatrudnienie i praca są podstawowymi elementami mającymi zapewnić równe szanse dla wszystkich i w szerokim zakresie przyczyniają się do pełnego uczestnictwa obywateli w życiu gospodarczym, kulturalnym i społecznym oraz do ich rozwoju.

(10) W dniu 29 czerwca 2000 r. Rada przyjęła dyrektywę 2000/43/WE [6] w sprawie stosowania zasady równego traktowania osób bez względu na pochodzenie rasowe lub etniczne, która już zapewnia ochronę przed tego rodzaju dyskryminacją w dziedzinie zatrudnienia i pracy.

(11) Dyskryminacja ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną może być przeszkodą w realizacji celów Traktatu WE, w szczególności w zakresie wysokiego poziomu zatrudnienia

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(1) Dz.U. C 177 E z 27.6.2000, str. 42.
(2) Opinia wydana w dniu 12 października 2000 r. (dotychczas nieopublikowana w Dzienniku Urzędowym).
(3) Dz.U. C 204 z 18.7.2000, str. 82.
(4) Dz.U. C 226 z 8.8.2000, str. 1.
(5) Dz.U. L 39 z 14.2.1976, str. 40.
(6) Dz.U. L 180 z 19.7.2000, str. 22.

i ochrony socjalnej, podnoszenia poziomu i jakości życia, spójności gospodarczej i społecznej, solidarności i swobodnego przepływu osób.

(12) W tym celu wszelka bezpośrednia i pośrednia dyskryminacja ze względu na wyznawaną religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w zakresie regulowanym niniejszą dyrektywą powinna być w całej Wspólnocie zakazana. Zakaz dyskryminacji powinien również dotyczyć obywateli państw trzecich, ale nie obejmie on odmiennego traktowania ze względu na przynależność państwową, bez uszczerbku dla postanowień dotyczących wjazdu i pobytu obywateli państw trzecich oraz ich dostępu do zatrudnienia i pracy.

(13) Niniejszej dyrektywy nie stosuje się do uregulowań w zakresie zabezpieczenia społecznego i ochrony socjalnej, których korzyści nie są tożsame z dochodami w znaczeniu nadanym temu terminowi do celów stosowania Artykułu 141 Traktatu WE, ani do wszelkiego rodzaju płatności dokonywanych przez państwo, których celem jest dostęp do zatrudnienia lub utrzymanie zatrudnienia.

(14) Niniejsza dyrektywa nie narusza przepisów prawa krajowego ustanawiających wiek emerytalny.

(15) Ocena stanu faktycznego, który nasuwa przypuszczenie o istnieniu bezpośredniej lub pośredniej dyskryminacji, należy do sądu krajowego lub innego właściwego organu, zgodnie z prawem krajowym lub praktyką krajową, które mogą przewidywać, w szczególności, że fakt występowania dyskryminacji pośredniej można udowodnić z wykorzystaniem wszelkich środków, również na podstawie danych statystycznych.

(16) Przyjęcie środków uwzględniających potrzeby osób niepełnosprawnych w miejscu pracy jest najważniejszym czynnikiem w walce z dyskryminacją osób niepełnosprawnych.

(17) Niniejsza dyrektywa nie nakłada wymogu, aby osoba, która nie jest kompetentna ani zdolna bądź dyspozycyjna do wykonywania najważniejszych czynności na danym stanowisku lub kontynuacji danego kształcenia, była przyjmowana do pracy, awansowana lub dalej zatrudniana, nie naruszając obowiązku wprowadzania racjonalnych zmian uwzględniających potrzeby osób niepełnosprawnych.

(18) Niniejsza dyrektywa nie wymaga, w szczególności od sił zbrojnych, policji, służb więziennych lub ratowniczych przyjmowania do pracy lub dalszego zatrudniania osób nieposiadających wymaganych zdolności umożliwiających wykonywanie zadań, które mogą im zostać powierzone z uwzględnieniem wynikającego z prawa celu utrzymania zdolności operacyjnej tych służb.

(19) Ponadto, aby umożliwić Państwom Członkowskim utrzymywanie skuteczności sił zbrojnych, mogą one nie stosować przepisów niniejszej dyrektywy dotyczących niepełnosprawności i wieku w całych siłach zbrojnych lub ich części. Państwa Członkowskie, które zdecydują się na taki krok, muszą określić zakres stosowania takiego odstępstwa.

(20) Należy przyjąć właściwe, to znaczy skuteczne i praktyczne środki w celu przystosowania miejsca pracy z uwzględnieniem niepełnosprawności, na przykład przystosowując pomieszczenia lub wyposażenie, czas pracy, podział zadań lub ofertę kształceniową lub integracyjną.

(21) Aby ustalić, czy przyjęcie danych środków wiąże się z koniecznością nieproporcjonalnie wysokiego obciążenia, należy uwzględnić w szczególności związane z tym koszty finansowe i inne, rozmiar organizacji lub środki finansowe, którymi dysponują przedsiębiorstwa oraz możliwość pozyskania środków publicznych lub jakiejkolwiek innej pomocy.

(22) Niniejsza dyrektywa nie narusza przepisów prawa krajowego dotyczących stanu cywilnego i wynikających z tego świadczeń.

(23) W bardzo niewielu okolicznościach różnice w traktowaniu mogą być uzasadnione w przypadku gdy charakterystyka związana z religią lub przekonaniami, niepełnosprawnością, wiekiem bądź orientacją seksualną jest istotnym i determinującym wymogiem zawodowym, pod warunkiem że cel jest zgodny z prawem, a wymóg zachowuje proporcje. O takich okolicznościach należy powiadamiać w informacjach dostarczanych przez Państwa Członkowskie Komisji.

(24) Unia Europejska w swojej Deklaracji nr 11 w sprawie statusu kościołów i organizacji niewyznaniowych, załączonej do Aktu Końcowego Traktatu Amsterdamskiego w wyraźny sposób uznała, że uznaje i nie narusza statusu, z którego korzystają na mocy prawa krajowego kościoły i stowarzyszenia lub wspólnoty religijne w Państwach Członkowskich oraz, że szanuje w równym stopniu status organizacji filozoficznych i niewyznaniowych. Uwzględniając powyższe, Państwa Członkowskie mogą utrzymywać lub wprowadzać zgodne z prawem i uzasadnione postanowienia szczególne dotyczące podstawowych wymagań zawodowych, które mogą być stawiane w odniesieniu do prowadzenia działalności zawodowej.

(25) Zakaz dyskryminacji ze względu na wiek jest podstawowym elementem na drodze do osiągnięcia celów określonych w wytycznych dotyczących zatrudnienia i popierania zróżnicowania zatrudnienia. Jednakże w niektórych okolicznościach różnice w traktowaniu ze względu na wiek mogą być uzasadnione i wymagają wprowadzenia szczególnych przepisów, które mogą się różnić w zależności od sytuacji Państw Członkowskich. Należy więc odróżnić odmienne traktowanie, które jest uzasadnione, w szczególności wynikającymi z prawa celami polityki zatrudnienia, rynku pracy i kształcenia zawodowego, od dyskryminacji, która musi być zakazana.

(26) Zakaz dyskryminacji powinien być obowiązujący, bez uszczerbku dla utrzymania i przyjęcia środków mających zapobiegać lub rekompensować niekorzystną sytuację grup osób danej religii lub przekonania, niepełnosprawności, wieku lub orientacji seksualnej i takie środki mogą dopuszczać istnienie organizacji osób danej religii lub przekonania, niepełnosprawności, wieku lub orientacji seksualnej w przypadku gdy ich głównym celem jest wspieranie szczególnych potrzeb tych osób.

(27) W Zaleceniu 86/379/EWG z dnia 24 lipca 1986 r. w sprawie zatrudniania we Wspólnocie osób niepełnosprawnych [1], Rada określiła ramy, w których podane są przykłady pozytywnych działań mających wspierać zatrudnienie i kształcenie osób niepełnosprawnych, a w rezolucji z dnia 17 czerwca 1999 r. w sprawie możliwości zatrudnienia osób niepełnosprawnych [2] potwierdziła szczególną wagę, jaką przywiązuje się w szczególności do rekrutacji, dalszego zatrudniania i kształcenia oraz kształcenia ustawicznego osób niepełnosprawnych.

(28) Niniejsza dyrektywa określa minimalne wymagania, co daje Państwom Członkowskim możliwość przyjmowania lub utrzymywania korzystniejszych przepisów. Stosowanie niniejszej dyrektywy nie może uzasadniać regresu w stosunku do sytuacji istniejącej obecnie w każdym Państwie Członkowskim.

(29) Osoby, które były dyskryminowane ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną, powinny dysponować odpowiednimi środkami ochrony prawnej. Dla zapewnienia skuteczniejszego poziomu ochrony, stowarzyszenia lub osoby prawne powinny mieć również możliwość wszczynania procedur sądowych, na zasadach określonych przez Państwa Członkowskie, na rzecz ofiary lub ją wspierając, nie naruszając reguł procedury krajowej dotyczących przedstawicielstwa i obrony przed sądem.

(30) Skuteczne wprowadzenie w życie zasady równości wymaga odpowiedniej ochrony prawnej przed retorsjami.

(31) Wprowadzenie przepisów dotyczących ciężaru dowodu wymaga, od momentu zaistnienia domniemania dyskryminacji i, w przypadkach, gdy fakt ten zostanie potwierdzony, skutecznego stosowania zasady równego traktowania, w której ciężar dowodu przypadnie na pozwanego. Jednakże pozwany nie ma obowiązku udowadniania, że powód jest wyznawcą danej religii, posiada określone przekonania, jest w szczególny sposób niepełnosprawny, jest w danym wieku lub określonej orientacji seksualnej.

(32) Państwa Członkowskie mogą nie stosować zasad dotyczących ciężaru dowodu do procedur sądowych, w których ustalenie okoliczności faktycznych sprawy należy do sądu lub właściwego organu. Takie procedury są procedurami, w których powód nie musi udowadniać stanu faktycznego, których ustalenie należy do sądu lub właściwego organu.

(33) Państwa Członkowskie powinny wspierać dialog między przedstawicielami pracodawców i pracowników i, w ramach krajowej praktyki, z organizacjami pozarządowymi w celu zwrócenia uwagi na różne formy dyskryminacji w miejscu pracy oraz walki z nimi.

(34) Potrzeba wspierania pokoju i pojednania między głównymi wspólnotami Irlandii Północnej wymaga umieszczenia w niniejszej dyrektywie przepisów szczególnych.

(35) Państwa Członkowskie powinny wprowadzić skuteczne, proporcjonalne i dolegliwe sankcje stosowane w przypadkach nieprzestrzegania zobowiązań wynikających z niniejszej dyrektywy.

(36) Państwa Członkowskie mogą powierzać przedstawicielom pracodawców i pracowników, na ich wspólny wniosek, wprowadzenie w życie niniejszej dyrektywy, w zakresie tego co wynika ze zbiorowych układów pracy, pod warunkiem że zostaną podjęte wszystkie niezbędne czynności umożliwiające im w każdej chwili osiągnięcie rezultatów określonych w niniejszej dyrektywie.

(37) Zgodnie z zasadą pomocniczości określoną w art. 5 Traktatu WE, cel niniejszej dyrektywy, to znaczy stworzenie we Wspólnocie obszaru działania w sferze równości zatrudnienia i pracy, nie może być w wystarczającym stopniu realizowany przez Państwa Członkowskie, powinien więc, ze względu na rozmiary i rezultaty akcji, być lepiej realizowany na poziomie wspólnotowym. Zgodnie z zasadą proporcjonalności określoną we wspomnianym artykule, niniejsza dyrektywa nie wykracza ponad to, co jest konieczne dla osiągnięcia jej celu,

PRZYJMUJE NINIEJSZĄ DYREKTYWĘ:

ROZDZIAŁ I

PRZEPISY OGÓLNE

Artykuł 1

Cel

Celem niniejszej dyrektywy jest wyznaczenie ogólnych ram dla walki z dyskryminacją ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w odniesieniu do zatrudnienia i pracy, w celu realizacji w Państwach Członkowskich zasady równego traktowania.

Artykuł 2

Pojęcie dyskryminacji

1. Do celów niniejszej dyrektywy „zasada równego traktowania" oznacza brak jakichkolwiek form bezpośredniej lub pośredniej dyskryminacji z przyczyn określonych w art. 1.

2. Do celów ust. 1:

a) dyskryminacja bezpośrednia występuje w przypadku gdy osobę traktuje się mniej przychylnie niż traktuje się, traktowano lub traktowano by inną osobę w porównywalnej sytuacji, z jakiejkolwiek przyczyny wymienionej w art. 1;

b) dyskryminacja pośrednia występuje w przypadku, gdy przepis, kryterium lub pozornie neutralna praktyka może doprowadzić do szczególnej niekorzystnej sytuacji dla osób danej religii lub przekonań, niepełnosprawności, wieku lub orientacji seksualnej, w stosunku do innych osób, chyba że:

   i) taki przepis, kryterium lub praktyka jest obiektywnie uzasadniona zgodnym z prawem celem, a środki mające służyć osiągnięciu tego celu są właściwe i konieczne, lub

[1] Dz.U. L 225 z 12.8.1986, str. 43.
[2] Dz.U. C 186 z 2.7.1999, str. 3.

ii) jeżeli w przypadku osób w określony sposób niepełnosprawnych, pracodawca lub każda osoba, do której odnosi się niniejsza dyrektywa, jest zobowiązany, na mocy przepisów krajowych, podejmować właściwe środki zgodnie z zasadami określonymi w art. 5, w celu zlikwidowania niedogodności spowodowanych tym przepisem, kryterium lub praktyką.

3. Molestowanie uważa się za formę dyskryminacji w rozumieniu ust. 1, jeżeli ma miejsce niepożądane zachowanie mające związek z jedną z przyczyn określonych w art. 1, a jego celem lub skutkiem jest naruszenie godności osoby i stworzenie onieśmielającej, wrogiej, poniżającej, upokarzającej lub uwłaczającej atmosfery. W tym znaczeniu pojęcie molestowania może być definiowane zgodnie z ustawodawstwem i krajową praktyką Państw Członkowskich.

4. Każde zachowanie polegające na zmuszaniu kogokolwiek do praktykowania wobec osób zachowań dyskryminacyjnych z jednej z przyczyn określonych w art. 1, uważa się za dyskryminację w rozumieniu ust. 1.

5. Niniejsza dyrektywa nie narusza środków przewidzianych przepisami krajowymi, które w społeczeństwie demokratycznym są niezbędne dla zapewnienia bezpieczeństwa publicznego, utrzymania porządku i zapobiegania działaniom podlegającym sankcjom karnym, ochrony zdrowia i ochrony praw i wolności innych osób.

Artykuł 3

Zakres

1. W granicach kompetencji Wspólnoty, niniejszą dyrektywę stosuje się do wszystkich osób, zarówno sektora publicznego jak i prywatnego, włącznie z instytucjami publicznymi, w odniesieniu do:

a) warunków dostępu do zatrudnienia lub pracy na własny rachunek, w tym również kryteriów selekcji i warunków rekrutacji, niezależnie od dziedziny działalności i na wszystkich szczeblach hierarchii zawodowej, również w odniesieniu do awansu zawodowego;

b) dostępu do wszystkich rodzajów i szczebli poradnictwa zawodowego, kształcenia zawodowego, doskonalenia i przekwalifikowania zawodowego, łącznie ze zdobywaniem praktycznych doświadczeń;

c) warunków zatrudnienia i pracy, łącznie z warunkami zwalniania i wynagradzania;

d) członkostwa i działania w organizacjach pracowników lub pracodawców bądź jakiejkolwiek organizacji, której członkowie wykonują określony zawód, łącznie z korzyściami, jakie dają tego typu organizacje.

2. Celem niniejszej dyrektywy nie jest zróżnicowane traktowanie ze względu na przynależność państwową i nie narusza ona przepisów oraz warunków odnoszących się do wjazdu i pobytu obywateli państw trzecich oraz bezpaństwowców na terytorium Państw Członkowskich i wszelkiego traktowania związanego ze statusem prawnym danych obywateli państw trzecich i bezpaństwowców.

3. Niniejszej dyrektywy nie stosuje się do wszelkiego rodzaju płatności dokonanych z systemów publicznych lub podobnych, włączając w to systemy zabezpieczenia społecznego i ochrony socjalnej.

4. Państwa Członkowskie mogą ustalić, że niniejsza dyrektywa w kwestii dyskryminacji ze względu na niepełnosprawność lub wiek, nie znajduje zastosowania wobec sił zbrojnych.

Artykuł 4

Wymagania zawodowe

1. Niezależnie od przepisów od art. 2 ust. 1 i 2, Państwa Członkowskie mogą uznać, że odmienne traktowanie ze względu cechy związane z jedną z przyczyn wymienionych w art. 1 nie stanowi dyskryminacji w przypadku gdy ze względu na rodzaj działalności zawodowej lub warunki jej wykonywania, dane cechy są istotnym i determinującym wymogiem zawodowym, pod warunkiem że cel jest zgodny z prawem, a wymóg jest proporcjonalny.

2. Państwa Członkowskie mogą utrzymać w mocy swoje ustawodawstwo krajowe, które obowiązuje w dniu przyjęcia niniejszej dyrektywy, lub przewidzieć w przyszłym ustawodawstwie, uwzględniającym praktykę krajową istniejącą w dniu przyjęcia niniejszej dyrektywy, przepisy na mocy których, w przypadku działalności zawodowej kościołów albo innych organizacji publicznych bądź prywatnych, których etyka opiera się na religii lub przekonaniach, odmienne traktowanie ze względu na religię lub przekonania osoby nie stanowi dyskryminacji w przypadku gdy ze względu na charakter tego rodzaju działalności lub kontekst, w którym jest prowadzona, religia lub przekonania stanowią podstawowy, zgodny z prawem i uzasadniony wymóg zawodowy, uwzględniający etykę organizacji. Tego rodzaju odmienne traktowanie powinno być realizowane z poszanowaniem zasad i postanowień konstytucyjnych Państw Członkowskich oraz zasad ogólnych prawa wspólnotowego, i nie powinno być usprawiedliwieniem dla dyskryminacji, u podstaw której leżą inne przyczyny.

Pod warunkiem że jej przepisy są przestrzegane, niniejsza dyrektywa nie narusza więc prawa kościołów i innych organizacji publicznych lub prywatnych, których etyka opiera się na religii lub przekonaniach, działających zgodnie z krajowymi przepisami konstytucyjnymi i ustawodawczymi, do wymagania od osób pracujących dla nich działania w dobrej wierze i lojalności wobec etyki organizacji.

Artykuł 5

Racjonalne usprawnienia dla osób niepełnosprawnych

W celu zagwarantowania przestrzegania zasady równego traktowania osób niepełnosprawnych, przewiduje się wprowadzenie racjonalnych usprawnień. Oznacza to, że pracodawca podejmuje właściwe środki, z uwzględnieniem potrzeb konkretnej sytuacji, aby umożliwić osobie niepełnosprawnej dostęp do pracy, wykonywanie jej lub rozwój zawodowy bądź kształcenie, o ile środki te nie nakładają na pracodawcę nieproporcjonalnie wysokich obciążeń. Obciążenia te nie są nieproporcjonalne, jeżeli są w wystarczającym stopniu rekompensowane ze środków istniejących w ramach polityki prowadzonej przez dane Państwo Członkowskie na rzecz osób niepełnosprawnych.

Artykuł 6

Uzasadnienie odmiennego traktowania ze względu na wiek

1. Niezależnie od przepisów art. 2 ust. 2, Państwa Członkowskie mogą uznać, że odmienne traktowanie ze względu na wiek nie stanowi dyskryminacji, jeżeli w ramach prawa krajowego zostanie to obiektywnie i racjonalnie uzasadnione zgodnym z przepi-

sami celem, w szczególności celami polityki zatrudnienia, rynku pracy i kształcenia zawodowego, i jeżeli środki mające służyć realizacji tego celu są właściwe i konieczne.

Takie odmienne traktowanie może polegać między innymi na:

a) wprowadzeniu specjalnych warunków dostępu do zatrudnienia i kształcenia zawodowego, zatrudnienia i pracy, włącznie z warunkami zwalniania i wynagradzania, dla ludzi młodych, pracowników starszych i osób mających na utrzymaniu inne osoby, w celu wspierania ich integracji zawodowej lub zapewnienia im ochrony;

b) określeniu warunków dolnej granicy wieku, doświadczenia zawodowego lub stażu pracy, wymaganego do zatrudnienia lub niektórych korzyści związanych z zatrudnieniem;

c) określenia górnej granicy wieku przy rekrutacji, z uwzględnieniem wykształcenia wymaganego na danym stanowisku lub potrzeby racjonalnego okresu zatrudnienia przed przejściem na emeryturę.

2. Niezależnie od przepisów art. 2 ust. 2, Państwa Członkowskie mogą uznać, że nie stanowi dyskryminacji ze względu na wiek ustalanie, dla systemów zabezpieczenia społecznego pracowników, wieku przyznania lub nabycia praw do świadczeń emerytalnych lub inwalidzkich, włącznie z wyznaczaniem, w ramach tych systemów, różnych granic wieku dla pracowników lub grup bądź kategorii pracowników i wykorzystania, w ramach tych systemów, kryteriów wieku do obliczania wysokości świadczeń, pod warunkiem że nie stanowi to dyskryminacji ze względu na płeć.

Artykuł 7

Działanie pozytywne

1. W celu zapewnienia całkowitej równości w życiu zawodowym, zasada równości traktowania nie stanowi przeszkody dla utrzymywania lub przyjmowania przez Państwo Członkowskie szczególnych środków mających zapobiegać lub wyrównywać niedogodności, u podstaw których leży jedna z przyczyn określonych w art. 1.

2. W odniesieniu do osób niepełnosprawnych, zasada równego traktowania nie stanowi przeszkody dla prawa Państw Członkowskich do utrzymywania lub przyjmowania przepisów dotyczących ochrony zdrowia i bezpieczeństwa w miejscu pracy, ani środków mających na celu stworzenie lub utrzymanie przepisów bądź ułatwień w celu ochrony lub wspierania integracji w środowisku pracy.

Artykuł 8

Wymagania minimalne

1. Państwa Członkowskie mogą przyjmować lub utrzymywać przepisy bardziej korzystne w celu ochrony zasady równego traktowania od przepisów ustanowionych w niniejszej dyrektywie.

2. Stosowanie niniejszej dyrektywy nie może być w żadnym wypadku powodem obniżenia poziomu ochrony przed dyskryminacją, który już zapewnia Państwo Członkowskie w zakresie regulowanym niniejszą dyrektywą.

ROZDZIAŁ II

ŚRODKI ODWOŁAWCZE ORAZ STOSOWANIE PRAWA

Artykuł 9

Ochrona praw

1. Państwa Członkowskie zapewnią, aby procedury sądowe i/lub administracyjne oraz, w przypadku gdy uznają to za właściwe, procedury pojednawcze, których celem jest doprowadzenie do stosowania zobowiązań wynikających z niniejszej dyrektywy, były dostępne dla wszystkich osób, które uważają się za pokrzywdzone w związku z naruszeniem wobec nich zasady równego traktowania, nawet po zakończeniu związku, w którym przypuszczalnie miała miejsce dyskryminacja.

2. Państwa Członkowskie zapewnią, aby stowarzyszenia, organizacje lub osoby prawne, które mają, zgodnie z przewidzianymi prawem krajowym kryteriami, uzasadniony interes w zapewnieniu aby przestrzegane były postanowienia niniejszej dyrektywy, mogły wszczynać, na rzecz osoby występującej z powództwem lub ją wspierając, za jej zgodą, postępowania sądowe i/lub procedury administracyjne przewidziane w celu spowodowania stosowania niniejszej dyrektywy.

3. Przepisy ust. 1 i 2 nie naruszają przepisów krajowych dotyczących terminów składania odwołań w odniesieniu do zasady równego traktowania.

Artykuł 10

Ciężar dowodu

1. Zgodnie z ich krajowymi systemami sądowymi, Państwa Członkowskie podejmują niezbędne środki dla zapewnienia, aby strona pozwana musiała udowodnić, że nie wystąpiło pogwałcenie zasady równego traktowania, w przypadku gdy osoby, które uważają się za pokrzywdzone w związku nie przestrzeganiem wobec nich zasady równego traktowania, ustalą przed sądem lub innym właściwym organem fakty, które nasuwają przypuszczenie o zaistnieniu bezpośredniej i pośredniej dyskryminacji.

2. Ustęp 1 nie stanowi przeszkody dla ustanawiania przez Państwa Członkowskie zasad dowodowych korzystniejszych dla strony skarżącej.

3. Ustęp 1 nie ma zastosowania do postępowań karnych.

4. Przepisy ust. 1, 2 i 3 stosuje się również do każdej procedury sądowej wszczętej zgodnie z art. 9 ust. 2.

5. Państwa Członkowskie nie mogą stosować przepisu ust. 1 do procedur sądowych, w których ustalenie okoliczności faktycznych sprawy należy do sądu lub właściwego organu.

Artykuł 11

Ochrona przed retorsjami

Państwa Członkowskie wprowadzają do swoich krajowych systemów prawnych środki niezbędne do ochrony pracowników przed wszelkimi zwolnieniami lub nieprzychylnym traktowaniem przez pracodawcę, będącymi reakcją na skargę złożoną w przedsiębiorstwie lub na uruchomienie procedury sądowej mającej na celu doprowadzenie do przestrzegania zasady równego traktowania.

Artykuł 12

Upowszechnianie informacji

Państwa Członkowskie zapewnią, że przepisy przyjmowane zgodnie z niniejszą dyrektywą, jak również przepisy, które już obowiązują w tej materii, udostępniane będą zainteresowanym osobom z wykorzystaniem wszelkich właściwych środków, na przykład w miejscu pracy, na całym ich terytorium.

Artykuł 13

Dialog społeczny

1. Zgodnie ze swoją tradycją i krajową praktyką Państwa Członkowskie podejmują odpowiednie środki wspierające dialog między przedstawicielami pracodawców i pracowników w celu promowania równego traktowania, włącznie ze sprawowaniem nadzoru w miejscu pracy, poprzez zbiorowe układy pracy, kodeksy postępowania oraz badanie lub wymianę doświadczeń i dobrych praktyk.

2. W poszanowaniu swoich tradycji i krajowej praktyki, Państwa Członkowskie zachęcają przedstawicieli pracodawców i pracowników, nie naruszając ich autonomii, do zawierania, na właściwym poziomie, umów ustanawiających zasady niedyskryminacji w zakresie określonym w art. 3, który wchodzi w zakres rokowań zbiorowych. Umowy takie powinny być zgodne z minimalnymi wymaganiami przewidzianymi w niniejszej dyrektywie oraz przepisami krajowymi będącymi ich transpozycją.

Artykuł 14

Dialog z organizacjami pozarządowymi

Państwa Członkowskie wspierają dialog z właściwymi organizacjami pozarządowymi, które mają, zgodnie z praktyką i prawem krajowym, uzasadniony interes w przyczynianiu się do walki z dyskryminacją z przyczyn wymienionych w art. 1, w celu promowania zasady równego traktowania.

ROZDZIAŁ III

PRZEPISY SZCZEGÓLNE

Artykuł 15

Irlandia Północna

1. Aby uporać się z problemem mniejszej liczby przedstawicieli jednej z głównych wspólnot religijnych w służbach policyjnych Irlandii Północnej, odmienne traktowanie przy rekrutacji do tych służb, również personelu wsparcia, nie stanowi dyskryminacji, o ile w wyraźny sposób zezwalają na to przepisy krajowe.

2. Dla utrzymania równowagi w możliwościach zatrudniania nauczycieli w Irlandii Północnej, wspierając przy tym przełamywanie podziałów historycznych między zamieszkałymi tam głównymi wspólnotami religijnymi, przepisy niniejszej dyrektywy dotyczące religii lub przekonań nie mają zastosowania do rekrutacji nauczycieli do szkół w Irlandii Północnej, chyba że w wyraźny sposób zezwalają na to przepisy krajowe.

ROZDZIAŁ IV

POSTANOWIENIA KOŃCOWE

Artykuł 16

Zgodność

Państwa Członkowskie podejmują niezbędne działania, aby:

a) zniesione zostały przepisy ustawowe, wykonawcze i administracyjne sprzeczne z zasadą równego traktowania;

b) przepisy sprzeczne z zasadą równego traktowania zawarte w umowach lub układach zbiorowych, regulaminach wewnętrznych przedsiębiorstw, jak również w statutach regulujących wykonywanie wolnych zawodów oraz w statutach organizacji pracowników i pracodawców, zostały uznane za nieważne lub zostały zmienione.

Artykuł 17

Sankcje

Państwa Członkowskie ustanowią zasady stosowania sankcji obowiązujących wobec naruszeń przepisów krajowych przyjętych zgodnie z niniejszą dyrektywą i podejmą wszelkie niezbędne działania dla zapewnienia ich stosowania. Sankcje, które mogą określać wypłacenie odszkodowania ofierze, muszą być skuteczne, proporcjonalne i dolegliwe. Najpóźniej do dnia 2 grudnia 2003 r. Państwa Członkowskie poinformują o tych przepisach Komisję, jak również poinformują niezwłocznie o wszystkich ich kolejnych zmianach.

Artykuł 18

Wprowadzenie w życie

Państwa Członkowskie do dnia 2 grudnia 2003 r. przyjmą przepisy ustawowe, wykonawcze i administracyjne niezbędne do wykonania niniejszej dyrektywy lub mogą powierzyć przedstawicielom pracodawców i pracowników, na ich wspólny wniosek, wprowadzenie w życie niniejszej dyrektywy, w zakresie przepisów dotyczących zbiorowych układów pracy. W takich wypadkach Państwa Członkowskie zapewnią do dnia 2 grudnia 2003 r., aby przedstawiciele pracodawców i pracowników wprowadzili w drodze umowy niezbędne środki, przy czym podejmą wszelkie niezbędne działania gwarantujące przedstawicielom pracodawców i pracowników w każdym czasie osiągnięcie wyników określonych w niniejszej dyrektywie. Państwa niezwłocznie powiadamiają o tym Komisję.

W celu uwzględnienia szczególnych warunków, Państwa Członkowskie mogą, o ile zaistnieje taka potrzeba, dysponować dodatkowym terminem trzech lat, licząc od dnia 2 grudnia 2003 r., to znaczy w sumie sześć lat na wprowadzenie w życie przepisów niniejszej dyrektywy dotyczących dyskryminacji ze względu na wiek i niepełnosprawność. W tym wypadku niezwłocznie powiadamiają o tym Komisję. Każde Państwo Członkowskie, które korzysta z dodatkowego terminu, przedstawia Komisji corocznie raport na temat kroków, jakie podjęło w celu uporania się z dyskryminacją ze względu na wiek i niepełnosprawność oraz postępu we wprowadzeniu w życie dyrektywy. Komisja przedstawia roczny raport Radzie.

Jeżeli Państwa Członkowskie przyjmą te środki, powinny one zawierać odniesienie do niniejszej dyrektywy lub powinno towarzyszyć im powołanie się na tę dyrektywę przy ich urzędowej publikacji. Metody dokonywania takiego odniesienia określane są przez Państwa Członkowskie.

Artykuł 19

Raport

1. Do dnia 2 grudnia 2005 r. i następnie raz na pięć lat, Państwa Członkowskie przekażą Komisji wszelkie informacje niezbędne do sporządzenia przez Komisję, przeznaczonego dla Parlamentu Europejskiego i Rady, raportu dotyczącego stosowania niniejszej dyrektywy.

2. Raport Komisji uwzględniać będzie odpowiednio opinię przedstawicieli pracodawców i pracowników oraz zainteresowanych organizacji pozarządowych. Zgodnie z zasadą zintegrowanego osiągania równości szans kobiet i mężczyzn, w raporcie tym zawarta będzie, między innymi, ocena wpływu podjętych działań na mężczyzn i kobiety. W świetle uzyskanych informacji w raporcie tym zawarte będą, o ile zaistnieje taka potrzeba, propozycje zmian i aktualizacji niniejszej dyrektywy.

Artykuł 20

Wejście w życie

Niniejsza dyrektywa wchodzi w życie z dniem jej opublikowaniu w *Dzienniku Urzędowym Wspólnot Europejskich*.

Artykuł 21

Adresaci

Niniejsza dyrektywa skierowana jest do Państw Członkowskich.

Sporządzono w Brukseli, dnia 27 listopada 2000 r.

W imieniu Rady

É. GUIGOU

Przewodnicząca

WYROK TRYBUNAŁU (druga izba)

z dnia 6 grudnia 2012 r.(*)

Równe traktowanie w zakresie zatrudnienia i pracy – Dyrektywa 2000/78/WE – Zakaz dyskryminacji ze względu na wiek i niepełnosprawność – Odprawa pieniężna z tytułu rozwiązania stosunku pracy – Program socjalny przewidujący obniżenie wysokości odprawy pieniężnej z tytułu rozwiązania stosunku pracy przysługującej pracownikom niepełnosprawnym

W sprawie C-152/11

mającej za przedmiot wniosek o wydanie, na podstawie art. 267 TFUE, orzeczenia w trybie prejudycjalnym, złożony przez Arbeitsgericht München (Niemcy) postanowieniem z dnia 17 lutego 2011 r., które wpłynęło do Trybunału w dniu 28 marca 2011 r., w postępowaniu:

Johann Odar

przeciwko

Baxter Deutschland GmbH,

TRYBUNAŁ (druga izba),

w składzie: A. Rosas, pełniący obowiązki prezesa drugiej izby, U. Lõhmus, A. Ó Caoimh, A. Arabadjiev (sprawozdawca) i C.G. Fernlund, sędziowie,

rzecznik generalny: E. Sharpston,

sekretarz: K. Malacek, administrator,

uwzględniając pisemny etap postępowania i po przeprowadzeniu rozprawy w dniu 18 kwietnia 2012 r.,

rozważywszy uwagi przedstawione:

– w imieniu J. Odara przez S. Saller i B. Renkl, Rechtsanwälte,

– w imieniu Baxter Deutschland GmbH przez C. Grundmann, Rechtsanwältin,

– w imieniu rządu niemieckiego przez T. Henzego, J. Möllera i N. Grafa Vitzthuma, działających w charakterze pełnomocników,

– w imieniu Komisji Europejskiej przez J. Enegrena i V. Kreuschitza, działających w charakterze pełnomocników,

po zapoznaniu się z opinią rzecznika generalnego na posiedzeniu w dniu 12 lipca 2012 r.,

wydaje następujący

Wyrok

1 Wniosek o wydanie orzeczenia w trybie prejudycjalnym dotyczy wykładni art. 2 i art. 6 ust. 1 akapit drugi lit. a) dyrektywy Rady 2000/78/WE z dnia 27 listopada 2000 r.

ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy (Dz.U. L 303, s. 16 – wyd. spec. w jęz. polskim, rozdz. 5, t. 4, s. 79).

2 Wniosek ów został przedstawiony w ramach sporu pomiędzy J. Odarem a jego byłym pracodawcą, spółką Baxter Deutschland GmbH (zwaną dalej „spółką Baxter"), dotyczącego wysokości odprawy pieniężnej z tytułu rozwiązania stosunku pracy, którą J. Odar otrzymał zgodnie z postanowieniami porozumienia o programie ochrony socjalnej (zwanego dalej „POS") zawartego przez tę spółkę i jej radę zakładową.

Ramy prawne

Prawo Unii

3 Motywy 8, 11, 12 i 15 dyrektywy 2000/78 brzmią następująco:

„(8) Wytyczne dotyczące zatrudnienia na rok 2000, przyjęte przez Radę Europejską w Helsinkach w dniach 10 i 11 grudnia 1999 r., podkreślają potrzebę wspierania rynku pracy przychylnego dla integracji społecznej, formułując spójną całość polityk, których celem jest walka z dyskryminacją takich grup jak osoby niepełnosprawne. Wytyczne te podkreślają również potrzebę zwrócenia szczególnej uwagi na pomoc starszym pracownikom, aby mogli oni w szerszym zakresie uczestniczyć w życiu zawodowym.

[…]

(11) Dyskryminacja ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną może być przeszkodą w realizacji celów traktatu WE, w szczególności w zakresie wysokiego poziomu zatrudnienia i ochrony socjalnej, podnoszenia poziomu i jakości życia, spójności gospodarczej i społecznej, solidarności i swobodnego przepływu osób.

(12) W tym celu wszelka bezpośrednia i pośrednia dyskryminacja ze względu na wyznawaną religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w zakresie regulowanym niniejszą dyrektywą powinna być w całej Wspólnocie zakazana. [...]

[…]

(15) Ocena stanu faktycznego, który nasuwa przypuszczenie o istnieniu bezpośredniej lub pośredniej dyskryminacji, należy do sądu krajowego lub innego właściwego organu, zgodnie z prawem krajowym lub praktyką krajową, które mogą przewidywać, w szczególności, że fakt występowania dyskryminacji pośredniej można udowodnić z wykorzystaniem wszelkich środków, również na podstawie danych statystycznych".

4 Zgodnie z art. 1 tej dyrektywy jej celem jest „wyznaczenie ogólnych ram dla walki z dyskryminacją ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w odniesieniu do zatrudnienia i pracy, w celu realizacji w państwach członkowskich zasady równego traktowania".

5 Artykuł 2 tej dyrektywy, zatytułowany „Pojęcie dyskryminacji", przewiduje w ust. 1 i 2:

„1. Do celów niniejszej dyrektywy »zasada równego traktowania« oznacza brak jakichkolwiek form bezpośredniej lub pośredniej dyskryminacji z przyczyn określonych w art. 1.

2. Do celów ust. 1:

a) dyskryminacja bezpośrednia występuje, w przypadku gdy osobę traktuje się mniej przychylnie niż traktuje się, traktowano lub traktowano by inną osobę w porównywalnej sytuacji, z jakiejkolwiek przyczyny wymienionej w art. 1;

b) dyskryminacja pośrednia występuje w przypadku, gdy przepis, kryterium lub pozornie neutralna praktyka może doprowadzić do szczególnej niekorzystnej sytuacji dla osób danej religii lub przekonań, niepełnosprawności, wieku lub orientacji seksualnej, w stosunku do innych osób, chyba że:

i) taki przepis, kryterium lub praktyka jest obiektywnie uzasadniona zgodnym z prawem celem, a środki mające służyć osiągnięciu tego celu są właściwe i konieczne, lub

ii) jeżeli w przypadku osób w określony sposób niepełnosprawnych, pracodawca lub każda osoba, do której odnosi się niniejsza dyrektywa, jest zobowiązany, na mocy przepisów krajowych, podejmować właściwe środki zgodnie z zasadami określonymi w art. 5, w celu zlikwidowania niedogodności spowodowanych tym przepisem, kryterium lub praktyką".

6 Artykuł 3 dyrektywy 2000/78, zatytułowany „Zakres", stanowi w ust. 1:

„W granicach kompetencji Wspólnoty niniejszą dyrektywę stosuje się do wszystkich osób, zarówno sektora publicznego, jak i prywatnego, włącznie z instytucjami publicznymi, w odniesieniu do:

[…]

c) warunków zatrudnienia i pracy, łącznie z warunkami zwalniania i wynagradzania;

[…]".

7 Artykuł 6 tej dyrektywy, zatytułowany „Uzasadnienie odmiennego traktowania ze względu na wiek", przewiduje w ust. 1:

„Niezależnie od przepisów art. 2 ust. 2 państwa członkowskie mogą uznać, że odmienne traktowanie ze względu na wiek nie stanowi dyskryminacji, jeżeli w ramach prawa krajowego zostanie to obiektywnie i racjonalnie uzasadnione zgodnym z przepisami celem, w szczególności celami polityki zatrudnienia, rynku pracy i kształcenia zawodowego, i jeżeli środki mające służyć realizacji tego celu są właściwe i konieczne.

Takie odmienne traktowanie może polegać między innymi na:

a) wprowadzeniu specjalnych warunków dostępu do zatrudnienia i kształcenia zawodowego, zatrudnienia i pracy, włącznie z warunkami zwalniania i wynagradzania, dla ludzi młodych, pracowników starszych i osób mających na utrzymaniu inne osoby, w celu wspierania ich integracji zawodowej lub zapewnienia im ochrony;

[…]".

8 Artykuł 16 tej dyrektywy stanowi:

„Państwa członkowskie podejmują niezbędne działania, aby:

a) zniesione zostały przepisy ustawowe, wykonawcze i administracyjne sprzeczne z zasadą równego traktowania;

b) przepisy sprzeczne z zasadą równego traktowania zawarte w umowach lub układach zbiorowych […] zostały uznane za nieważne lub zostały zmienione".

Prawo niemieckie

Ustawodawstwo niemieckie

9 Dyrektywa 2000/78 została implementowana do prawa niemieckiego w drodze Allgemeines Gleichbehandlungsgesetz (ogólnej ustawy o równym traktowaniu) z dnia 14 sierpnia 2006 r.

(BGBl. 2006 I, s. 1897, zwanej dalej „AGG”). Ustawa ta przewiduje w § 1, zatytułowanym „Przedmiot ustawy”:

„Celem niniejszej ustawy jest uniemożliwienie lub wyeliminowanie wszelkich nierówności ze względu na rasę lub pochodzenie etniczne, płeć, religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną”.

10 Paragraf 10 AGG, zatytułowany „Dopuszczalność odmiennego traktowania ze względu na wiek”, stanowi:

„Niezależnie od postanowień § 8 odmienne traktowanie ze względu na wiek jest dopuszczalne również wtedy, gdy jest ono obiektywnie i racjonalnie uzasadnione zgodnym z prawem celem. Środki mające służyć realizacji tego celu muszą być właściwe i konieczne. Takie odmienne traktowanie może między innymi polegać na:

[…]

6) różnicowaniu świadczeń wypłacanych z zakładowych programów socjalnych w rozumieniu Betriebsverfassungsgesetz (ustawy o ustroju przedsiębiorstw), jeżeli strony postanowiły w nich, że wysokość odprawy pieniężnej będzie zależeć od wieku lub stażu pracy w przedsiębiorstwie oraz będzie uwzględniać szanse zainteresowanego na znalezienie nowego zatrudnienia, które zależą przede wszystkim od wieku, lub wyłączyły możliwość skorzystania ze świadczeń programu socjalnego przez pracowników, którzy są zabezpieczeni pod względem ekonomicznym, ponieważ po ewentualnym zaprzestaniu pobierania zasiłku dla bezrobotnych mają prawo do świadczeń emerytalnych”.

11 Wspomniana ustawa o ustroju przedsiębiorstw, w brzmieniu z dnia 25 września 2001 r. (BGBl. 2001 I, s. 2518), wymaga, w §§ 111–113, przyjęcia środków łagodzących negatywne skutki restrukturyzacji przedsiębiorstwa dla pracowników. Pracodawcy i rady zakładowe są zobowiązani do ustanowienia programów socjalnych w tym zakresie.

12 Paragraf 112 ustawy o ustroju przedsiębiorstw, zatytułowany „Porozumienie w sprawie restrukturyzacji przedsiębiorstwa i programu socjalnego”, przewiduje w ust. 1:

„Jeżeli pracodawca i rada zakładowa osiągną porozumienie w sprawie zrównoważenia interesów w ramach planowanej restrukturyzacji przedsiębiorstwa, porozumienie takie sporządzane jest na piśmie i podpisywane przez obie strony. Podobnie postępuje się w przypadku porozumienia w sprawie rekompensowania lub łagodzenia ekonomicznych skutków planowanej restrukturyzacji przedsiębiorstwa dla pracowników (program socjalny). Program socjalny ma moc porozumienia zakładowego […]”.

13 Zgodnie z § 127 księgi trzeciej Sozialgesetzbuch (kodeksu socjalnego), zwykły zasiłek dla bezrobotnych wypłacany jest przez czas określony, w zależności od wieku pracownika i długości jego okresu składkowego. Przed ukończeniem 50. roku życia pracownik ma prawo do zasiłku dla bezrobotnych w wysokości równej 12-miesięcznemu wynagrodzeniu, która po ukończeniu przez niego 50. roku życia ulega podwyższeniu do wysokości równej 15-miesięcznemu wynagrodzeniu, po ukończeniu 55. roku życia do wysokości równej 18-miesięcznemu wynagrodzeniu, zaś po ukończeniu 58. roku życia do wysokości równej 24-miesięcznemu wynagrodzeniu.

Program ochrony socjalnej i uzupełniający program socjalny

14 W dniu 30 kwietnia 2004 r. spółka Baxter zawarła z centralną radą zakładową porozumienie o POS. Paragraf 6 ust. 1 pkt 1.1–1.5 tego programu brzmi następująco:

„1. Odprawy pieniężne przysługujące z tytułu rozwiązania stosunku pracy (z wyjątkiem przypadków »wcześniejszego przejścia na emeryturę«)

1.1. Pracownikom, którym mimo wszelkich starań nie może zostać zaoferowane odpowiednie miejsce pracy w przedsiębiorstwie Baxter [z siedzibą w Niemczech],

z którymi nie można przedterminowo rozwiązać stosunku pracy na podstawie § 5 i którzy odchodzą z przedsiębiorstwa (wskutek wypowiedzenia umowy o pracę z przyczyn ekonomicznych lub rozwiązania umowy o pracę za porozumieniem stron), wypłacana jest odprawa pieniężna, której kwota brutto wyliczana jest w euro według następującego wzoru:

Odprawa = współczynnik wieku x staż pracy w przedsiębiorstwie x miesięczne wynagrodzenie brutto [zwanego dalej »wzorem podstawowym«]

1.2. Tabela współczynników wieku

Wiek	Współczynnik wieku	Wiek	Współczynnik wieku	Wiek	Współczynnik wieku	Wiek	Współczynnik wieku	Wiek	Współ wieku
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. W przypadku pracowników, którzy ukończyli 54. rok życia i których stosunek pracy ulega rozwiązaniu z przyczyn ekonomicznych lub za porozumieniem stron, kwota odprawy wyliczona zgodnie z § 6 ust. 1 pkt 1.1 porównywana jest z następującym wyliczeniem:

liczba miesięcy pozostających do pierwszego możliwego terminu przejścia na emeryturę x 0,85 x miesięczne wynagrodzenie brutto [zwanym dalej »wzorem alternatywnym«].

Jeżeli kwota odprawy wyliczona zgodnie ze wzorem podstawowym przewyższa kwotę wyliczoną zgodnie ze wzorem alternatywnym, pracownikowi wypłacana jest kwota niższa. Kwota ta musi być jednak co najmniej równa połowie odprawy wyliczonej zgodnie ze [wzorem podstawowym].

Jeżeli iloczyn otrzymany w wyniku zastosowania [wzoru alternatywnego] jest równy zeru, pracownikowi wypłacana jest połowa odprawy wyliczonej zgodnie ze [wzorem podstawowym]".

15 W dniu 13 marca 2008 r. spółka Baxter zawarła z radą zakładową porozumienie o uzupełniającym programie socjalnym (zwanym dalej „UPS"). Paragraf 7 tego programu, dotyczący odpraw pieniężnych, brzmi następująco:

„Pracownicy objęci obecnym [POS], których stosunek pracy ulega rozwiązaniu z przyczyn dotyczących przedsiębiorstwa, otrzymują następujące świadczenia:

7.1. Odprawa pieniężna. Pracownicy otrzymują jednorazową odprawę pieniężną wynikającą z § 6 ust. 1 [POS].

7.2. Wyjaśnienie. W odniesieniu do § 6 pkt 1.5 [POS] strony uzgadniają, co następuje: pojęcie pierwszego możliwego terminu przejścia na emeryturę oznacza dzień, w którym pracownik nabywa prawo do świadczeń emerytalnych, nawet gdyby ich wysokość miałaby być niższa ze względu na przejście na wcześniejszą emeryturę.

[…]".

Postępowanie główne i pytania prejudycjalne

16 Skarżący w postępowaniu głównym, J. Odar, jest obywatelem austriackim, urodzonym w 1950 r. Jest żonaty, ma dwoje dzieci, pozostające na jego utrzymaniu. Ze względu na stwierdzony u niego 50-procentowy stopień niepełnosprawności został uznany za osobę poważnie niepełnosprawną. Od dnia 17 kwietnia 1979 r. J. Odar był zatrudniony w spółce Baxter lub spółce, której Baxter stała się następcą prawnym, ostatnio w charakterze kierownika ds. marketingu.

17 W dniu 25 kwietnia 2008 r. spółka Baxter rozwiązała stosunek pracy z J. Odarem i zaoferowała mu możliwość kontynuowania zatrudnienia w miejscowości Munich-Unterschleißheim (Niemcy). Johann Odar przyjął tę ofertę, a następnie złożył wypowiedzenie ze skutkiem na dzień 31 grudnia 2009 r., uzgadniając wcześniej ze spółką Baxter, że nie zmniejszy to przysługującej mu odprawy pieniężnej.

18 Jak wynika z postanowienia odsyłającego, z chwilą ukończenia 65. roku życia, czyli w dniu 1 sierpnia 2015 r., J. Odar może wystąpić do niemieckiego systemu ubezpieczeń emerytalnych o przyznanie mu zwykłej emerytury, zaś od chwili ukończenia 60. roku życia, czyli od dnia 1 sierpnia 2010 r., może powoływać się na prawo do emerytury dla osób poważnie niepełnosprawnych.

19 Spółka Baxter wypłaciła J. Odarowi odprawę pieniężną z POS w wysokości 308 253,31 EUR brutto. Zgodnie z wyliczeniem dokonanym w oparciu o wzór podstawowy przysługująca mu odprawa powinna wynosić 616 506,63 EUR brutto. Stosując wzór alternatywny i przyjmując, że J. Odar przejdzie na emeryturę w pierwszym możliwym terminie, czyli w dniu 1 sierpnia 2010 r., spółka Baxter wyliczyła wysokość jego odprawy w kwocie 197 199,09 EUR brutto. W związku z tym wypłaciła J. Odarowi odprawę w minimalnej gwarantowanej wysokości – czyli połowę kwoty 616 506,63 EUR.

20 Pismem z dnia 30 czerwca 2010 r. J. Odar wystąpił z powództwem do Arbeitsgericht München (sądu pracy w Monachium). Żąda w nim zasądzenia od spółki Baxter wypłaty dodatkowej odprawy pieniężnej w kwocie 271 988, 88 EUR brutto. Kwota ta stanowi różnicę między odprawą już mu wypłaconą a kwotą, którą otrzymałby, gdyby w chwili rozwiązania stosunku pracy – przy założeniu takiego samego stażu pracy w przedsiębiorstwie – miał ukończone 54 lata. Johann Odar twierdzi, że sposób wyliczania odprawy przewidziany w POS jest dla niego niekorzystny ze względu na jego niepełnosprawność.

21 Sąd odsyłający pragnie ustalić, czy § 10 zdanie trzecie pkt 6 AGG i metoda przewidziana w § 6 ust. 1 pkt 1.5 POS są zgodne z dyrektywą 2000/78. Wskazuje, że gdyby pierwsze z tych dwóch uregulowań krajowych okazało się być sprzeczne z prawem Unii, a w konsekwencji nie mogło znajdować zastosowania, żądanie J. Odara należałoby uwzględnić, jako że metoda przewidziana w drugim ze wspomnianych uregulowań nie może znajdować oparcia w normie prawnej, która byłaby sprzeczna z tą dyrektywą.

22 W tych okolicznościach Arbeitsgericht München postanowił zawiesić postępowanie i zwrócić się do Trybunału z następującymi pytaniami prejudycjalnymi:

„1) Czy uregulowanie krajowe przewidujące dopuszczalność odmiennego traktowania ze względu na wiek w sytuacji, gdy strony porozumienia zakładowego wyłączyły, w ramach systemu [ochrony socjalnej danego przedsiębiorstwa], ze świadczeń programu socjalnego pracowników, którzy są zabezpieczeni pod względem ekonomicznym, ponieważ w danym przypadku po wykorzystaniu zasiłku dla bezrobotnych mają prawo do świadczeń emerytalnych, narusza zakaz dyskryminacji ze względu na wiek w rozumieniu art. 1 i art. 16 dyrektywy [2000/78], czy też takie odmienne traktowanie jest uzasadnione w świetle art. 6 ust. 1 zdanie drugie lit. a) tej dyrektywy?

2) Czy uregulowanie krajowe przewidujące dopuszczalność odmiennego traktowania ze względu na wiek w sytuacji, gdy strony porozumienia zakładowego wyłączyły, w ramach systemu [ochrony socjalnej danego przedsiębiorstwa], ze świadczeń programu socjalnego pracowników, którzy są zabezpieczeni pod względem ekonomicznym, ponieważ w danym przypadku po wykorzystaniu zasiłku dla bezrobotnych mają prawo do świadczeń emerytalnych, narusza zakaz dyskryminacji ze względu na niepełnosprawność w rozumieniu art. 1 i 16 dyrektywy [2000/78]?

3) Czy uregulowanie [wchodzące w skład systemu ochrony socjalnej danego przedsiębiorstwa] przewidujące, że w przypadku pracowników, którzy ukończyli 54. rok życia i z którymi stosunek pracy zostaje rozwiązany z przyczyn [ekonomicznych], dokonywane jest alternatywne obliczenie odprawy na podstawie [pierwszego możliwego terminu przejścia na emeryturę] i w porównaniu ze zwykłą metodą obliczania, która w szczególności nawiązuje do długości stażu pracy w przedsiębiorstwie, wypłaceniu podlega mniejsza kwota odprawy, jednakże co najmniej połowa zwykłej kwoty odprawy, narusza zakaz dyskryminacji ze względu na wiek w rozumieniu art. 1 i 16 dyrektywy [2000/78], czy też takie odmienne traktowanie jest uzasadnione w świetle art. 6 ust. 1 zdanie drugie lit. a) [tej] dyrektywy?

4) Czy uregulowanie [wchodzące w skład systemu ochrony socjalnej danego przedsiębiorstwa] przewidujące, że w przypadku pracowników, którzy ukończyli 54. rok życia i z którymi stosunek pracy zostaje rozwiązany z przyczyn [ekonomicznych], dokonywane jest alternatywne obliczenie odprawy na podstawie [pierwszego możliwego terminu przejścia na emeryturę] i w porównaniu do zwykłej metody obliczania, która w szczególności nawiązuje do długości stażu pracy w przedsiębiorstwie, wypłaceniu podlega mniejsza kwota odprawy, jednakże co najmniej połowa zwykłej kwoty odprawy, a w przypadku tej alternatywnej metody obliczania za decydujące kryterium przyjmuje się nabycie uprawnień do świadczeń emerytalnych ze względu na niepełnosprawność, narusza zakaz dyskryminacji ze względu na niepełnosprawność w rozumieniu art. 1 i art. 16 dyrektywy [2000/78]?”.

W przedmiocie pytań prejudycjalnych

W przedmiocie dwóch pierwszych pytań

23 Poprzez swoje dwa pierwsze pytania, które należy rozpatrzyć łącznie, sąd odsyłający zmierza zasadniczo do ustalenia, czy art. 2 ust. 2 i art. 6 ust. 1 dyrektywy 2000/78 należy interpretować w ten sposób, że przepisy te stoją na przeszkodzie uregulowaniu krajowemu dopuszczającemu możliwość odmiennego traktowania ze względu na wiek w sytuacji, gdy w ramach zakładowego programu socjalnego partnerzy społeczni wyłączyli możliwość skorzystania ze świadczeń z tego programu przez pracowników, którzy są zabezpieczeni pod względem ekonomicznym, jako że po ewentualnym zaprzestaniu pobierania zasiłku dla bezrobotnych mają prawo do świadczeń emerytalnych.

24 W tym względzie trzeba na wstępie przypomnieć, że zgodnie z utrwalonym orzecznictwem Trybunału pytania dotyczące wykładni prawa Unii, z którymi zwrócił się sąd odsyłający w ramach stanu prawnego i faktycznego, za którego ustalenie jest on odpowiedzialny, przy czym prawidłowość tych ustaleń nie podlega ocenie przez Trybunał, korzystają z domniemania, iż mają one znaczenie dla sprawy. Odmowa wydania przez Trybunał orzeczenia w trybie prejudycjalnym, o które wnioskował sąd krajowy, jest możliwa tylko

wtedy, gdy jest oczywiste, że wykładnia prawa Unii, o którą wnioskowano, nie ma żadnego związku ze stanem faktycznym lub przedmiotem sporu przed sądem krajowym, gdy problem jest natury hipotetycznej, bądź gdy Trybunał nie dysponuje informacjami w zakresie stanu faktycznego lub prawnego niezbędnymi do udzielenia użytecznej odpowiedzi na pytania, które zostały mu postawione (zob. w szczególności wyroki: z dnia 22 czerwca 2010 r. w sprawach połączonych C-188/10 i C-189/10 Melki i Abdeli, Zb.Orz. s. I-5667, pkt 27; z dnia 29 marca 2012 r. w sprawie C-599/10 SAG ELV Slovensko i in., dotychczas nieopublikowany w Zbiorze, pkt 15; z dnia 12 lipca 2012 r. w sprawie C-378/10 VALE Építési, dotychczas nieopublikowany w Zbiorze, pkt 18).

25 Trzeba zauważyć, że taki właśnie przypadek zachodzi w niniejszej sprawie.

26 Otóż dwa pierwsze pytania opierają się na założeniu, o którym mowa w § 10 zdanie trzecie pkt 6 AGG, że partnerzy społeczni mogą wyłączyć możliwość skorzystania ze świadczeń programu socjalnego przez pracowników, którzy są zabezpieczeni pod względem ekonomicznym, jako że po ewentualnym zaprzestaniu pobierania zasiłku dla bezrobotnych mają prawo do świadczeń emerytalnych.

27 Tymczasem nic w postanowieniu odsyłającym nie wskazuje na to, że spór w postępowaniu głównym dotyczy takiego właśnie przypadku. Wprost przeciwnie, sąd odsyłający sam zauważył, że w odróżnieniu od sytuacji przewidzianej we wspomnianym przepisie AGG, POS nie wyklucza możliwości otrzymania odprawy pieniężnej przez pracowników zbliżających się do emerytury, niezależnie od tego, czy mają oni, czy też nie mają prawa do zasiłku dla bezrobotnych. Z akt sprawy wynika bowiem, że J. Odar odprawę otrzymał, choć – w rezultacie zastosowania § 6 ust. 1 pkt 1.5 POS w związku z § 7 pkt 7.2 UPS – w zmniejszonej wysokości, co kwestionuje w ramach powództwa przed sądem odsyłającym.

28 Wydaje się więc oczywiste, że problem ewentualnej zgodności art. 10 zdanie trzecie pkt 6 AGG z dyrektywą 2000/78 ma w odniesieniu do przedmiotu sporu postępowania głównego charakter abstrakcyjny i całkowicie hipotetyczny.

29 W tych okolicznościach nie ma potrzeby udzielania odpowiedzi na pytania drugie i trzecie sądu odsyłającego.

W przedmiocie pytania trzeciego

30 Poprzez swoje pytanie trzecie sąd odsyłający zmierza zasadniczo do ustalenia, czy art. 2 ust. 2 i art. 6 ust. 1 dyrektywy 2000/78 należy interpretować w ten sposób, że przepisy te stoją na przeszkodzie postanowieniu zakładowego programu socjalnego, zgodnie z którym wysokość odprawy pieniężnej przysługującej pracownikom, którzy ukończyli 54. rok życia i których stosunek pracy ulega rozwiązaniu z przyczyn ekonomicznych, jest wyliczana na podstawie pierwszego możliwego terminu przejścia na emeryturę, odmiennie niż w przypadku podstawowej metody wyliczania, zgodnie z którą podstawą wysokości odprawy jest między innymi staż pracy w przedsiębiorstwie, skutkiem czego kwota wypłaconej w ten sposób odprawy jest niższa w porównaniu z kwotą odprawy wyliczonej przy zastosowaniu owej metody podstawowej, przy tym co najmniej równa połowie tej kwoty.

31 Co się tyczy, po pierwsze, kwestii, czy rozpatrywane w postępowaniu głównym uregulowanie krajowe mieści się w zakresie stosowania dyrektywy 2000/78, należy podkreślić, że zarówno z tytułu i z preambuły, jak i z treści i celu tej dyrektywy wynika, że dyrektywa ta zmierza do ustanowienia ogólnych warunków ramowych celem zapewnienia każdej osobie równego traktowania „w zakresie zatrudnienia i pracy", oferując jej skuteczną ochronę przed dyskryminacją ze względu na jedną z przyczyn określonych w art. 1 tej dyrektywy, wśród których figuruje wiek.

32 W szczególności z art. 3 ust. 1 lit. c) dyrektywy 2000/78 wynika, że znajduje ona zastosowanie w ramach kompetencji Unii Europejskiej „do wszystkich osób, zarówno sektora publicznego, jak i prywatnego, włącznie z instytucjami publicznymi" w odniesieniu między innymi do „warunków zatrudnienia i pracy, łącznie z warunkami zwalniania i wynagradzania".

33 Zakładając obniżenie wysokości odprawy pieniężnej wypłacanej pracownikom, którzy ukończyli 54. rok życia, § 6 ust. 1 pkt 1.5 POS odnosi się do warunków zwalniania pracowników w rozumieniu art. 3 ust. 1 lit. c) dyrektywy 2000/78. Przepis ten mieści się więc w zakresie stosowania tej dyrektywy.

34 Z utrwalonego orzecznictwa wynika, że przyjmując środki wchodzące w zakres stosowania dyrektywy 2000/78, która w dziedzinie zatrudnienia i pracy konkretyzuje zakaz dyskryminacji ze względu na wiek, partnerzy społeczni powinni działać z poszanowaniem tej dyrektywy (wyroki: z dnia 13 września 2011 r. w sprawie C-447/09 Prigge i in., dotychczas nieopublikowany w Zbiorze, pkt 48; a także z dnia 7 czerwca 2012 r. w sprawie C-132/11 Tyrolean Airways Tiroler Luftfahrt, dotychczas nieopublikowany w Zbiorze, pkt 22).

35 Co się tyczy kwestii, czy postanowienie będące przedmiotem postępowania głównego wprowadza odmienne traktowanie ze względu na wiek w rozumieniu art. 2 ust. 1 dyrektywy 2000/78, trzeba zauważyć, iż § 6 ust. 1 pkt 1.5 POS prowadzi, w odniesieniu do pracowników, którzy ukończyli 54. rok życia i których stosunek pracy ulega rozwiązaniu z przyczyn ekonomicznych lub za porozumieniem stron, do sytuacji, w której kwota odprawy pieniężnej wyliczona zgodnie ze wzorem podstawowym porównywana jest z kwotą odprawy wyliczoną zgodnie ze wzorem alternatywnym. Zainteresowany pracownik otrzymuje odprawę w niższej wysokości, zachowując jednocześnie gwarancję otrzymania połowy kwoty wyliczonej zgodnie ze wzorem podstawowym.

36 Zgodnie z tymi postanowieniami J. Odar otrzymał kwotę 308 357,10 EUR, która stanowi połowę kwoty odprawy wyliczonej zgodnie ze wzorem podstawowym. Gdyby w chwili rozwiązania stosunku pracy J. Odar miał 54 lata, miałby prawo, na tych samych warunkach, do otrzymania odprawy w wysokości 580 357,10 EUR. Fakt ukończenia przez niego 54 lat spowodował zastosowanie w jego przypadku metody porównawczej, wskutek czego kwota otrzymanej przez niego odprawy była niższa w porównaniu z kwotą, którą otrzymałby, gdyby nie ukończył tego wieku. Okazuje się zatem, że metoda wyliczania przewidziana w POS w przypadku rozwiązania stosunku pracy z przyczyn ekonomicznych wprowadza odmienne traktowanie oparte bezpośrednio na wieku.

37 Należy zatem zbadać, czy owo odmienne traktowanie może znajdować uzasadnienie w świetle art. 6 ust. 1 akapit pierwszy dyrektywy 2000/78. Przepis ten stanowi bowiem, że odmienne traktowanie ze względu na wiek nie stanowi dyskryminacji, jeżeli w ramach prawa krajowego zostanie to obiektywnie i racjonalnie uzasadnione zgodnym z przepisami celem, w szczególności celami polityki zatrudnienia, rynku pracy i kształcenia zawodowego, i jeżeli środki mające służyć realizacji tego celu są właściwe i konieczne.

38 Co się tyczy celu środków krajowych będących przedmiotem postępowania głównego, sąd odsyłający zwraca uwagę, że brzmienie § 6 ust. 1 pkt 1.5 POS nie dostarcza żadnych wskazówek w zakresie celu, jaki postanowienie to ma realizować. Z przekazanych Trybunałowi akt sprawy wynika jednak, że cel ten stoi w sprzeczności z zasadą wskazaną w § 10 akapit trzeci pkt 6 AGG. Otóż, jak zauważył sąd odsyłający, wybrana przez partnerów społecznych struktura programu socjalnego musi umożliwiać skuteczną realizację celu wskazanego w tym postanowieniu AGG i nie może nieproporcjonalnie pomijać interesów osób znajdujących się w szczególnie niekorzystnej sytuacji ze względu na wiek.

39 Zgodnie z § 112 ustawy o ustroju przedsiębiorstw, w brzmieniu z dnia 25 września 2001 r., istota i cel programu socjalnego polegają na rekompensowaniu lub łagodzeniu skutków restrukturyzacji przedsiębiorstwa dla pracowników. W uwagach na piśmie rząd niemiecki wyjaśnił w tym względzie, że odprawy pieniężne wypłacane z programu ochrony socjalnej mają służyć ułatwieniu reintegracji zawodowej odchodzących pracowników.

40 Zdaniem tego rządu zróżnicowanie wysokości odpraw pieniężnych wypłacanych z programu ochrony socjalnej w zależności od wieku realizuje cel opierający się na założeniu, że ponieważ program ten służy łagodzeniu niekorzystnych dla pracowników skutków ekonomicznych w przyszłości, niektórych pracowników – tych, którzy nie doświadczą tychże niekorzystnych skutków utraty pracy, lub doświadczą ich łagodniej niż inni – można generalnie wyłączyć z zakresu tych świadczeń.

41 Rząd niemiecki podnosi w tym względzie, że program socjalny musi zakładać taki podział – ograniczonych – środków, by mógł on spełniać swoją „funkcję przejściową" w odniesieniu do wszystkich pracowników, nie zaś tylko najstarszych spośród nich. Co do zasady program taki nie może też niekorzystnie wpływać na możliwość przetrwania przedsiębiorstwa ani na pozostałych pracowników. Paragraf 10 zdanie trzecie pkt 6 AGG pozwala również ograniczyć możliwość ewentualnych nadużyć, polegających na wypłacaniu odpraw pieniężnych – mających zapewnić utrzymanie podczas poszukiwania nowego zatrudnienia – pracownikom, którzy w rzeczywistości przechodzą na emeryturę.

42 A więc celem omawianego postanowienia krajowego jest, w opinii tego rządu, zapewnienie zabezpieczenia finansowego na przyszłość, ochrona najmłodszych pracowników i wsparcie ich reintegracji zawodowej, przy uwzględnieniu konieczności sprawiedliwego podziału ograniczonych środków finansowych tworzących program socjalny.

43 Tak sformułowane cele mogą uzasadniać – tytułem odstępstwa od zasady zakazu dyskryminacji ze względu na wiek – odmienne traktowanie związane, między innymi, z „wprowadzeniem specjalnych warunków […] zatrudnienia i pracy, włącznie z warunkami zwalniania i wynagradzania, dla ludzi młodych, pracowników starszych […] w celu wspierania ich integracji zawodowej lub zapewnienia im ochrony" w rozumieniu art. 6 ust. 1 akapit drugi dyrektywy 2000/78.

44 Ponadto za zgodny z prawem wypada uznać cel zmierzający do zapobieżenia sytuacji, w której odprawa z tytułu rozwiązania stosunku pracy byłaby źródłem korzyści dla osób, które nie szukają nowej pracy, lecz będą otrzymywać inny dochód w postaci emerytury (zob. podobnie wyrok z dnia 12 października 2010 r. w sprawie C-499/08 Ingeniørforeningen i Danmark, Zb.Orz. s. I-9343, pkt 44).

45 W tych okolicznościach trzeba uznać, że cele tego rodzaju, jak realizowane przez § 6 ust. 1 pkt 1.5 POS, stanowią co do zasady cele, które „obiektywnie i racjonalnie" uzasadniają „w ramach prawa krajowego", stosownie do art. 6 ust. 1 akapit pierwszy dyrektywy 2000/78, odmienne traktowanie ze względu na wiek.

46 Należy jeszcze zbadać, czy środki służące osiągnięciu tych celów są właściwe i konieczne oraz czy nie wykraczają poza działania, które są konieczne do ich realizacji.

47 Wypada w tym względzie przypomnieć, że państwa członkowskie i ewentualnie partnerzy społeczni na szczeblu krajowym dysponują przy wyborze nie tylko realizacji określonego celu w obszarze polityki społecznej i zatrudnienia, lecz również przy ustalaniu środków mogących go realizować, szerokimi uprawnieniami dyskrecjonalnymi (zob. podobnie wyrok z dnia 5 lipca 2012 r. w sprawie C-141/11 Hörnfeldt, dotychczas nieopublikowany w Zbiorze, pkt 32).

48 Co się tyczy kwestii ustalenia, czy omawiane postanowienia POS i UPS są właściwe, trzeba zauważyć, że obniżenie wysokości odprawy pieniężnej wypłacanej pracownikom, którzy na dzień rozwiązania stosunku pracy dysponują zabezpieczeniem pod względem ekonomicznym, nie wydaje się być nieracjonalne z punktu widzenia celów tego rodzaju programów socjalnych, które służą zapewnieniu zwiększonej ochrony pracownikom, w przypadku których znalezienie nowego zatrudnienia wydaje się być utrudnione ze względu na ich ograniczone środki finansowe.

49 Tym samym należy uznać, że postanowienie takie jak § 6 ust. 1 pkt 1.5 POS, nie wydaje się być oczywiście niewłaściwe do osiągnięcia zgodnego z prawem celu polityki zatrudnienia realizowanej przez niemieckiego prawodawcę.

50 Co się tyczy kwestii ustalenia, czy postanowienia te są konieczne, należy z pełnym przekonaniem zauważyć, że zgodnie z § 7 pkt 7.2 UPS pierwszy możliwy termin przejścia na emeryturę w rozumieniu § 6 ust. 1 pkt 1.5 POS, odpowiada dniowi, w którym pracownik nabywa prawo do świadczeń emerytalnych, nawet jeżeli świadczenia wypłacane w ramach tej emerytury są niższe ze względu na to, że zainteresowany pracownik zaczął pobierać ją wcześniej.

51 Niemniej, jak już zauważono w pkt 27 niniejszego wyroku, POS nie zakłada możliwości obniżenia wysokości odpraw pieniężnych wypłacanych tego rodzaju pracownikom.

52 Trzeba w tym względzie zauważyć, że z jednej strony zgodnie z § 6 pkt 1.5 POS odprawa pieniężna przysługująca zainteresowanym pracownikom wypłacana jest w kwocie niższej spośród kwot wyliczonych zgodnie ze wzorem podstawowym lub wzorem alternatywnym, zaś jej beneficjent zachowuje gwarancję, że kwota, którą ostatecznie otrzyma, będzie przynajmniej równa połowie kwoty wyliczonej zgodnie ze wzorem podstawowym. Co więcej, jak wynika z tabeli przedstawionej w pkt 14 niniejszego wyroku, współczynnik wieku, który stanowi jedną ze zmiennych wzoru podstawowego i wzoru alternatywnego, stopniowo wzrasta, zwiększając się od 18 lat (0,35) do 57 lat (1,70). Dopiero przy 59 latach współczynnik ten zaczyna maleć (1,50), osiągając swój najniższy poziom w wieku 64 lat (0,30). Z drugiej strony, jak wskazano w akapicie trzecim tego postanowienia, nawet jeżeli iloczyn otrzymany w wyniku zastosowania wzoru alternatywnego będzie równy zeru, zainteresowanemu pracownikowi wypłacona zostanie połowa odprawy wyliczonej zgodnie ze wzorem podstawowym.

53 Odnosząc się do oceny sądu odsyłającego, trzeba zauważyć, że § 6 ust. 1 pkt 1.5 POS jest wynikiem porozumienia wynegocjowanego przez przedstawicieli pracodawców i pracowników, którzy skorzystali z prawa do negocjacji zbiorowych uznanego za jedno z praw podstawowych. Okoliczność pozostawienia w ten sposób partnerom społecznym troski o ustalenie równowagi w ich interesach oferuje znaczną elastyczność, ponieważ każda ze stron może w odpowiednim przypadku wypowiedzieć porozumienie (zob. podobnie wyrok z dnia 12 października 2010 r. w sprawie C-45/09 Rosenbladt, Zb.Orz. s. I-9391, pkt 67).

54 Z powyższych względów na pytanie trzecie trzeba odpowiedzieć, że art. 2 ust. 2 i art. 6 ust. 1 dyrektywy 2000/78 należy interpretować w ten sposób, że przepisy te nie stoją na przeszkodzie istnieniu uregulowania wchodzącego w skład systemu ochrony socjalnej danego przedsiębiorstwa, zgodnie z którym wysokość odprawy pieniężnej przysługującej pracownikom, którzy ukończyli 54. rok życia i których stosunek pracy ulega rozwiązaniu z przyczyn ekonomicznych, jest wyliczana na podstawie pierwszego możliwego terminu przejścia na emeryturę, odmiennie niż w przypadku podstawowej metody wyliczania, zgodnie z którą podstawą wysokości odprawy jest między innymi staż pracy w przedsiębiorstwie, skutkiem czego kwota wypłaconej w ten sposób odprawy jest niższa w porównaniu z kwotą odprawy wyliczonej przy zastosowaniu owej metody podstawowej, przy tym co najmniej równa połowie tej kwoty.

W przedmiocie pytania czwartego

55 Poprzez swoje pytanie czwarte sąd odsyłający zmierza zasadniczo do ustalenia, czy art. 2 ust. 2 dyrektywy 2000/78 należy interpretować w ten sposób, że przepis ten stoi na przeszkodzie istnieniu uregulowania wchodzącego w skład systemu ochrony socjalnej danego przedsiębiorstwa, zgodnie z którym wysokość odprawy pieniężnej przysługującej pracownikom, którzy ukończyli 54. rok życia i których stosunek pracy ulega rozwiązaniu z przyczyn ekonomicznych, jest wyliczana na podstawie pierwszego możliwego terminu przejścia na emeryturę, odmiennie niż w przypadku podstawowej metody wyliczania, zgodnie z którą podstawą wysokości odprawy jest między innymi staż pracy w przedsiębiorstwie, skutkiem czego kwota wypłaconej w ten sposób odprawy jest niższa w porównaniu z kwotą odprawy wyliczonej przy zastosowaniu owej metody podstawowej, z tym że co najmniej równa połowie tej kwoty, i zakłada, w przypadku zastosowania alternatywnej metody wyliczania, możliwość przejścia na wcześniejszą emeryturę ze względu na niepełnosprawność.

56 Co się w pierwszej kolejności tyczy kwestii, czy § 6 ust. 1 pkt 1.5 POS w związku z § 7 pkt 7.2 UPS wprowadza odmienne traktowanie ze względu na niepełnosprawność w rozumieniu art. 2 ust. 1 dyrektywy 2000/78, trzeba zauważyć, że wysokość odprawy wypłacanej zainteresowanemu pracownikowi ulega obniżeniu, na podstawie owego § 7 pkt 7.2, przy uwzględnieniu pierwszego możliwego terminu przejścia na emeryturę. Tymczasem nabycie prawa do świadczeń emerytalnych wymaga osiągnięcia pewnego wieku, który jest inny w przypadku osób poważnie niepełnosprawnych.

57 Jak słusznie zauważyła rzecznik generalna w pkt 50 swojej opinii, pierwsza zmienna podstawiona do wzoru alternatywnego zawsze będzie niższa w przypadku pracownika poważnie niepełnosprawnego niż w przypadku będącego w tym samym wieku pracownika w pełni sprawnego. W niniejszym przypadku okoliczność, że podstawą tego wyliczenia, które jakoby ma neutralny charakter, jest wiek przejścia na emeryturę, skutkuje tym, że pracownicy poważnie niepełnosprawni, którzy mają prawo do przejścia na emeryturę wcześniej, w wieku 60, a nie 63 lat, jak w przypadku pracowników w pełni sprawnych, otrzymują niższą odprawę z tytułu rozwiązania stosunku pracy, właśnie wskutek swojej poważnej niepełnosprawności.

58 Jak wynika z uwag J. Odara i co zostało potwierdzone przez spółkę Baxter na rozprawie, kwota odprawy pieniężnej z tytułu rozwiązania stosunku pracy, którą J. Odar otrzymałby, gdyby nie był osobą poważnie niepełnosprawną, wyniosłaby 570 839,47 EUR.

59 Wynika stąd, że § 6 ust. 1 pkt 1.5 POS w związku z § 7 pkt 7.2 UPS, którego zastosowanie skutkuje tym, że kwota odprawy pieniężnej z tytułu rozwiązania stosunku pracy wypłacanej pracownikom poważnie niepełnosprawnym jest niższa od kwoty odprawy otrzymywanej przez pracowników w pełni sprawnych, wprowadza odmienne traktowanie pośrednio oparte na kryterium niepełnosprawności, w rozumieniu art. 1 i art. 2 ust. 2 lit. a) dyrektywy 2000/78.

60 W drugiej kolejności trzeba zbadać, czy w kontekście, w którym pojawia się postanowienie będące przedmiotem postępowania głównego, pracownicy poważnie niepełnosprawni, znajdując się w przedziale wiekowym zbliżonym do wieku emerytalnego, znajdują się w sytuacji porównywalnej, w rozumieniu art. 2 ust. 2 lit. a) dyrektywy 2000/78, z sytuacjami będącymi w tym samym wieku pracowników w pełni sprawnych. Otóż w opinii rządu niemieckiego sytuacje wyjściowe obu tych kategorii pracowników, jeśli chodzi o moment nabycia uprawnień emerytalnych, są obiektywnie różne.

61 Trzeba w tym względzie podkreślić, że pracownicy będący w wieku zbliżonym do wieku emerytalnego, znajdują się w sytuacji porównywalnej z sytuacją innych pracowników objętych programem socjalnym, gdyż w przypadku wszystkich pracowników ich stosunek pracy z pracodawcą ulega rozwiązaniu z tych samych przyczyn i na takich samych warunkach.

62 Otóż przywilej przyznany pracownikom poważnie niepełnosprawnym, polegający na tym, że mają oni możliwość przejścia na emeryturę trzy lata wcześniej niż pracownicy w pełni sprawni, nie stawia ich w szczególnej sytuacji w porównaniu z tymi pracownikami.

63 Zgodnie z art. 2 ust. 2 lit. b) dyrektywy 2000/78 należy zbadać, czy odmienne traktowanie istniejące między tymi dwoma kategoriami pracowników znajduje obiektywne i racjonalne uzasadnienie zgodnym z prawem celem, a środki mające służyć osiągnięciu tego celu są właściwe i nie wykraczają poza działania, które są konieczne do zrealizowania celu zamierzonego przez niemieckiego prawodawcę.

64 W tym względzie w pkt 43–45 niniejszego wyroku stwierdzono już, że cele realizowane przez § 6 ust. 1 pkt 1.5 POS trzeba zasadniczo uznać za cele, które „obiektywnie i racjonalnie" uzasadniają „w ramach prawa krajowego" stosownie do art. 6 ust. 1 akapit pierwszy dyrektywy 2000/78, odmienne traktowanie ze względu na wiek. Z drugiej strony z pkt 49 niniejszego wyroku wynika, że tego rodzaju postanowienie krajowe nie wydaje się być oczywiście niewłaściwe do osiągnięcia zgodnego z prawem celu polityki zatrudnienia realizowanej przez niemieckiego prawodawcę.

65 Aby rozstrzygnąć, czy § 6 ust. 1 pkt 1.5 POS w związku z § 7 pkt 7.2 UPS wykracza poza działania, które są konieczne do zrealizowania zamierzonych celów, trzeba zbadać to postanowienie w kontekście, w którym funkcjonuje, i wziąć pod uwagę niekorzystną sytuację, w jakiej postanowienie to może ewentualnie stawiać osoby, których dotyczy.

66 Spółka Baxter i rząd niemiecki podnoszą zasadniczo, że obniżenie kwoty odprawy pieniężnej z tytułu rozwiązania stosunku pracy, którą otrzymał J. Odar, znajduje uzasadnienie w przywileju przyznanym pracownikom poważnie niepełnosprawnym, który polega na

możliwości przechodzenia przez nich na emeryturę trzy lata wcześniej w porównaniu z pracownikami w pełni sprawnymi.

67 Nie można jednak zgodzić się z tą argumentacją. Otóż z jednej strony dyskryminacja ze względu na niepełnosprawność występuje wówczas, gdy sporny środek nie jest uzasadniony obiektywnymi względami, niemającymi związku z tego rodzaju dyskryminacją (zob. podobnie i analogicznie wyroki: z dnia 6 kwietnia 2000 r. w sprawie C-226/98 Jørgensen, Rec. s. I-2447, pkt 29; z dnia 23 października 2003 r. w sprawach połączonych C-4/02 i C-5/02 Schönheit i Becker, Rec. s. I-12575, pkt 67; a także z dnia 12 października 2004 r. w sprawie C-313/02 Wippel, Zb.Orz. s. I-9483, pkt 43). Z drugiej strony zaakceptowanie tej argumentacji skutkowałoby pozbawieniem skuteczności (effet utile) krajowych przepisów ustanawiających wspomniany przywilej, u którego źródła leży ogólne przekonanie o potrzebie uwzględnienia szczególnych trudności i zagrożeń, na jakie narażeni są pracownicy poważnie niepełnosprawni.

68 Wydaje się więc, że partnerzy społeczni, realizując zgodny z prawem cel polegający na sprawiedliwym podziale ograniczonych środków finansowych tworzących program socjalny, w sposób proporcjonalny do potrzeb zainteresowanych pracowników, nie wzięli pod uwagę okoliczności, które w szczególności dotyczą pracowników poważnie niepełnosprawnych.

69 Mianowicie nie uwzględnili oni ani zagrożeń, na wystąpienie których narażone są osoby poważnie niepełnosprawne, które generalnie mają większe trudności z powrotem do życia zawodowego, ani okoliczności, że zagrożenia te zwiększają się wraz ze zbliżaniem się przez nich do wieku emerytalnego. Tymczasem osoby te mają specyficzne potrzeby wynikające zarówno z ochrony, jakiej wymaga ich obecny stan, jak i z konieczności założenia, że ich stan może się w przyszłości pogorszyć. Jak w pkt 68 swojej opinii zauważyła rzecznik generalna, nie można zapominać o tym, że osoby poważnie niepełnosprawne mogą mieć zwiększone wymagania finansowe wynikające z ich niepełnosprawności, których nie sposób przewidzieć, a które wraz z upływem lat mogą wzrastać.

70 Wynika stąd, że środek będący przedmiotem postępowania głównego, skutkując tym, że odprawy pieniężne z tytułu rozwiązania stosunku pracy z przyczyn ekonomicznych wypłacane pracownikom poważnie niepełnosprawnym są niższe niż odprawy wypłacane pracownikom w pełni sprawnym, prowadzi do nadmiernego naruszenia uzasadnionych interesów pracowników poważnie niepełnosprawnych i tym samym wykracza poza działania, które są konieczne do zrealizowania celu polityki socjalnej zamierzonego przez niemieckiego prawodawcę.

71 W związku z powyższym odmienne traktowanie będące rezultatem § 6 ust. 1 pkt 1.5 POS nie znajduje uzasadnienia w świetle art. 2 ust. 2 lit. b) ppkt (i) dyrektywy 2000/78.

72 Z powyższych względów na pytanie czwarte trzeba odpowiedzieć, iż art. 2 ust. 2 dyrektywy 2000/78 należy interpretować w ten sposób, że przepis ten stoi na przeszkodzie istnieniu uregulowania wchodzącego w skład systemu ochrony socjalnej danego przedsiębiorstwa, zgodnie z którym wysokość odprawy pieniężnej przysługującej pracownikom, którzy ukończyli 54. rok życia i których stosunek pracy ulega rozwiązaniu z przyczyn ekonomicznych, jest wyliczana na podstawie pierwszego możliwego terminu przejścia na emeryturę, odmiennie niż w przypadku podstawowej metody wyliczania, zgodnie z którą podstawą wysokości odprawy jest między innymi staż pracy w przedsiębiorstwie, skutkiem czego kwota wypłaconej w ten sposób odprawy jest niższa w porównaniu z kwotą odprawy wyliczonej przy zastosowaniu owej metody podstawowej, przy tym co najmniej równa połowie tej kwoty, i zakłada, w przypadku zastosowania alternatywnej metody wyliczania, możliwość przejścia na wcześniejszą emeryturę ze względu na niepełnosprawność.

W przedmiocie kosztów

73 Dla stron w postępowaniu głównym niniejsze postępowanie ma charakter incydentalny, dotyczy bowiem kwestii podniesionej przed sądem odsyłającym, do niego zatem należy rozstrzygnięcie o kosztach. Koszty poniesione w związku z przedstawieniem uwag

Trybunałowi, inne niż poniesione przez strony w postępowaniu głównym, nie podlegają zwrotowi.

Z powyższych względów Trybunał (druga izba) orzeka, co następuje:

1) **Artykuł 2 ust. 2 i art. 6 ust. 1 dyrektywy Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy należy interpretować w ten sposób, że przepisy te nie stoją na przeszkodzie istnieniu uregulowania wchodzącego w skład systemu ochrony socjalnej danego przedsiębiorstwa, zgodnie z którym wysokość odprawy pieniężnej przysługującej pracownikom, którzy ukończyli 54. rok życia i których stosunek pracy ulega rozwiązaniu z przyczyn ekonomicznych, jest wyliczana na podstawie pierwszego możliwego terminu przejścia na emeryturę, odmiennie niż w przypadku podstawowej metody wyliczania, zgodnie z którą podstawą wysokości odprawy jest między innymi staż pracy w przedsiębiorstwie, skutkiem czego kwota wypłaconej w ten sposób odprawy jest niższa w porównaniu z kwotą odprawy wyliczonej przy zastosowaniu owej metody podstawowej, przy tym co najmniej równa połowie tej kwoty.**

2) **Artykuł 2 ust. 2 dyrektywy 2000/78 należy interpretować w ten sposób, że przepis ten stoi na przeszkodzie istnieniu uregulowania wchodzącego w skład systemu ochrony socjalnej danego przedsiębiorstwa, zgodnie z którym wysokość odprawy pieniężnej przysługującej pracownikom, którzy ukończyli 54. rok życia i których stosunek pracy ulega rozwiązaniu z przyczyn ekonomicznych, jest wyliczana na podstawie pierwszego możliwego terminu przejścia na emeryturę, odmiennie niż w przypadku podstawowej metody wyliczania, zgodnie z którą podstawą wysokości odprawy jest między innymi staż pracy w przedsiębiorstwie, skutkiem czego kwota wypłaconej w ten sposób odprawy jest niższa w porównaniu z kwotą odprawy wyliczonej przy zastosowaniu owej metody podstawowej, przy tym co najmniej równa połowie tej kwoty, i zakłada, w przypadku zastosowania alternatywnej metody wyliczania, możliwość przejścia na wcześniejszą emeryturę ze względu na niepełnosprawność.**

Podpisy

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* Język postępowania: niemiecki.

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

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* Langue de procédure: l'italien.

WYROK TRYBUNAŁU (druga izba)

z dnia 11 kwietnia 2013 r.(*)

Polityka społeczna – Konwencja Narodów Zjednoczonych o prawach osób niepełnosprawnych – Dyrektywa 2000/78/WE – Równość traktowania w zakresie zatrudnienia i pracy – Artykuły 1, 2 i 5 – Różnica w traktowaniu ze względu na niepełnosprawność – Rozwiązanie umowy o pracę przez pracodawcę – Istnienie niepełnosprawności – Nieobecności pracownika spowodowane jego niepełnosprawnością – Obowiązek wprowadzenia usprawnień – Praca w niepełnym wymiarze czasu pracy – Długość okresu wypowiedzenia

W sprawach połączonych C-335/11 i C-337/11

mających za przedmiot wnioski o wydanie, na podstawie art. 267 TFUE, orzeczenia w trybie prejudycjalnym, złożone przez Sø- og Handelsretten (Dania) postanowieniami z dnia 29 czerwca 2011 r., które wpłynęły do Trybunału w dniu 1 lipca 2011 r., w postępowaniu:

HK Danmark, działający w imieniu Jette Ring,

przeciwko

Dansk almennyttigt Boligselskab (C-335/11)

oraz

HK Danmark, działający w imieniu Lone Skouboe Werge,

przeciwko

Dansk Arbejdsgiverforening, **działającemu w imieniu Pro Display A/S w upadłości** (C-337/11),

TRYBUNAŁ (druga izba),

w składzie: R. Silva de Lapuerta, prezes izby, K. Lenaerts, wiceprezes Trybunału, pełniący funkcje sędziego drugiej izby, G. Arestis, A. Arabadjiev (sprawozdawca) i J.L. da Cruz Vilaça, sędziowie,

rzecznik generalny: J. Kokott,

sekretarz: C. Strömholm, administrator,

uwzględniając pisemny etap postępowania i po przeprowadzeniu rozprawy w dniu 18 października 2012 r.,

rozważywszy uwagi przedstawione:

– w imieniu HK Danmark, działającego w imieniu J. Ring, przez J. Goldschmidta, advokat,

– w imieniu HK Danmark, działającego w imieniu L. Skouboe Werge, przez M. Østergård, advokat,

– w imieniu Dansk almennyttigt Boligselskab przez C. Emmelutha i L. Greisen, advokater,

– w imieniu Dansk Arbejdsgiverforening, działającego w imieniu Pro Display A/S w upadłości przez T.B. Skyum i L. Greisen, advokater,

– w imieniu rządu duńskiego początkowo przez C. Vanga, a następnie przez V. Pasternak Jørgensen, działających w charakterze pełnomocników,

– w imieniu rządu belgijskiego przez L. Van den Broeck, działającą w charakterze pełnomocnika,

– w imieniu Irlandii przez D. O'Hagana, działającego w charakterze pełnomocnika, wspieranego przez C. Powera, BL,

– w imieniu rządu greckiego przez D. Tsagkaraki, działającą w charakterze pełnomocnika,

– w imieniu rządu włoskiego przez G. Palmieri, działającą w charakterze pełnomocnika, wspieraną przez C. Gerardis, avvocato dello Stato,

– w imieniu rządu polskiego przez M. Szpunara oraz J. Faldygę i M. Załękę, działających w charakterze pełnomocników,

– w imieniu rządu Zjednoczonego Królestwa przez K. Smith, barrister,

– w imieniu Komisji Europejskiej przez M. Simonsen i J. Enegrena, działających w charakterze pełnomocników,

po zapoznaniu się z opinią rzecznika generalnego na posiedzeniu w dniu 6 grudnia 2012 r.,

wydaje następujący

Wyrok

1 Wnioski o wydanie orzeczenia w trybie prejudycjalnym dotyczą wykładni art. 1, 2 i 5 dyrektywy Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy (Dz.U. L 303, s. 16).

2 Wnioski te zostały złożone w ramach dwóch sporów, z jednej strony między HK Danmark (zwanym dalej „HK"), działającym w imieniu J. Ring, a Dansk almennyttigt Boligselskab (zwaną dalej „DAB") oraz z drugiej strony między HK, działającym w imieniu L. Skouboe Werge, a Dansk Arbejdsgiverforening, działającym w imieniu Pro Display A/S w upadłości (zwaną dalej „Pro Display"), w przedmiocie zgodności z prawem zwolnienia J. Ring i L. Skouboe Werge.

Ramy prawne

Prawo międzynarodowe

3 Konwencja Narodów Zjednoczonych o prawach osób niepełnosprawnych, zatwierdzona w imieniu Wspólnoty Europejskiej decyzją Rady 2010/48/WE z dnia 26 listopada 2009 r. (Dz.U. 2010, L 23, s. 35) (zwana dalej „konwencją NZ"), w lit. e) preambuły stanowi:

„uznając, że niepełnosprawność jest pojęciem ewoluującym i że niepełnosprawność wynika z interakcji między osobami z dysfunkcjami a barierami wynikającymi z postaw ludzkich i środowiskowymi, które utrudniają tym osobom pełny i skuteczny udział w życiu społeczeństwa, na zasadzie równości z innymi osobami".

4 Zgodnie z art. 1 tej konwencji:

„Celem niniejszej konwencji jest popieranie, ochrona i zapewnienie pełnego i równego korzystania ze wszystkich praw człowieka i podstawowych wolności przez wszystkie osoby niepełnosprawne oraz popieranie poszanowania ich przyrodzonej godności.

Do osób niepełnosprawnych zalicza się te osoby, które mają długotrwale naruszoną sprawność fizyczną, umysłową, intelektualną lub w zakresie zmysłów, co może, w oddziaływaniu z różnymi barierami, utrudniać im pełny i skuteczny udział w życiu społecznym, na zasadzie równości z innymi osobami".

5 W myśl art. 2 akapit czwarty wspomnianej konwencji „»racjonalne usprawnienie« oznacza konieczne i odpowiednie zmiany i dostosowania, nienakładające nieproporcjonalnego lub nadmiernego obciążenia, jeśli jest to potrzebne w konkretnym przypadku w celu zapewnienia osobom niepełnosprawnym możliwości korzystania z wszelkich praw człowieka i podstawowych wolności oraz ich wykonywania na zasadzie równości z innymi osobami".

Prawo Unii

6 Motywy 6 i 8 dyrektywy 2000/78 przewidują:

„(6) Wspólnotowa karta socjalnych podstawowych praw pracowników uznaje znaczenie walki z dyskryminacją we wszystkich jej postaciach, włącznie z potrzebą podjęcia właściwych działań na rzecz integracji społecznej i gospodarczej osób starszych i niepełnosprawnych.

[...]

(8) Wytyczne dotyczące zatrudnienia na rok 2000, przyjęte przez Radę Europejską w Helsinkach w dniach 10 i 11 grudnia 1999 r., podkreślają potrzebę wspierania rynku pracy przychylnego dla integracji społecznej, formułując spójną całość polityk, których celem jest walka z dyskryminacją takich grup jak osoby niepełnosprawne. Wytyczne te podkreślają również potrzebę zwrócenia szczególnej uwagi na pomoc starszym pracownikom, aby mogli oni w szerszym zakresie uczestniczyć w życiu zawodowym".

7 Zgodnie z motywami 16 i 17 tej dyrektywy:

„(16) Przyjęcie środków uwzględniających potrzeby osób niepełnosprawnych w miejscu pracy jest najważniejszym czynnikiem w walce z dyskryminacją osób niepełnosprawnych.

(17) Niniejsza dyrektywa nie nakłada wymogu, aby osoba, która nie jest kompetentna ani zdolna bądź dyspozycyjna do wykonywania najważniejszych czynności na danym stanowisku lub kontynuacji danego kształcenia, była przyjmowana do pracy, awansowana lub dalej zatrudniana, nie naruszając obowiązku wprowadzania racjonalnych zmian uwzględniających potrzeby osób niepełnosprawnych".

8 Motywy 20 i 21 wspomnianej dyrektywy brzmią następująco:

„(20) Należy przyjąć właściwe, to znaczy skuteczne i praktyczne środki w celu przystosowania miejsca pracy z uwzględnieniem niepełnosprawności, na przykład przystosowując pomieszczenia lub wyposażenie, czas [rytm] pracy, podział zadań lub ofertę kształceniową lub integracyjną.

(21) Aby ustalić, czy przyjęcie danych środków wiąże się z koniecznością nieproporcjonalnie wysokiego obciążenia, należy uwzględnić w szczególności związane z tym koszty finansowe i inne, rozmiar organizacji lub środki finansowe, którymi dysponują przedsiębiorstwa, oraz możliwość pozyskania środków publicznych lub jakiejkolwiek innej pomocy".

9 Zgodnie z art. 1 dyrektywy 2000/78 jej „[c]elem [...] jest wyznaczenie ogólnych ram dla walki z dyskryminacją ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w odniesieniu do zatrudnienia i pracy, w celu realizacji w państwach członkowskich zasady równego traktowania”.

10 Artykuł 2 tej dyrektywy, zatytułowany „Pojęcie dyskryminacji”, przewiduje:

„1. Do celów niniejszej dyrektywy »zasada równego traktowania« oznacza brak jakichkolwiek form bezpośredniej lub pośredniej dyskryminacji z przyczyn określonych w art. 1.

2. Do celów ust. 1:

a) dyskryminacja bezpośrednia występuje w przypadku, gdy osobę traktuje się mniej przychylnie niż traktuje się, traktowano lub traktowano by inną osobę w porównywalnej sytuacji, z jakiejkolwiek przyczyny wymienionej w art. 1;

b) dyskryminacja pośrednia występuje w przypadku, gdy przepis, kryterium lub pozornie neutralna praktyka może [mogą] doprowadzić do szczególnej niekorzystnej sytuacji dla osób danej religii lub przekonań, niepełnosprawności, wieku lub orientacji seksualnej, w stosunku do innych osób, chyba że:

i) taki przepis, kryterium lub praktyka jest [są] obiektywnie uzasadniona [uzasadnione] zgodnym z prawem celem, a środki mające służyć osiągnięciu tego celu są właściwe i konieczne; lub

ii) jeżeli w przypadku osób w określony sposób niepełnosprawnych pracodawca lub każda osoba, do której odnosi się niniejsza dyrektywa, jest zobowiązany [są zobowiązani], na mocy przepisów krajowych, podejmować właściwe środki zgodnie z zasadami określonymi w art. 5 w celu zlikwidowania niedogodności spowodowanych tym przepisem, kryterium lub praktyką.

[...]”.

11 Artykuł 5 wspomnianej dyrektywy, zatytułowany „Racjonalne usprawnienia dla osób niepełnosprawnych”, brzmi następująco:

„W celu zagwarantowania przestrzegania zasady równego traktowania osób niepełnosprawnych przewiduje się wprowadzenie racjonalnych usprawnień. Oznacza to, że pracodawca podejmuje właściwe środki, z uwzględnieniem potrzeb konkretnej sytuacji, aby umożliwić osobie niepełnosprawnej dostęp do pracy, wykonywanie jej lub rozwój zawodowy bądź kształcenie, o ile środki te nie nakładają na pracodawcę nieproporcjonalnie wysokich obciążeń. Obciążenia te nie są nieproporcjonalne, jeżeli są w wystarczającym stopniu rekompensowane ze środków istniejących w ramach polityki prowadzonej przez dane państwo członkowskie na rzecz osób niepełnosprawnych”.

Prawo duńskie

12 Paragraf 2 lov om retsforholdet mellem arbejdsgivere og funktionærer (ustawy o stosunkach prawnych między pracodawcami a pracownikami, zwanej dalej „FL”) stanowi:

„1. Umowa o pracę między pracodawcą a pracownikiem może zostać rozwiązana tylko z zachowaniem okresu wypowiedzenia na zasadach opisanych poniżej. To samo odnosi się do rozwiązania umowy o pracę na czas określony przed upływem terminu, na który została zawarta.

2. Rozwiązanie umowy o pracę przez pracodawcę następuje z zachowaniem okresu wypowiedzenia wynoszącego co najmniej:

1) jeden miesiąc i kończącego się ostatniego dnia miesiąca, jeżeli pracownik był zatrudniony krócej niż 6 miesięcy;

2) trzy miesiące i kończącego się ostatniego dnia miesiąca, jeżeli pracownik był zatrudniony co najmniej 6 miesięcy.

3. Okres wypowiedzenia przewidziany w ust. 2 pkt 2) przedłuża się o jeden miesiąc za każde trzy lata zatrudnienia, maksymalnie do sześciu miesięcy".

13 Paragraf 5 FL, który gwarantuje pracownikowi między innymi prawo do pełnego wynagrodzenia w wypadku choroby, stanowi:

„1. Jeżeli pracownik jest niezdolny do wykonywania pracy z powodu choroby, wynikająca z tego nieobecność w pracy jest usprawiedliwiona, chyba że w okresie zatrudnienia spowodował on tę chorobę świadomie lub wskutek rażącego niedbalstwa lub przy podjęciu zatrudnienia podstępnie zataił, że cierpi na daną chorobę.

2. Umowa o pracę może jednak przewidywać, że w danym stosunku pracy pracownik może zostać zwolniony za jednomiesięcznym wypowiedzeniem upływającym z końcem miesiąca, jeżeli w okresie 12 ostatnich miesięcy pracownik był nieobecny z powodu choroby z zachowaniem prawa do wynagrodzenia przez 120 dni. Ważność wypowiedzenia jest uzależniona od dokonania go bezzwłocznie z upływem 120 dni choroby, kiedy pracownik jest nadal chory, przy czym powrót pracownika do pracy po dokonaniu wypowiedzenia nie narusza jego ważności".

14 Dyrektywa 2000/78 została transponowana do prawa krajowego na mocy lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m. v. (ustawy nr 1417 o zmianie ustawy o zakazie dyskryminacji na rynku pracy) z dnia 22 grudnia 2004 r. (zwanej dalej „ustawą antydyskryminacyjną"). Paragraf 2 ustawy antydyskryminacyjnej przewiduje:

„Pracodawca podejmuje odpowiednie środki w zależności od potrzeb w konkretnej sytuacji, aby umożliwić osobie niepełnosprawnej dostęp do pracy, jej wykonywanie, rozwój zawodowy i kształcenie, o ile środki te nie nakładają na pracodawcę nieproporcjonalnie wysokiego obciążenia. Obciążenia tego nie można uważać za nieproporcjonalne, jeżeli jest odpowiednio rekompensowane ze środków publicznych".

Spory w postępowaniach głównych i pytania prejudycjalne

15 W 1996 r. J. Ring została zatrudniona przez spółkę budownictwa społecznego Boligorganisationen Samvirke w Lyngby, a następnie od dnia 17 lipca 2000 r. była zatrudniona w DAB, która przejęła tę spółkę. W okresie od dnia 6 czerwca 2005 r. do dnia 24 listopada 2005 r. J. Ring była wielokrotnie nieobecna w pracy. Przedstawione przez nią zaświadczenia lekarskie wskazywały w szczególności, że cierpiała ona na chroniczne bóle kręgosłupa w odcinku lędźwiowym, które nie podlegały leczeniu. Nie można też było sformułować żadnych prognoz co do możliwości ponownego podjęcia działalności zawodowej w pełnym wymiarze czasu pracy.

16 Pismem DAB z dnia 24 listopada 2005 r. J. Ring została poinformowana o wypowiedzeniu zgodnie z § 5 ust. 2 FL.

17 Z udostępnionych Trybunałowi akt sprawy wynika, że przestrzeń pracy została zagospodarowana po tym zwolnieniu. DAB przedstawiła kosztorys z dnia 3 września 2008 r. na łączną kwotę „ok. 305 000 DKK (+ marża)" dotyczący prac przy urządzaniu „okienka recepcyjnego z kilkoma stanowiskami położonymi za nim" oraz „wymiany wykładziny" i zamontowania „biurek z regulowaną wysokością blatu".

18 W dniu 1 lutego 2006 r. J. Ring podjęła pracę na stanowisku recepcjonistki w spółce ADRA Danmark w wymiarze 20 godzin tygodniowo. Strony w postępowaniu głównym w sprawie C-335/11 zgadzają się co do tego, że jej stanowisko pracy niczym się nie wyróżnia i jest wyposażone między innymi w stół z regulowaną wysokością blatu.

19 Z kolei L. Skouboe Werge została zatrudniona przez Pro Display w 1998 r. na stanowisku sekretarki/asystentki dyrekcji. W dniu 19 grudnia 2003 r. doznała w wypadku drogowym urazu odcinka szyjnego kręgosłupa. W następstwie tego zdarzenia przez około trzy tygodnie pozostawała na zwolnieniu lekarskim. W dalszym okresie jej nieobecności spowodowane chorobą były jedynie sporadyczne. W dniu 4 listopada 2004 r. dyrektor księgowości Pro Display poinformowała personel w drodze wiadomości elektronicznej, że za jej zgodą L. Skouboe Werge pozostanie przez okres czterech tygodni na częściowym zwolnieniu chorobowym i w tym czasie będzie pracowała w wymiarze ok. czterech godzin dziennie. Pro Display otrzymywała refundację wynagrodzenia L. Skouboe Werge odpowiadającą dziennym zasiłkom chorobowym.

20 Z dniem 10 stycznia 2005 r. (poniedziałek) L. Skouboe Werge przeszła na zwolnienie chorobowe w pełnym wymiarze czasu. Wiadomością elektroniczną z dnia 14 stycznia 2005 r. powiadomiła ona dyrektora administracyjnego, że nadal czuje się bardzo źle i że w tym samym dniu ma wizytę u lekarza specjalisty. W orzeczeniu lekarskim sporządzonym w dniu 17 stycznia 2005 r. stwierdzono, że w tym dniu L. Skouboe Werge stawiła się na wizytę lekarską i oświadczyła, iż była niezdolna do pracy od dnia 10 stycznia 2005 r. Lekarz uznał, że niezdolność do pracy potrwa jeszcze miesiąc. W orzeczeniu lekarskim z dnia 23 lutego 2005 r. ten sam lekarz uznał, że nie jest w stanie wypowiedzieć się co do czasu trwania dalszej niezdolności.

21 Pismem z dnia 21 kwietnia 2005 r. L. Skouboe Werge została poinformowana o swoim zwolnieniu za wypowiedzeniem, które upływało z dniem 31 maja 2005 r.

22 Lone Skouboe Werge poddała się procedurze oszacowania zdolności do pracy przez urząd pracy Randers, który ocenił jej zdolność do pracy na około 8 godzin tygodniowo w wolnym tempie. W czerwcu 2006 r. przyznano jej inwalidztwo z powodu niezdolności do pracy. W 2007 r. Arbejdsskadestyrelsen (krajowy urząd do spraw wypadków przy pracy i chorób zawodowych) ustalił stopień inwalidztwa L. Skouboe Werge na poziomie 10% i stopień utraty zdolności do pracy zarobkowej na poziomie 50%, zmieniony następnie na 65%.

23 Działając w imieniu i na rachunek dwóch powódek w postępowaniu głównym, HK, związek zawodowy, wystąpił do Sø- og Handelsretten przeciwko ich pracodawcom z powództwem o zasądzenie odszkodowania na podstawie ustawy antydyskryminacyjnej. HK twierdzi, że te dwie pracownice były dotknięte niepełnosprawnością, a ich pracodawcy w wykonaniu obowiązku dokonania usprawnień przewidzianego w art. 5 dyrektywy 2000/78 byli zobowiązani zaproponować im zmniejszenie wymiaru czasu pracy. HK utrzymuje również, że § 5 ust. 2 FL nie może znajdować zastosowania wobec tych dwóch pracownic, ponieważ przebywały one na zwolnieniu lekarskim w związku ze swoją niepełnosprawnością.

24 W obu sprawach w postępowaniach głównych pracodawcy nie zgadzali się z tym, by stan zdrowia powódek w postępowaniach głównych wchodził w zakres pojęcia niepełnosprawności w rozumieniu dyrektywy 2000/78, ponieważ ich niezdolność ograniczała się do niemożności wykonywania pracy w pełnym wymiarze czasu pracy. W ich przekonaniu zmniejszenie wymiaru czasu pracy nie należy do środków, o których mowa w art. 5 tej dyrektywy. Wreszcie pracodawcy podnoszą, że zwolnienie niepełnosprawnego pracownika na podstawie § 5 ust. 2 FL w przypadku przebywania na zwolnieniu lekarskim w związku z niepełnosprawnością nie stanowi dyskryminacji i nie jest sprzeczne ze wspomnianą dyrektywą.

25 Sąd odsyłający wskazuje, że w pkt 45 wyroku z dnia 11 lipca 2006 r. w sprawie C-13/05 Chacón Navas, Zb.Orz. s. I-6467, Trybunał potwierdził, iż aby ograniczenie zdolności uczestnictwa w życiu zawodowym można było objąć pojęciem niepełnosprawności, musi istnieć prawdopodobieństwo, że jest ono długoterminowe.

26 W tych okolicznościach Sø- og Handelsretten postanowił zawiesić postępowanie i zwrócić się do Trybunału z następującymi pytaniami prejudycjalnymi, które w obu sprawach, C-335/11 i C-337/11, brzmią identycznie:

„1) a) Czy każda osoba, która z powodu urazów fizycznych, umysłowych lub psychicznych nie może świadczyć pracy lub może świadczyć ją jedynie

w ograniczonym zakresie w okresie, który pod względem długości spełnia wymogi określone w pkt 45 [ww. wyroku w sprawie Chacón Navas], jest objęta pojęciem niepełnosprawności w rozumieniu dyrektywy 2000/78?

b) Czy stan patologiczny spowodowany chorobą zdiagnozowaną medycznie jako nieuleczalna może być objęty pojęciem niepełnosprawności w rozumieniu tej dyrektywy?

c) Czy stan patologiczny spowodowany zdiagnozowaną medycznie chorobą przejściową może być objęty pojęciem niepełnosprawności w rozumieniu dyrektywy?

2) Czy trwałe ograniczenie zdolności funkcjonalnej, które nie pociąga za sobą potrzeby specjalnych środków pomocniczych lub im podobnych, a oznacza jedynie, że dana osoba nie jest zdolna do pracy w pełnym wymiarze czasu pracy, należy uznać za niepełnosprawność w rozumieniu dyrektywy 2000/78?

3) Czy zmniejszenie wymiaru czasu pracy należy do środków objętych art. 5 dyrektywy 2000/78?

4) Czy dyrektywa 2000/78 stoi na przeszkodzie stosowaniu przepisu krajowego, zgodnie z którym pracodawca jest uprawniony do rozwiązania stosunku pracy ze skróconym okresem wypowiedzenia, jeżeli w okresie 12 kolejnych miesięcy pracownik pobierał wynagrodzenie w okresach choroby przez ogółem 120 dni, w wypadku gdy pracownika należy uznać za osobę niepełnosprawną w rozumieniu dyrektywy, o ile:

a) nieobecność była spowodowana niepełnosprawnością

lub

b) nieobecność była spowodowana faktem, że pracodawca nie podjął w konkretnej sytuacji wymaganych środków, aby umożliwić osobie niepełnosprawnej wykonywanie pracy?”.

27 Na mocy postanowienia prezesa Trybunału z dnia 4 sierpnia 2011 r. sprawy C-335/11 i C-337/11 zostały połączone do celów pisemnego i ustnego etapu postępowania, jak również do celów wydania wyroku.

W przedmiocie pytań prejudycjalnych

Uwagi wstępne

28 Na wstępie należy przypomnieć, że na podstawie art. 216 ust. 2 TFUE, jeżeli umowy międzynarodowe są zawarte przez Unię Europejską, takie umowy są wiążące dla instytucji Unii i w konsekwencji mają one pierwszeństwo przed aktami Unii (wyrok z dnia 21 grudnia 2011 r. w sprawie C-366/10 Air Transport Association of America i in., dotychczas nieopublikowany w Zbiorze, pkt 50 i przytoczone tam orzecznictwo).

29 Warto również przypomnieć, że pierwszeństwo umów międzynarodowych zawartych przez Unię nad przepisami prawa wtórnego wymaga, by te ostatnie interpretowane były w miarę możliwości zgodnie z tymi umowami (wyrok z dnia 22 listopada 2012 r. w sprawach połączonych C-320/11, C-330/11, C-382/11 i C-383/11 Didżitałnet i in., dotychczas nieopublikowany w Zbiorze, pkt 39 i przytoczone tam orzecznictwo).

30 Z decyzji 2010/48 wynika, że Unia zatwierdziła konwencję NZ. W konsekwencji od momentu wejścia w życie powyższej decyzji postanowienia tej konwencji stanowią integralną część prawnego porządku Unii (zob. podobnie wyrok z dnia 30 kwietnia 1974 r. w sprawie 181/73 Haegeman, Rec. s. 449, pkt 5).

31 Ponadto z dodatku do załącznika II do wspomnianej decyzji wynika, że w kontekście dziedzin samodzielnego życia, włączenia społecznego, pracy i zatrudnienia dyrektywa 2000/78 jest wymieniana wśród aktów Unii, które regulują zagadnienia objęte konwencją NZ.

32 Wynika stąd, że dyrektywę 2000/78 należy interpretować w miarę możliwości zgodnie ze wspomnianą konwencją.

33 To właśnie w świetle powyższych rozważań należy udzielić odpowiedzi na pytania przedłożone Trybunałowi przez sąd odsyłający.

W przedmiocie pytań pierwszego i drugiego

34 W pytaniach pierwszym i drugim, które należy rozpatrzyć łącznie, sąd odsyłający występuje zasadniczo o rozstrzygnięcie, czy pojęcie niepełnosprawności, o którym mowa w dyrektywie 2000/78, należy interpretować w ten sposób, że obejmuje ono także stan zdrowia osoby, która z powodu urazów fizycznych, umysłowych lub psychicznych nie może świadczyć pracy lub może świadczyć ją jedynie w ograniczonym zakresie w okresie, który będzie prawdopodobnie długotrwały, lub stale. Sąd ten zwraca się także z pytaniem, czy pojęcie to należy interpretować w ten sposób, że może nim być objęty stan patologiczny spowodowany chorobą zdiagnozowaną medycznie jako nieuleczalna lub stan patologiczny spowodowany zdiagnozowaną medycznie chorobą przejściową, oraz czy rozstrzygający dla uznania stanu zdrowia danej osoby za niepełnosprawność jest charakter środków, które pracodawca jest zobowiązany podjąć.

35 Na wstępie należy zauważyć, że jak wynika z art. 1 dyrektywy 2000/78, jej celem jest wyznaczenie ogólnych ram dla walki w zakresie zatrudnienia i pracy z dyskryminacją z przyczyn wymienionych w tym przepisie, wśród których znajduje się także niepełnosprawność (zob. ww. wyrok w sprawie Chacón Navas, pkt 41). Zgodnie ze swym art. 3 ust. 1 lit. c) dyrektywa ta ma zastosowanie, w granicach kompetencji Unii Europejskiej, do wszystkich osób w zakresie między innymi warunków zwalniania.

36 Należy przypomnieć, że pojęcie niepełnosprawności nie zostało zdefiniowane w samej dyrektywie 2000/78. Jednakże w pkt 43 ww. wyroku w sprawie Chacón Navas Trybunał orzekł, że należy je rozumieć jako ograniczenie wynikające konkretnie z osłabienia funkcji fizycznych, umysłowych lub psychicznych, które stanowi przeszkodę dla danej osoby w uczestnictwie w życiu zawodowym.

37 Z kolei w konwencji NZ, ratyfikowanej przez Unię decyzją z dnia 26 listopada 2009 r., czyli po ogłoszeniu ww. wyroku w sprawie Chacón Navas, uznano w pkt e) preambuły, że „niepełnosprawność jest pojęciem ewoluującym i że niepełnosprawność wynika z interakcji między osobami z dysfunkcjami a barierami wynikającymi z postaw ludzkich i środowiskowymi, które utrudniają tym osobom pełny i skuteczny udział w życiu społeczeństwa, na zasadzie równości z innymi osobami". W związku z tym art. 1 akapit drugi tej konwencji stanowi, że do osób niepełnosprawnych zalicza się te osoby, „które mają długotrwale naruszoną sprawność fizyczną, umysłową, intelektualną lub sensoryczną, co może, w oddziaływaniu z różnymi barierami, utrudniać im pełne i skuteczne uczestnictwo w życiu społecznym, na równych zasadach z innymi osobami".

38 W świetle rozważań zawartych w pkt 28–32 niniejszego wyroku niepełnosprawność należy rozumieć jako ograniczenie wynikające w szczególności z osłabienia funkcji fizycznych, umysłowych lub psychicznych, które w oddziaływaniu z różnymi barierami może utrudniać danej osobie pełne i skuteczne uczestnictwo w życiu społecznym na równych zasadach z innymi pracownikami.

39 Dodatkowo z art. 1 akapit drugi konwencji NZ wynika, że sprawność fizyczna, umysłowa, intelektualna lub sensoryczna musi być naruszona w sposób „długotrwały".

40 Należy dodać jeszcze, że – na co wskazała rzecznik generalna w pkt 32 opinii – nie wydaje się, by dyrektywa 2000/78 miała obejmować jedynie niepełnosprawność wrodzoną lub będącą następstwem wypadków, wyłączając tę spowodowaną chorobą. Zróżnicowanie

zakresu stosowania dyrektywy w zależności od przyczyny niepełnosprawności byłoby bowiem sprzeczne z celem tej dyrektywy, którym jest urzeczywistnienie równego traktowania.

41 W rezultacie należy stwierdzić, że jeżeli uleczalna lub nieuleczalna choroba powoduje ograniczenie wynikające w szczególności z osłabienia funkcji fizycznych, umysłowych lub psychicznych, które w oddziaływaniu z różnymi barierami może utrudniać danej osobie pełne i skuteczne uczestnictwo w życiu społecznym na równych zasadach z innymi pracownikami, i jeżeli ograniczenie to ma charakter długotrwały, to taka choroba może mieścić się w zakresie pojęcia niepełnosprawności w rozumieniu dyrektywy 2000/78.

42 Z kolei choroba, która nie prowadzi do takiego ograniczenia, nie jest objęta pojęciem niepełnosprawności w rozumieniu dyrektywy 2000/78. Choroby jako takiej nie można bowiem uznać za przyczynę dołączającą się do tych, ze względu na które dyrektywa 2000/78 zakazuje wszelkiej dyskryminacji (ww. wyrok w sprawie Chacón Navas, pkt 57).

43 Okoliczność, że dana osoba może świadczyć pracę wyłącznie w ograniczonym zakresie, nie stanowi przeszkody dla tego, by stan zdrowia tej osoby został objęty pojęciem niepełnosprawności. Wbrew temu, co podnoszą DAB i Pro Display, niepełnosprawność niekoniecznie musi oznaczać całkowite wyłączenie z wykonywania pracy lub z życia zawodowego.

44 W tym względzie należy stwierdzić, że wynikające z pkt 38 niniejszego wyroku pojęcie niepełnosprawności musi być rozumiane jako przeszkoda w wykonywaniu działalności zawodowej, a nie – jak podnoszą DAB i Pro Display – jako uniemożliwienie wykonywania takiej działalności. Stan zdrowia osoby niepełnosprawnej pozwalający na wykonywanie pracy, choćby w niepełnym wymiarze czasu pracy, może zatem mieścić się w definicji pojęcia niepełnosprawności. Proponowana przez DAB i Pro Display interpretacja byłaby ponadto nie do pogodzenia z celem dyrektywy 2000/78, która dąży w szczególności do tego, by osoby niepełnosprawne miały dostęp do zatrudnienia i mogły świadczyć pracę.

45 Ponadto stwierdzenie istnienia niepełnosprawności nie zależy od charakteru środków usprawniających takich jak wykorzystanie specjalnego sprzętu. W tym względzie należy uznać, że definicja niepełnosprawności w rozumieniu art. 1 dyrektywy 2000/78 poprzedza określenie i ocenę właściwych środków usprawniających, o których mowa w art. 5 tej dyrektywy.

46 Zgodnie z motywem 16 dyrektywy 2000/78 tego rodzaju środki mają na celu uwzględnienie potrzeb osób niepełnosprawnych. Są one zatem konsekwencją, a nie wyróżnikiem niepełnosprawności. Jednocześnie środki lub usprawnienia, o których mowa w motywie 20 tej dyrektywy, pozwalają na wywiązanie się z obowiązku, który wynika z art. 5 wspomnianej dyrektywy, jednak podlegają wprowadzeniu wyłącznie w przypadku występowania niepełnosprawności.

47 Z powyższych rozważań wynika, że odpowiedź na pytania pierwsze i drugie winna brzmieć: pojęcie niepełnosprawności, o którym mowa w dyrektywie 2000/78, należy interpretować w ten sposób, że obejmuje ono stan patologiczny spowodowany chorobą zdiagnozowaną medycznie jako uleczalna lub nieuleczalna, w przypadku gdy choroba ta powoduje ograniczenie wynikające w szczególności z osłabienia funkcji fizycznych, umysłowych lub psychicznych, które w oddziaływaniu z różnymi barierami może utrudniać danej osobie pełne i skuteczne uczestnictwo w życiu społecznym na równych zasadach z innymi pracownikami, i gdy ograniczenie to ma charakter długotrwały. Charakter środków, które winien podjąć pracodawca, nie rozstrzyga o tym, czy stan zdrowia danej osoby może zostać objęty omawianym pojęciem.

W przedmiocie pytania trzeciego

48 W pytaniu trzecim sąd odsyłający dąży zasadniczo do ustalenia, czy art. 5 dyrektywy 2000/78 należy interpretować w ten sposób, że zmniejszenie czasu pracy może stanowić jeden ze środków usprawniających, o którym mowa w tym przepisie.

49 Jak stanowi powyższy przepis, pracodawca jest zobowiązany podjąć właściwe środki, zwłaszcza aby umożliwić osobie niepełnosprawnej dostęp do zatrudnienia, wykonywanie pracy lub rozwój zawodowy bądź kształcenie. Motyw 20 wspomnianej dyrektywy zawiera przykładowy katalog takich środków, które mogą mieć charakter fizyczny, organizacyjny lub edukacyjny.

50 Należy zauważyć, że ani art. 5 dyrektywy 2000/78, ani motyw 20 tego aktu nie wymieniają zmniejszenia wymiaru czasu pracy. Aby ustalić, czy przystosowanie czasu pracy może jednak zostać objęte tym pojęciem, należy dokonać wykładni pojęcia rytmu pracy, które występuje we wspomnianym motywie.

51 DAB i Pro Display podnoszą w tym względzie, że wspomniane pojęcie odnosi się do elementów takich jak organizacja rytmu i tempa pracy, na przykład w ramach procesu produkcyjnego, a także przerw w pracy, by w miarę możliwości zmniejszyć obciążenie niepełnosprawnego pracownika.

52 Z motywu 20 ani z żadnego innego przepisu dyrektywy 2000/78 nie wynika jednak, by intencją ustawodawcy Unii było ograniczenie pojęcia rytmu pracy tylko do takich elementów i wykluczenia z tego pojęcia przystosowania godzin pracy, a w szczególności możliwości, by osoby niepełnosprawne, które nie są zdolne do wykonywania pracy w pełnym wymiarze czasu pracy, pracowały w niepełnym wymiarze czasu pracy.

53 Zgodnie z art. 2 akapit czwarty konwencji NZ „racjonalne usprawnienie" oznacza „konieczne i odpowiednie zmiany i dostosowania, nienakładające nieproporcjonalnego lub nadmiernego obciążenia, jeśli jest to potrzebne w konkretnym przypadku w celu zapewnienia osobom niepełnosprawnym możliwości korzystania z wszelkich praw człowieka i podstawowych wolności oraz ich wykonywania na zasadzie równości z innymi osobami". Z powyższego wynika, że wspomniane postanowienie zaleca szeroką wykładnię pojęcia racjonalnego usprawnienia.

54 Natomiast w kontekście dyrektywy 2000/78 pojęcie to musi być rozumiane jako usunięcie wszelkich barier, które mogą utrudniać osobom niepełnosprawnym pełne i skuteczne uczestnictwo w życiu społecznym na równych zasadach z innymi pracownikami.

55 Wobec tego, że z jednej strony motyw 20 dyrektywy 2000/78 i art. 2 akapit czwarty konwencji NZ odnoszą się do środków nie tylko materialnych, lecz również organizacyjnych, zaś z drugiej strony termin „rytm" pracy należy rozumieć jako tempo lub styl, w jakim wykonuje się pracę, nie można wykluczyć, że zmniejszenie wymiaru czasu pracy może stanowić jeden ze środków usprawniających, o których mowa w art. 5 tej dyrektywy.

56 Należy ponadto zauważyć, że zawarty w motywie 20 dyrektywy 2000/78 katalog właściwych środków służących przystosowaniu miejsca pracy w zależności od niepełnosprawności nie jest wyczerpujący, wobec czego zmniejszenie wymiaru czasu pracy, nawet jeżeli nie mieści się w pojęciu rytmu pracy, może zostać uznane za środek usprawniający, o którym mowa w art. 5 tej dyrektywy, o ile owo zmniejszenie wymiaru czasu pracy pozwala pracownikowi na dalsze wykonywanie pracy, zgodnie z celem przyświecającym temu przepisowi.

57 Należy jednak przypomnieć, że zgodnie ze swoim motywem 17 dyrektywa 2000/78 nie nakłada wymogu, aby osoba, która nie jest kompetentna ani zdolna bądź dyspozycyjna do wykonywania najważniejszych czynności na danym stanowisku lub kontynuacji danego kształcenia, była przyjmowana do pracy, awansowana lub dalej zatrudniana, nie naruszając obowiązku wprowadzania racjonalnych zmian uwzględniających potrzeby osób niepełnosprawnych, do których to zmian należy ewentualne zmniejszenie wymiaru czasu pracy

58 Dodatkowo zauważenia wymaga, że zgodnie z art. 5 wspomnianej dyrektywy usprawnienia, których mogą domagać się osoby niepełnosprawne, muszą być racjonalne w tym znaczeniu, że nie mogą stanowić nieproporcjonalnie wysokiego obciążenia dla pracodawcy.

59 W postępowaniach głównych sąd krajowy musi zatem ocenić, czy środek usprawniający w postaci zmniejszenia wymiaru czasu pracy nie stanowi nieproporcjonalnie wysokiego obciążenia dla pracodawców.

60 Jak wynika z motywu 21 dyrektywy 2000/78, w tym zakresie należy uwzględnić w szczególności związane z wprowadzeniem danego środka koszty finansowe i inne, rozmiar przedsiębiorstwa i środki finansowe, którymi ono dysponuje, a także możliwość pozyskania środków publicznych lub jakiejkolwiek innej pomocy.

61 Należy przypomnieć, że w ramach postępowania, o którym mowa w art. 267 TFUE, a u którego podstaw leży jasny podział ról między sądami krajowymi a Trybunałem, wszelka ocena okoliczności faktycznych leży w kompetencjach sądu krajowego. Jednakże w celu udzielenia sądowi krajowemu użytecznej odpowiedzi Trybunał może w duchu współpracy z sądami krajowymi dostarczyć temu sądowi wszelkich wskazówek, które uzna za niezbędne (wyrok z dnia 15 kwietnia 2010 r. w sprawie C-433/05 Sandström, Zb.Orz. s. I-2885, pkt 35 i przytoczone tam orzecznictwo).

62 Istotnym elementem w ramach tej oceny może być powoływana przez sąd odsyłający okoliczność, że natychmiast po zwolnieniu J. Ring DAB opublikowała ogłoszenie o pracę na stanowisku pracownika biurowego w niepełnym wymiarze czasu pracy, a mianowicie 22 godzin tygodniowo, w swoim oddziale okręgowym w Lyngby. Przedłożone Trybunałowi akta nie zawierają informacji pozwalających wywieść, że J. Ring nie była w stanie objąć tego stanowiska w niepełnym wymiarze czasu pracy, lub zrozumieć powody uzasadniające brak propozycji jego objęcia. Ponadto sąd odsyłający wskazał, że J. Ring podjęła wkrótce po swoim zwolnieniu nową pracę jako recepcjonistka w innej spółce i że rzeczywisty wymiar jej czasu pracy wynosił 20 godzin tygodniowo.

63 Poza tym, jak zauważył rząd duński na rozprawie, prawo duńskie przewiduje możliwość przyznania przedsiębiorstwom pomocy publicznej na usprawnienia mające na celu ułatwienie osobom niepełnosprawnym dostępu do rynku pracy, a zwłaszcza inicjatywy, których celem jest zachęcenie pracodawców do zatrudniania i zachowywania na stanowiskach osób dotkniętych niepełnosprawnością.

64 Zważywszy na powyższe, odpowiedź na pytanie trzecie winna brzmieć: art. 5 dyrektywy 2000/78 należy interpretować w ten sposób, że zmniejszenie wymiaru czasu pracy może stanowić jeden ze środków usprawniających, o których mowa w tym przepisie. Do sądu krajowego należy dokonanie oceny, czy w okolicznościach sprawy w postępowaniu głównym środek usprawniający w postaci zmniejszenia wymiaru czasu pracy nie stanowi nieproporcjonalnie wysokiego obciążenia dla pracodawcy.

W przedmiocie pytania czwartego lit. b)

65 W pytaniu czwartym lit. b) sąd odsyłający dąży zasadniczo do ustalenia, czy dyrektywę 2000/78 należy interpretować w ten sposób, że stoi ona na przeszkodzie stosowaniu przepisu krajowego, zgodnie z którym pracodawca jest uprawniony do rozwiązania stosunku pracy ze skróconym okresem wypowiedzenia, jeżeli w okresie 12 kolejnych miesięcy niepełnosprawny pracownik pobierał wynagrodzenie w okresach choroby przez 120 dni, o ile nieobecność była spowodowana faktem, że pracodawca nie podjął właściwych środków w wykonaniu obowiązku wprowadzenia racjonalnych usprawnień przewidzianego w art. 5 tej dyrektywy.

66 Należy stwierdzić, że w świetle obowiązku wypływającego z art. 5 dyrektywy 2000/78 okoliczność, iż pracodawca nie podjął wspomnianych środków, może skutkować przypisaniem nieobecności niepełnosprawnego pracownika zaniechaniu pracodawcy, a nie niepełnosprawności tego pracownika.

67 W przypadku gdyby sąd krajowy ustalił, że nieobecność pracownic była w niniejszym wypadku wynikiem niewprowadzenia przez pracodawcę właściwych środków usprawniających, dyrektywa 2000/78 stałaby na przeszkodzie stosowaniu przepisu krajowego takiego jak ten rozpatrywany w postępowaniach głównych.

68 Zważywszy na powyższe, odpowiedź na pytanie czwarte lit. b) winna brzmieć: dyrektywę 2000/78 należy interpretować w ten sposób, że stoi ona na przeszkodzie stosowaniu przepisu krajowego, zgodnie z którym pracodawca jest uprawniony do rozwiązania stosunku pracy ze skróconym okresem wypowiedzenia, jeżeli w okresie 12 kolejnych miesięcy niepełnosprawny pracownik pobierał wynagrodzenie w okresach choroby przez 120 dni, o ile nieobecność była spowodowana faktem, że pracodawca nie podjął właściwych środków w wykonaniu obowiązku wprowadzenia racjonalnych usprawnień przewidzianego w art. 5 tej dyrektywy.

W przedmiocie pytania czwartego lit. a)

69 W pytaniu czwartym lit. a) sąd odsyłający zmierza zasadniczo do ustalenia, czy dyrektywę 2000/78 należy interpretować w ten sposób, że stoi ona na przeszkodzie stosowaniu przepisu krajowego, zgodnie z którym pracodawca jest uprawniony do rozwiązania stosunku pracy ze skróconym okresem wypowiedzenia, jeżeli w okresie 12 kolejnych miesięcy niepełnosprawny pracownik pobierał wynagrodzenie w okresach choroby przez 120 dni, o ile nieobecność była spowodowana niepełnosprawnością.

70 Należy stwierdzić, że w pytaniu tym sąd odsyłający ma na myśli sytuację, w której § 5 ust. 2 FL miałby zastosowanie do osoby niepełnosprawnej w następstwie nieobecności z powodu choroby spowodowanej w części lub w całości niepełnosprawnością, a nie faktem, że pracodawca nie podjął właściwych środków w wykonaniu obowiązku wprowadzenia racjonalnych usprawnień przewidzianego w art. 5 dyrektywy 2000/78.

71 Jak potwierdził Trybunał w pkt 48 ww. wyroku w sprawie Chacón Navas, niekorzystne traktowanie ze względu na niepełnosprawność jest sprzeczne z ochroną ustanowioną w dyrektywie 2000/78 tylko pod warunkiem, że stanowi dyskryminację w rozumieniu art. 2 ust. 1 tej dyrektywy. Niepełnosprawny pracownik objęty podmiotowym zakresem stosowania tej dyrektywy musi bowiem podlegać ochronie przed jakąkolwiek dyskryminacją w stosunku do pracownika, który nie jest niepełnosprawny. Nasuwa się zatem pytanie, czy rozpatrywany w postępowaniach głównych przepis krajowy może wprowadzać dyskryminację osób niepełnosprawnych.

72 Co się tyczy zagadnienia, czy przepis rozpatrywany w postępowaniach głównych wprowadza odmienne traktowanie ze względu na niepełnosprawność, należy zauważyć, że § 5 ust. 2 FL, który odnosi się do nieobecności z powodu choroby, znajduje zastosowanie w tym samym stopniu do osób niepełnosprawnych i do osób, które nie są niepełnosprawne i były nieobecne z tego powodu przez okres ponad 120 dni. W tych okolicznościach nie można uznać, że przepis ten ustanawia odmienne traktowanie bezpośrednio związane z niepełnosprawnością w rozumieniu art. 1 w związku z art. 2 ust. 2 lit. a) dyrektywy 2000/78.

73 W tym względzie warto wskazać, że osoba, z którą pracodawca rozwiązał umowę o pracę wyłącznie z powodu choroby, nie jest objęta ogólnymi ramami ustanowionymi w celu walki z dyskryminacją ze względu na niepełnosprawność przez dyrektywę 2000/78 (zob. analogicznie ww. wyrok w sprawie Chacón Navas, pkt 47).

74 Należy zatem stwierdzić, że § 5 ust. 2 FL nie wprowadza bezpośredniej dyskryminacji ze względu na niepełnosprawność, ponieważ nie opiera się na kryterium, które jest nierozerwalnie związane z niepełnosprawnością.

75 Co się tyczy kwestii, czy wspomniany przepis może wprowadzać różnicę w traktowaniu pośrednio związaną z niepełnosprawnością, należy zauważyć, że uwzględnienie dni nieobecności z powodu choroby spowodowanej niepełnosprawnością przy obliczaniu dni nieobecności z powodu choroby oznacza zrównanie choroby spowodowanej niepełnosprawnością z ogólnym pojęciem choroby. Tymczasem, jak wskazał Trybunał w pkt 44 ww. wyroku w sprawie Chacón Navas, proste zrównanie pojęcia niepełnosprawności z pojęciem choroby jest wykluczone.

76 Należy w tym względzie stwierdzić, że pracownik niepełnosprawny jest w większym stopniu wystawiony na ryzyko zastosowania wobec niego skróconego okresu wypowiedzenia przewidzianego w § 5 ust. 2 FL niż pracownik, który nie jest niepełnosprawny. Jak zauważyła

bowiem rzecznik generalna w pkt 67 opinii, w porównaniu z pracownikiem, który nie jest niepełnosprawny, pracownik niepełnosprawny ponosi dodatkowe ryzyko zapadnięcia na chorobę związaną z daną niepełnosprawnością. A zatem jest on wystawiony na zwiększone ryzyko kumulacji dni nieobecności z powodu choroby i osiągnięcia progu 120 dni, o którym mowa w § 5 ust. 2 FL. Okazuje się więc, że reguła 120 dni przewidziana w tym przepisie może stwarzać niekorzystną sytuację dla pracowników niepełnosprawnych i w ten sposób wprowadzać odmienne traktowanie pośrednio związane z niepełnosprawnością w rozumieniu art. 2 ust. 2 lit. b) dyrektywy 2000/78.

77 Zgodnie z art. 2 ust. 2 lit. b) ppkt i) wspomnianej dyrektywy należy zbadać, czy owa różnica w traktowaniu jest obiektywnie uzasadniona zgodnym z prawem celem, a środki mające służyć osiągnięciu tego celu są właściwe i nie wykraczają poza to, co konieczne do osiągnięcia celu zamierzonego przez ustawodawcę duńskiego.

78 Jeżeli chodzi o cel § 5 ust. 2 FL, rząd duński podkreśla, że jest nim zachęcenie pracodawców do zatrudniania i utrzymywania na stanowiskach pracowników wystawionych na szczególnie wysokie ryzyko powtarzających się nieobecności z powodu choroby poprzez pozwolenie im na późniejsze zwolnienie tych pracowników za skróconym okresem wypowiedzenia, jeżeli nieobecność okazuje się długotrwała. W zamian pracownicy ci mogą zachować swoje zatrudnienie w okresie choroby.

79 Rząd ten wskazuje, że wspomniany przepis godzi interesy pracodawcy i pracownika i wpisuje się w pełni w ogólną politykę regulacyjną duńskiego rynku pracy, który bazuje na połączeniu z jednej strony elastyczności i swobody umów, a z drugiej strony ochrony pracowników.

80 DAB i Pro Display wyjaśniają, że reguła 120 dni przewidziana w § 5 ust. 2 FL chroni chorych pracowników, ponieważ pracodawca, który przystał na stosowanie tej reguły, będzie zwykle skłonny dłużej odczekać, zanim przystąpi do zwolnienia takiego pracownika.

81 Warto przypomnieć, że państwa członkowskie dysponują szerokimi uprawnieniami dyskrecjonalnymi nie tylko przy wyborze określonego celu w obszarze polityki społecznej i zatrudnienia, lecz również przy ustalaniu środków mogących go realizować (zob. podobnie wyroki: z dnia 5 lipca 2012 r. w sprawie C-141/11 Hörnfeldt, dotychczas nieopublikowany w Zbiorze, pkt 32; z dnia 6 grudnia 2012 r. w sprawie C-152/11 Odar, dotychczas nieopublikowany w Zbiorze, pkt 47).

82 Trybunał orzekł już w przeszłości, że wspieranie zatrudniania stanowi niepodważalnie słuszny cel polityki społecznej czy też polityki zatrudnienia państw członkowskich i że ta ocena musi znaleźć zastosowanie do instrumentów polityki krajowego rynku pracy mających na celu zwiększenie szans pracowników określonych kategorii na włączenie się do aktywnego życia (zob. wyrok z dnia 16 października 2007 r. w sprawie C-411/05 Palacios de la Villa, Zb.Orz. s. I-8531, pkt 65). Jednocześnie działanie podjęte w celu wspierania elastyczności rynku pracy może zostać uznane za środek z zakresu polityki zatrudnienia.

83 W rezultacie cele tego rodzaju jak wskazane przez rząd duński mogą co do zasady zostać uznane za obiektywnie uzasadniające w ramach prawa krajowego, jak tego wymaga art. 2 ust. 2 lit. b) ppkt i) dyrektywy 2000/78, różnicę w traktowaniu ze względu na niepełnosprawność taką jak ta wynikająca z § 5 ust. 2 FL.

84 Należy jeszcze sprawdzić, czy środki wprowadzone celem realizacji tych celów są właściwe i konieczne, jak również czy nie wykraczają poza to, co jest wymagane do ich osiągnięcia.

85 Rząd duński twierdzi, że § 5 ust. 2 FL pozwala w najwłaściwszy sposób osiągnąć z jednej strony cel polegający na zatrudnieniu i utrzymaniu na stanowiskach osób, które – przynajmniej potencjalnie – mają ograniczoną zdolność do pracy, a także z drugiej strony nadrzędny cel elastycznego, opierającego się na swobodzie umów i pewnego rynku pracy.

86 DAB i Pro Display precyzują w tym względzie, że zgodnie z uregulowaniami duńskimi dotyczącymi zasiłków chorobowych pracodawca, który wypłaca pracownikowi w okresie przebywania przez niego na zwolnieniu lekarskim wynagrodzenie, ma prawo ubiegania się

o refundację dziennych zasiłków chorobowych przez władze gminne miejsca zamieszkania pracownika. Prawo do tych dziennych zasiłków chorobowych jest jednak ograniczone do 52 tygodni, a ich wysokość jest niższa od rzeczywiście pobieranego wynagrodzenia. W tych okolicznościach postanowienia § 5 ust. 2 FL zapewniają właściwą równowagę między sprzecznymi ze sobą, jeżeli chodzi o nieobecności z powodu choroby, interesami pracownika i pracodawcy.

87 Z uwagi na szerokie uprawnienia dyskrecjonalne przysługujące państwom członkowskim nie tylko przy wyborze określonego celu w obszarze polityki społecznej i zatrudnienia, lecz również przy ustalaniu środków mogących go realizować, nie wydaje się pozbawione sensu uznanie przez te państwa, że środek taki jak reguła 120 dni przewidziana w § 5 ust. 2 FL może być właściwy do osiągnięcia wskazanych powyżej celów.

88 Można bowiem przyjąć, że wspomniana reguła, przewidując prawo do zastosowania skróconego okresu wypowiedzenia celem zwolnienia pracowników nieobecnych z powodu choroby przez ponad 120 dni, wpływa na pracodawców zachęcająco w zakresie zatrudniania i utrzymywania pracowników na stanowiskach.

89 Aby rozstrzygnąć, czy reguła 120 dni przewidziana w § 5 ust. 2 FL wykracza poza działania, które są konieczne do zrealizowania zamierzonych celów, trzeba zbadać ten przepis w kontekście, w którym funkcjonuje, i wziąć pod uwagę niekorzystną sytuację, w jakiej może on ewentualnie stawiać osoby, których dotyczy (zob. podobnie ww. wyrok w sprawie Odar, pkt 65).

90 W tym względzie sąd odsyłający powinien rozważyć, czy ustawodawca duński, realizując słuszne cele wspierania zatrudniania osób chorych z jednej strony i zachowania właściwej równowagi między sprzecznymi ze sobą, jeżeli chodzi o nieobecności z powodu choroby, interesami pracodawcy i pracownika z drugiej strony, nie wziął pod uwagę istotnych okoliczności, które dotyczą w szczególności pracowników niepełnosprawnych.

91 W tym zakresie nie można pominąć zagrożeń, na które narażone są osoby niepełnosprawne, które generalnie mają większe trudności z powrotem do życia zawodowego niż osoby, które nie są niepełnosprawne, i mają specyficzne potrzeby związane z ochroną, jakiej wymaga ich stan (zob. podobnie ww. wyrok w sprawie Odar, pkt 68, 69).

92 Zważywszy na powyższe rozważania, odpowiedź na pytanie czwarte lit. a) powinna brzmieć: dyrektywę 2000/78 należy interpretować w ten sposób, że stoi ona na przeszkodzie stosowaniu przepisu krajowego, zgodnie z którym pracodawca jest uprawniony do rozwiązania stosunku pracy ze skróconym okresem wypowiedzenia, jeżeli w okresie 12 kolejnych miesięcy niepełnosprawny pracownik pobierał wynagrodzenie w okresach choroby przez 120 dni, o ile nieobecność była spowodowana niepełnosprawnością, chyba że przepis ten, służąc realizacji zgodnego z prawem celu, nie wykracza poza to, co jest konieczne do jego osiągnięcia, która to okoliczność podlega ocenie sądu odsyłającego.

W przedmiocie kosztów

93 Dla stron w postępowaniu głównym niniejsze postępowanie ma charakter incydentalny, dotyczy bowiem kwestii podniesionej przed sądem odsyłającym, do niego zatem należy rozstrzygnięcie o kosztach. Koszty poniesione w związku z przedstawieniem uwag Trybunałowi, inne niż koszty stron w postępowaniu głównym, nie podlegają zwrotowi.

Z powyższych względów Trybunał (druga izba) orzeka, co następuje:

1) Pojęcie niepełnosprawności, o którym mowa w dyrektywie Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy, należy interpretować w ten sposób, że obejmuje ono stan patologiczny spowodowany chorobą zdiagnozowaną medycznie jako uleczalna lub nieuleczalna, w przypadku gdy choroba ta powoduje ograniczenie wynikające

w szczególności z osłabienia funkcji fizycznych, umysłowych lub psychicznych, które w oddziaływaniu z różnymi barierami może utrudniać danej osobie pełne i skuteczne uczestnictwo w życiu społecznym na równych zasadach z innymi pracownikami, i gdy ograniczenie to ma charakter długotrwały. Charakter środków, które winien podjąć pracodawca, nie rozstrzyga o tym, czy stan zdrowia danej osoby może zostać objęty omawianym pojęciem.

2) **Artykuł 5 dyrektywy 2000/78 należy interpretować w ten sposób, że zmniejszenie wymiaru czasu pracy może stanowić jeden ze środków usprawniających, o których mowa w tym przepisie. Do sądu krajowego należy dokonanie oceny, czy w okolicznościach sprawy w postępowaniu głównym środek usprawniający w postaci zmniejszenia wymiaru czasu pracy nie stanowi nieproporcjonalnie wysokiego obciążenia dla pracodawcy.**

3) **Dyrektywę 2000/78 należy interpretować w ten sposób, że stoi ona na przeszkodzie stosowaniu przepisu krajowego, zgodnie z którym pracodawca jest uprawniony do rozwiązania stosunku pracy ze skróconym okresem wypowiedzenia, jeżeli w okresie 12 kolejnych miesięcy niepełnosprawny pracownik pobierał wynagrodzenie w okresach choroby przez 120 dni, o ile nieobecność była spowodowana faktem, że pracodawca nie podjął właściwych środków w wykonaniu obowiązku wprowadzenia racjonalnych usprawnień przewidzianego w art. 5 tej dyrektywy.**

4) **Dyrektywę 2000/78 należy interpretować w ten sposób, że stoi ona na przeszkodzie stosowaniu przepisu krajowego, zgodnie z którym pracodawca jest uprawniony do rozwiązania stosunku pracy ze skróconym okresem wypowiedzenia, jeżeli w okresie 12 kolejnych miesięcy niepełnosprawny pracownik pobierał wynagrodzenie w okresach choroby przez 120 dni, o ile nieobecność była spowodowana niepełnosprawnością, chyba że przepis ten, służąc realizacji zgodnego z prawem celu, nie wykracza poza to, co jest konieczne do jego osiągnięcia, która to okoliczność podlega ocenie sądu odsyłającego.**

Podpisy

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* Język postępowania: duński.

OPINIA RZECZNIKA GENERALNEGO
JULIANE KOKOTT
przedstawiona w dniu 6 grudnia 2012 r.(1)

Sprawy połączone C-335/11 i C-337/11

HK Danmark, działający w imieniu Jette Ring
przeciwko
Dansk Almennyttigt Boligselskab DAB
i
HK Danmark, działający w imieniu Lone Skouboe Werge
przeciwko
Pro Display A/S w upadłości

[wniosek o wydanie orzeczenia w trybie prejudycjalnym złożony przez Sø- og Handelsretten (Dania)]

Równe traktowanie w zakresie zatrudnienia i pracy – Dyrektywa 2000/78/WE – Zakaz dyskryminacji ze względu na niepełnosprawność – Pojęcie niepełnosprawności – Rozgraniczenie między chorobą a niepełnosprawnością – Racjonalne usprawnienia dla osób niepełnosprawnych – Dyskryminacja pośrednia – Uzasadnienie

I – Wstęp

1. Kiedy mamy do czynienia z niepełnosprawnością w rozumieniu dyrektywy 2000/78/WE ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy(2) i jak należy rozgraniczyć pojęcie niepełnosprawności od pojęcia choroby? Kwestia ta jest istotą niniejszego pytania prejudycjalnego. Tym samym zwrócono się do Trybunału o sprecyzowanie definicji pojęcia niepełnosprawności wypracowanej w sprawie Chacón Navas(3).

2. Przedmiotem niniejszej sprawy jest ponadto rozumienie pojęcia racjonalnych usprawnień dla osób niepełnosprawnych, do których podjęcia pracodawca jest zobowiązany przez art. 5 dyrektywy 2000/78. Sąd odsyłający zadaje wreszcie pytanie, czy okres wypowiedzenia skrócony ze względu na nieobecności spowodowane chorobą może stanowić dyskryminację ze względu na niepełnosprawność.

II – Ramy prawne

A – *Prawo międzynarodowe*

3. Konwencja Narodów Zjednoczonych z dnia 13 grudnia 2006 r. o prawach osób niepełnosprawnych(4) w lit. e) preambuły stanowi: „uznając, że niepełnosprawność jest pojęciem ewoluującym i że niepełnosprawność wynika z interakcji między osobami

z dysfunkcjami a barierami wynikającymi z postaw ludzkich i środowiskowymi, które utrudniają tym osobom pełny i skuteczny udział w życiu społeczeństwa, na zasadzie równości z innymi osobami".

4. Artykuł 1 akapit drugi konwencji zawiera następujące definicje:

„Do osób niepełnosprawnych zalicza się te osoby, które mają długotrwale naruszoną sprawność fizyczną, umysłową, intelektualną lub w zakresie zmysłów, co może, w oddziaływaniu z różnymi barierami, utrudniać im pełny i skuteczny udział w życiu społecznym, na zasadzie równości z innymi osobami".

B – *Prawo Unii*

5. Motyw 20 dyrektywy 2000/78 stanowi:

„Należy przyjąć właściwe, to znaczy skuteczne i praktyczne środki w celu przystosowania miejsca pracy z uwzględnieniem niepełnosprawności, na przykład przystosowując pomieszczenia lub wyposażenie, czas pracy, podział zadań lub ofertę kształceniową lub integracyjną".

6. Zgodnie z art. 2 ust. 2 lit. b) dyrektywy 2000/78 dyskryminacja pośrednia występuje w przypadku, „gdy przepis, kryterium lub pozornie neutralna praktyka może doprowadzić do szczególnej niekorzystnej sytuacji dla osób danej religii lub przekonań, niepełnosprawności, wieku lub orientacji seksualnej, w stosunku do innych osób, chyba że:

i) taki przepis, kryterium lub praktyka jest [są] obiektywnie uzasadniona[e] zgodnym z prawem celem, a środki mające służyć osiągnięciu tego celu są właściwe i konieczne, lub

[…]".

7. Artykuł 5 dyrektywy 2000/78 w rozdziale zatytułowanym „Racjonalne usprawnienia dla osób niepełnosprawnych" przewiduje, co następuje:

„W celu zagwarantowania przestrzegania zasady równego traktowania osób niepełnosprawnych przewiduje się wprowadzenie racjonalnych usprawnień. Oznacza to, że pracodawca podejmuje właściwe środki, z uwzględnieniem potrzeb konkretnej sytuacji, aby umożliwić osobie niepełnosprawnej dostęp do pracy, wykonywanie jej lub rozwój zawodowy bądź kształcenie, o ile środki te nie nakładają na pracodawcę nieproporcjonalnie wysokich obciążeń. Obciążenia te nie są nieproporcjonalne, jeżeli są w wystarczającym stopniu rekompensowane ze środków istniejących w ramach polityki prowadzonej przez dane państwo członkowskie na rzecz osób niepełnosprawnych".

C – *Prawo krajowe*

8. Wdrożenie dyrektywy 2000/78 do prawa duńskiego nastąpiło przez Forskelsbehandlingslov(5). Paragraf 7 tej ustawy przewiduje możliwość dochodzenia odszkodowania od pracodawcy, jeśli doszło do naruszenia zakazu dyskryminacji lub zaniechania podjęcia koniecznych działań przez pracodawcę.

9. Ustawa Funktionærlov(6) reguluje stosunki prawne między pracodawcą i pracownikiem.

10. Paragraf 5 ust. 2 FL zawiera szczególną regulację dotyczącą wypowiedzenia stosunku pracy z powodu choroby pracownika i stanowi, że:

„Za pisemnym porozumieniem można jednak uzgodnić, że dany stosunek pracy pracownika może zostać rozwiązany za jednomiesięcznym wypowiedzeniem upływającym z końcem miesiąca, jeżeli pracownik pobierał wynagrodzenie w okresie choroby przez ogółem 120 dni w okresie 12 kolejnych miesięcy. Ważność wypowiedzenia jest uzależniona od złożenia go

bezzwłocznie z upływem 120 dni choroby, kiedy pracownik jest nadal chory, przy czym powrót pracownika do pracy po wypowiedzeniu nie narusza jego ważności".

III – Okoliczności faktyczne i postępowanie główne

11. Niniejszy wniosek o wydanie orzeczenia w trybie prejudycjalnym ma swój początek w dwóch pozwach pracownic Jette Ring i Lone Skouboe Werge wniesionych w 2006 r. do Handels- og Kontorfunktionærernes Forbund Danmark (HK)(7) o odszkodowanie na mocy duńskiej ustawy antydyskryminacyjnej z tytułu dyskryminacji z powodu niepełnosprawności. W odniesieniu do obu stosunków pracy uzgodnione było zastosowanie § 5 ust. 2 FL.

A – *Sprawa C-335/11*

12. Tłem postępowania krajowego w sprawie Ring jest następujący stan faktyczny:

13. J. Ring była zatrudniona od 2000 r. w firmie Dansk Almennyttigt Boligselskab (DAB) w biurze handlowym. W okresie od czerwca 2005 r. do wypowiedzenia w listopadzie 2005 r. była ona wielokrotnie nieobecna w pracy z powodu choroby; okresy nieobecności przekraczały w sumie 120 dni. Przedłożone na usprawiedliwienie nieobecności zaświadczenia lekarskie poświadczały przede wszystkim chroniczne bóle kręgosłupa spowodowane między innymi zmianami zwyrodnieniowymi kręgów lędźwiowych, które objawiały się ustawicznymi bólami w okolicy lędźwiowej. Po stwierdzeniu przez lekarzy prowadzących zesztywnienia kręgów lędźwiowych w wyniku naturalnego procesu zrośnięcia się nie istniały żadne inne możliwości leczenia. Nie zostały podjęte żadne działania mogące złagodzić dolegliwości w czasie pracy J. Ring, jak na przykład nabycie biurka z regulowaną wysokością blatu dla jej stanowiska pracy lub propozycja pracy na część etatu. Jednakże DAB oferowała zasadniczo miejsca pracy w niepełnym wymiarze czasu.

14. Z J. Ring rozwiązano stosunek pracy ze skróconym okresem wypowiedzenia na podstawie § 5 ust. 2 FL z powodu skumulowanych okresów nieobecności. Bezpośrednio po wypowiedzeniu J. Ring stosunku pracy DAB opublikowała ogłoszenie oferujące zatrudnienie w niepełnym wymiarze czasu pracy z porównywalnym zakresem zadań w pobliskim biurze regionalnym. J. Ring objęła stanowisko recepcjonistki w innej firmie, która przeznaczyła do jej dyspozycji stół z regulowaną wysokością blatu, przy ustalonym na 20 godzin rzeczywistym czasie pracy. Zatrudnienie nastąpiło w pełnym wymiarze czasu pracy w ramach duńskiego systemu flexjob (ruchomego czasu pracy) z 50% rekompensatą kosztów płacy(8).

B – *Sprawa C-337/11*

15. Sø- og Handelsret przedstawił w sprawie Skouboe Werge następujący stan faktyczny:

16. L. Skouboe Werge była zatrudniona od 1998 r. na stanowisku asystentki w dziale administracji w firmie Pro Display. Po doznanym podczas wypadku drogowego w grudniu 2003 r. urazie odcinka szyjnego kręgosłupa i trwającym trzy tygodnie zwolnieniu lekarskim powróciła ona początkowo do pracy w pełnym wymiarze czasu w Pro Display. Po tym jak pod koniec 2004 r. stało się jasne, że L. Skouboe Werge nadal cierpi z powodu następstw urazu odcinka szyjnego kręgosłupa, otrzymała ona tymczasowo na okres czterech tygodni zwolnienie, zgodnie z którym pracowała zaledwie około czterech godzin dziennie. Z powodu utrzymujących się dolegliwości L. Skouboe Werge poinformowała pracodawcę w styczniu 2005 r. o zwolnieniu lekarskim opiewającym na pełny wymiar czasu pracy. W następstwie powyższego rozwiązano jej stosunek pracy przy zastosowaniu 120-dniowej regulacji przewidzianej § 5 ust. 2 FL z jednomiesięcznym okresem wypowiedzenia upływającym z dniem 31 maja 2005 r.

17. Dolegliwości L. Skouboe Werge przejawiały się rozmaitymi symptomami, w szczególności poprzez promieniujące w kierunku ramion bóle karku, problemy szczękowe, zmęczenie, zaburzenia koncentracji oraz pamięci, trudności z wypowiadaniem się, nadmierną wrażliwość na hałas, niski poziom odporności na stres oraz zawroty głowy. Wskutek oszacowania jej zdolności do pracy na mniej więcej osiem godzin tygodniowo przy

zachowaniu wolnego tempa pracy otrzymała ona w czerwcu 2006 r. wcześniejszą emeryturę. W konsekwencji powyższego decyzją krajowego biura wypadków przy pracy i chorób zawodowych ustalono stopień niepełnosprawności L. Skouboe Werge na 10%, a stopień utraty zdolności do pracy zarobkowej na 65%.

18. Zgodnie ze stanowiskiem prezentowanym przez HK w postępowaniach głównych rozwiązanie z pracownicami umów o pracę ze skróconym okresem wypowiedzenia w myśl § 5 ust. 2 FL było wykluczone, gdyż stanowiło to naruszenie zakazu dyskryminacji ze względu na niepełnosprawność w rozumieniu dyrektywy 2000/78. W związku z tym sądowi odsyłającemu nasuwa się pytanie, jak należy definiować pojęcie „niepełnosprawność" w rozumieniu dyrektywy 2000/78.

IV – Wniosek o wydanie orzeczenia w trybie prejudycjalnym i postępowanie przed Trybunałem

19. Postanowieniami z dnia 29 czerwca 2011 r., które wpłynęły do sekretariatu Trybunału w dniu 1 lipca 2011 r., Sø- og Handelsret zawiesił oba postępowania i zwrócił się do Trybunału z następującymi pytaniami prejudycjalnymi:

„1a) Czy każda osoba, która z powodu urazów [dysfunkcji] fizycznych, mentalnych [umysłowych] lub psychicznych nie może świadczyć pracy lub może świadczyć ją jedynie w ograniczonym zakresie w okresie, który pod względem długości spełnia wymogi określone w pkt 45 wyroku Trybunału w sprawie C-13/05 Navas, jest objęta pojęciem niepełnosprawności w rozumieniu dyrektywy 2000/78?

1b) Czy stan spowodowany chorobą zdiagnozowaną medycznie jako nieuleczalna może być objęty pojęciem niepełnosprawności w rozumieniu tej dyrektywy?

1c) Czy stan spowodowany zdiagnozowaną medycznie chorobą przejściową może być objęty pojęciem niepełnosprawności w rozumieniu dyrektywy?

2) Czy trwałe ograniczenie zdolności funkcjonalnej, które nie pociąga za sobą potrzeby specjalnych środków pomocniczych lub im podobnych, a oznacza jedynie, że dana osoba nie jest zdolna do pracy w pełnym wymiarze czasu, należy uznać za niepełnosprawność w rozumieniu dyrektywy 2000/78?

3) Czy skrócenie [obniżenie wymiaru] czasu pracy należy do środków objętych art. 5 dyrektywy 2000/78?

4) Czy dyrektywa 2000/78 stoi na przeszkodzie stosowaniu przepisu krajowego, zgodnie z którym pracodawca jest uprawniony do zwolnienia pracownika [rozwiązania z pracownikiem stosunku pracy] ze skróconym okresem wypowiedzenia, jeżeli pracownik pobierał wynagrodzenie w okresach choroby przez ogółem 120 dni w okresie 12 kolejnych miesięcy, w wypadku gdy pracownika należy uznać za osobę niepełnosprawną w rozumieniu dyrektywy, jeżeli

a) nieobecność była spowodowana niepełnosprawnością?

lub

b) nieobecność była spowodowana faktem, że pracodawca nie podjął w konkretnej sytuacji wymaganych środków, aby umożliwić osobie niepełnosprawnej wykonywanie pracy?".

20. Na mocy postanowienia prezesa Trybunału z dnia 4 sierpnia 2011 r. sprawy C-335/11 i C-337/11 zostały połączone do łącznego rozpoznania w ramach pisemnego lub ustnego etapu postępowania oraz do wydania wyroku kończącego postępowanie w sprawie.

21. Oprócz stron postępowania głównego w ustnym i pisemnym etapie postępowania przed Trybunałem wzięły udział rządy Danii, Irlandii, Polski oraz Zjednoczonego Królestwa, jak również Komisja Europejska. Ponadto rządy Belgii i Grecji przedstawiły uwagi na piśmie.

V – Ocena

22. Pytania pierwsze i drugie przedłożone przez Sø- og Handelsret mogą być przedmiotem wspólnej odpowiedzi, gdyż oba dotyczą definicji pojęcia niepełnosprawności (zob. pkt A poniżej). Pytanie trzecie dotyczy formy i zakresu usprawnień, które zgodnie z art. 5 dyrektywy 2000/78 wprowadzić ma pracodawca (zob. pkt B poniżej). Na koniec zostanie rozpatrzone pytanie czwarte, a zatem dyskryminujący charakter regulacji skracającej okres wypowiedzenia z powodu nieobecności spowodowanych chorobą (zob. pkt C poniżej).

A – *Pytania pierwsze i drugie*

1. Definicja pojęcia niepełnosprawności

23. Sama dyrektywa 2000/78 nie zawiera definicji pojęcia niepełnosprawności.

24. Już w sprawie Chacón Navas zwrócono się do Trybunału o zdefiniowanie tego pojęcia w sposób autonomiczny na gruncie prawa Unii. Zgodnie z tym pojęcie niepełnosprawności należy rozumieć jako „ograniczenie, wynikające konkretnie z naruszenia funkcji fizycznych, umysłowych lub psychicznych, które stanowi przeszkodę dla danej osoby w uczestnictwie w życiu zawodowym”(9). Ponadto musi zachodzić prawdopodobieństwo, iż owo ograniczenie jest długoterminowe(10).

25. W roku 2010 – a zatem kilka lat po wydaniu wyroku w sprawie Chacón Navas – Unia Europejska ratyfikowała Konwencję Narodów Zjednoczonych o prawach osób niepełnosprawnych. Konwencja NZ przede wszystkim wskazuje w swojej preambule, iż pojęcie niepełnosprawności należy rozumieć w sposób dynamiczny i że niepełnosprawność jest pojęciem ewoluującym(11). Artykuł 1 konwencji zawiera definicję tego pojęcia. Zgodnie z nią „do osób niepełnosprawnych zalicza się te osoby, które mają długotrwale naruszoną sprawność fizyczną, umysłową, intelektualną lub w zakresie zmysłów, co może, w oddziaływaniu z różnymi barierami, utrudniać im pełny i skuteczny udział w życiu społecznym, na zasadzie równości z innymi osobami”.

26. Zgodnie z art. 216 ust. 2 TFUE umowy międzynarodowe zawarte przez Unię wiążą instytucje Unii i państwa członkowskie. Umowy międzynarodowe zawarte przez Unię stanowią od momentu ich wejścia w życie istotną („integralną”) część porządku prawnego Unii Europejskiej(12). Dlatego postanowienia prawa wtórnego Unii muszą być, w miarę możliwości, interpretowane w sposób zgodny ze zobowiązaniami międzynarodowymi Unii(13).

27. Zakres pojęciowy terminu niepełnosprawność w rozumieniu dyrektywy 2000/78 nie może zatem ustępować zakresowi ochrony gwarantowanemu przez konwencję NZ. Zgodnie z definicją konwencji NZ źródłem utrudnień w uczestnictwie w życiu społecznym jest „oddziaływanie z różnymi barierami”. W tym aspekcie możliwe jest w określonych konstelacjach, iż definicja zawarta w wyroku Chacón Navas będzie ustępować definicji konwencji NZ i będzie musiała być interpretowana w sposób zgodny z prawem międzynarodowym.

28. W rozpatrywanych przypadkach istota problemu nie dotyczy jednak elementu definicji „barier”. Sąd odsyłający dąży do wyjaśnienia, czy stan spowodowany chorobą zdiagnozowaną medycznie jako nieuleczalna lub przejściowa może być objęty pojęciem niepełnosprawności. Ani definicja zawarta w wyroku w sprawie Chacón Navas, ani ta wprowadzona konwencją NZ nie zawiera odpowiedzi na pytania sądu odsyłającego. Obie definicje nie zawierają – poza wymogiem przewlekłości ograniczenia – żadnych jasno określonych kryteriów służących rozgraniczeniu niepełnosprawności i choroby.

29. W celu udzielenia odpowiedzi na pytania sądu odsyłającego należy rozpatrzyć kwestię rozgraniczenia niepełnosprawności i choroby.

2. Rozgraniczenie niepełnosprawności i choroby

30. W swoim wyroku w sprawie Chacón Navas Trybunał stwierdził, że pracownicy nie podlegają ochronie z tytułu zakazu dyskryminacji ze względu na niepełnosprawność w przypadku jakiejkolwiek choroby(14). Tym samym Trybunał wprowadził rozróżnienie między chorobą a niepełnosprawnością. Dyrektywa nie wymienia „choroby" jako samodzielnej zakazanej przesłanki o charakterze dyskryminującym.

31. Jednakże Trybunał wyłączył jedynie „chorobę jako taką" z zakresu stosowania dyrektywy(15). Z wyroku w sprawie Chacón Navas nie wynika, aby choroba, która jest przyczyną niepełnosprawności, wykluczała zakwalifikowanie jako niepełnosprawność. Trybunał doprecyzował także w swoim drugim wyroku dotyczącym dyskryminacji, iż z wyroku w sprawie Chacón Navas nie wynika konieczność interpretowania przedmiotowego zakresu stosowania tej dyrektywy w sposób ścisły(16).

32. W szczególności z dyrektywy 2000/78 nie wynika w sposób ewidentny, że obejmuje ona swoim zakresem jedynie niepełnosprawność wrodzoną lub będącą następstwem wypadków. Zróżnicowanie zakresu stosowania dyrektywy w zależności od przyczyny niepełnosprawności byłoby arbitralne i sprzeczne z celem dyrektywy, którym jest urzeczywistnienie równego traktowania.

33. Wobec powyższego należy rozróżniać chorobę jako możliwą przyczynę dysfunkcji od dysfunkcji będącej jej konsekwencją. Dyrektywa obejmuje ochroną także wywodzące się z choroby trwałe ograniczenie, które stanowi przeszkodę w uczestnictwie w życiu zawodowym.

34. Niniejsze przypadki dotyczą naruszeń funkcji fizycznych, które przejawiają się między innymi bólami i ograniczeniem możliwości poruszania się. Rozgraniczenie choroby od niepełnosprawności jest tutaj prostsze niż w sprawie, w której Sąd Najwyższy Stanów Zjednoczonych Ameryki Północnej orzekł, iż także *bezobjawowa* infekcja HIV może być niepełnosprawnością w rozumieniu Anti-Discrimination Act(17). Odpowiedź na pytanie, czy dolegliwości danej osoby w konkretnym stanie faktycznym stanowią ograniczenie, należy do oceny sądu państwa członkowskiego.

35. Z treści dyrektywy 2000/78 nie wynikają żadne przesłanki wskazujące na ograniczenie zakresu stosowania do przypadków, w których stwierdzono określony poziom niepełnosprawności(18). Jako że ta kwestia nie została przedłożona przez sąd odsyłający ani nie była dyskutowana przez uczestników postępowania, nie jest tu konieczne jej ostateczne rozstrzygnięcie.

36. Rozstrzygające dla istnienia niepełnosprawności jest ponadto prawdopodobieństwo, iż ograniczenie jest „długoterminowe"(19). Sformułowanie konwencji NZ ustanawia wymóg „długotrwałego" naruszenia sprawności(20). Pod względem znaczeniowym nie widzę tutaj żadnej różnicy.

37. W przypadku ograniczenia mającego swoje źródło w nieuleczalnej chorobie można z reguły potwierdzić jego długi czas trwania. Jednakże przebieg zasadniczo uleczalnej choroby może być również – aż do pełnego wyzdrowienia – tak długi, iż ograniczenie ma charakter długoterminowy. Również przebycie generalnie uleczalnej choroby może pozostawić po sobie długotrwałe ograniczenie. Zwłaszcza w wypadku chorób przewlekłych przejście od (uleczalnej) choroby do ograniczenia o przypuszczalnie trwałym charakterze może następować w sposób płynny. O niepełnosprawności można mówić dopiero wtedy, gdy rokowania wskazują na trwałe ograniczenie.

38. Z ustalenia, czy dana choroba sama w sobie jest uleczalna czy nieuleczalna, trwała czy przejściowa, nie można wnioskować w sposób definitywny o tym, czy w późniejszym okresie dojdzie do trwałego ograniczenia.

3. Potrzeba specjalnych środków pomocniczych

39. Sąd odsyłający pyta ponadto, czy dla przyjęcia niepełnosprawności musi być spełniony warunek, iż konieczne są specjalne środki pomocnicze, czy też wystarczający jest fakt, że wykonywanie pracy w pełnym wymiarze czasu nie jest już możliwe.

40. Pojęcie niepełnosprawności w rozumieniu dyrektywy nie zawiera warunku konieczności specjalnych środków pomocniczych.

41. Z art. 5 dyrektywy 2000/78 wynika wyraźnie, iż najpierw konieczne jest stwierdzenie istnienia niepełnosprawności, ażeby móc następnie podjąć właściwe oraz konieczne środki. Motyw 20 dostarcza wskazówek, co może być rozumiane przez pojęcie właściwych środków, i wymienia między innymi „przystosowanie miejsca pracy z uwzględnieniem niepełnosprawności". W związku z tym konieczność specjalnych elementów wyposażenia i środków pomocniczych jest*konsekwencją* stwierdzenia niepełnosprawności, a nie częścią definicji pojęcia niepełnosprawności.

42. Konieczność specjalnych środków pomocniczych jako element definicji nie przekonuje również w świetle ratio legis dyrektywy. W rozumieniu dyrektywy niepełnosprawność może polegać na dysfunkcji fizycznej, psychicznej lub umysłowej. Wydaje się, że wymóg konieczności specjalnych środków pomocniczych wynika z przyjęcia za punkt odniesienia wzorca człowieka dotkniętego dysfunkcjami fizycznymi. Gdyby uznać środki pomocnicze za konieczny element pojęcia niepełnosprawności, oznaczałoby to wyłączenie, wymienionych wyraźnie w dyrektywie, naruszeń sprawności umysłowej oraz psychicznej, gdyż nie wymagają one z reguły żadnych środków pomocniczych. Taki wymóg dyskryminowałby te osoby niepełnosprawne, których niepełnosprawność nie może być wyrównana lub złagodzona przez środek pomocniczy i które to już z tego powodu z reguły są nią poważniej dotknięte niż inne osoby.

43. W rezultacie rozstrzygające znaczenie ma jedynie ustalenie istnienia przeszkody w uczestnictwie w życiu zawodowym.

44. DAB i Pro Display podniosły, iż za niepełnosprawną można uznać tylko osobę, która jest całkowicie wykluczona z życia zawodowego, w związku z czym zmniejszona możliwość świadczenia pracy nie jest wystarczająca do zakwalifikowania jako niepełnosprawność. Ta argumentacja nie jest przekonująca. Pojęcie „przeszkoda w uczestnictwie w życiu zawodowym" już w swoim potocznym rozumieniu obejmuje jedynie częściowe ograniczenie, a nie generalne „wykluczenie" z życia zawodowego.

45. Motyw 17 dyrektywy przemawia za uwzględnieniem osób, dla których niemożność pracy w pełnym wymiarze czasu stanowi przeszkodę w uczestnictwie w życiu zawodowym. Motyw ten przewiduje, iż ochroną zagwarantowaną przez dyrektywę objęci są pracownicy, którzy zasadniczo są „kompetentni, zdolni lub dyspozycyjni do wykonywania najważniejszych czynności na danym stanowisku". Dyrektywa ma na celu ochronę tych właśnie osób, które mogą zasadniczo – nawet jeśli tylko w ograniczonym zakresie lub poprzez szczególne usprawnienia – uczestniczyć w życiu zawodowym. Zastosowanie dyrektywy nie jest zatem uzależnione od wykluczenia osób dotkniętych niepełnosprawnością z życia zawodowego.

46. Tytułem wniosku częściowego należy zatem stwierdzić, iż pojęcie niepełnosprawności obejmuje ograniczenie spowodowane naruszeniem funkcji fizycznych, umysłowych lub psychicznych, które stanowi przeszkodę dla danej osoby w uczestnictwie w życiu zawodowym. Do celów definicji niepełnosprawności nie ma znaczenia, że dysfunkcja spowodowana jest chorobą; rozstrzygające znaczenie ma jedynie fakt, czy dane ograniczenie jest długoterminowe. Niepełnosprawnością w rozumieniu dyrektywy 2000/78 jest również takie trwałe naruszenie funkcji, które nie pociąga za sobą zapotrzebowania na szczególne środki pomocnicze i które wyłącznie lub co do istoty polega na niezdolności danej osoby do pracy w pełnym wymiarze godzin.

B – *Pytanie trzecie*

47. W ramach pytania trzeciego Sø- og Handelsret dąży do ustalenia, czy obniżenie wymiaru czasu pracy można zaliczyć do racjonalnych usprawnień dla osób niepełnosprawnych.

48. Zgodnie z art. 5 zdanie pierwsze dyrektywy 2000/78 w celu zagwarantowania przestrzegania zasady równego traktowania w odniesieniu do osób niepełnosprawnych

przewiduje się wprowadzenie racjonalnych usprawnień. To oznacza, iż pracodawca zobowiązany jest do podjęcia „właściwych środków, z uwzględnieniem potrzeb konkretnej sytuacji", aby umożliwić osobie niepełnosprawnej dostęp do pracy, wykonywanie jej, rozwój zawodowy bądź kształcenie. Pracodawca nie jest do tego zobligowany, gdy środki te nakładają na niego nieproporcjonalnie wysokie obciążenia.

49. Celem tego przepisu jest wprowadzenie w życie nie tylko równego *traktowania*, lecz także zapewnienie *równości* osób niepełnosprawnych i umożliwienie im przez to wykonywania zawodu.

50. Artykuł 5 dyrektywy 2000/78 przewiduje jedynie, iż te środki muszą być „właściwe, [podjęte] z uwzględnieniem potrzeb konkretnej sytuacji", aby umożliwić dostęp do pracy itp.

51. Motyw 20 dyrektywy wyjaśnia bliżej tę regulację. Zgodnie z nim „należy przyjąć właściwe, to znaczy skuteczne i praktyczne środki" w celu „przystosowania miejsca pracy z uwzględnieniem niepełnosprawności, na przykład przystosowując pomieszczenia lub wyposażenie, czas pracy, podział zadań lub ofertę kształceniową lub integracyjną".

52. Możliwe, że obniżenie wymiaru czasu pracy objęte jest wyraźnie przewidzianym w dyrektywie przykładem „przystosowania czasu pracy". DAB oraz Pro Display są jednak zdania, iż sformułowanie „przystosowanie czasu pracy" odnosi się jedynie do form świadczenia pracy, tempa pracy oraz podziału zadań między współpracowników.

53. Moim zdaniem obniżenie wymiaru czasu pracy, nawet przy założeniu, że nie wchodzi w zakres pojęcia „przystosowanie czasu pracy", jest objęte art. 5 dyrektywy.

54. Już z treści motywu 20 wynika, iż zawiera on tylko przykładowe wyliczenie, którego nie można uznać za wyczerpujące. Fakt, że obniżenie wymiaru czasu pracy nie jest tam wyraźnie wymienione, nie uzasadnia wniosku, iż nie jest ono objęte art. 5 dyrektywy.

55. DAB oraz Pro Display zwracają ponadto uwagę na to, że pojęcie wymiaru czasu pracy nie jest wymienione w dyrektywie i nie było przedmiotem dyskusji także na wstępnych etapach prac nad dyrektywą. Również pojęcie obniżenia wymiaru czasu pracy jest tak ściśle powiązane z dyrektywą dotyczącą pracy w niepełnym wymiarze godzin(21), iż podnoszone w tym zakresie żądania mogą być oceniane jedynie w jej kontekście.

56. Prawodawca unijny sformułował jednak treść art. 5 szeroko. Mówi on ogólnie o środkach umożliwiających dostęp osób niepełnosprawnych do zatrudnienia. Obniżenie wymiaru czasu pracy niewątpliwie może być uznane za środek właściwy do umożliwienia osobie niepełnosprawnej wykonywania zawodu.

57. Pod tym względem również motyw 20 przemawia za szerokim rozumieniem art. 5. Mianowicie – wbrew stanowisku DAB i Pro Display – wynika z niego, iż obejmuje on środki nie tylko w sensie fizycznym, lecz również organizacyjne. „Przystosowanie pomieszczenia" lub „przystosowanie wyposażenia" odnosi się do ograniczeń fizycznych, podczas gdy wymienione środki „przystosowania czasu pracy, podziału zadań lub oferty kształceniowej lub integracyjnej" mają charakter organizacyjny. Powyższe odpowiada w szczególności rozumieniu niepełnosprawności w ramach konwencji NZ, w myśl której dla definicji ograniczenia istotne są nie tylko bariery fizyczne, ale również pozostałe, zwłaszcza społeczne.

58. Za objęciem zatrudnienia w niepełnym wymiarze czasu zakresem stosowania dyrektywy 2000/78 przemawia również jej ratio legis. Wymaga ona podjęcia indywidualnie dopasowanych środków służących równemu traktowaniu i tym samym polepszeniu uczestnictwa osób niepełnosprawnych w życiu zawodowym(22). Decydujące znaczenie musi mieć zatem, czy dany środek może prowadzić do tego, że osoba z niepełnosprawnością może dokonać wyboru zawodu lub wykonywać nadal swój zawód. W świetle powyższego umożliwienie, przynajmniej częściowo zdolnym do pracy, pracownikom z niepełnosprawnością odpowiedniego uczestnictwa w życiu zawodowym poprzez oferowanie im pracy na część etatu, zamiast wykluczać takie osoby całkowicie z rynku pracy, odpowiada ratio legis dyrektywy. Nic nie wskazuje na to, że dyrektywa, obligując do podjęcia –

ewentualnie szeroko zakrojonych i kosztownych – środków takich jak zainstalowanie windy lub urządzeń sanitarnych odpowiadających potrzebom osób niepełnosprawnych, nie może obejmować obniżenia wymiaru czasu pracy.

59. Wprawdzie nie można odmówić słuszności argumentowi DAB i Pro Display, iż zatrudnienie w niepełnym wymiarze czasu może w pewnych okolicznościach poważnie ingerować w stosunek prawny między pracodawcą a pracownikiem i stanowić obciążenie dla pracodawcy. Jednakże taki sam skutek może mieć również wymienione przykładowo przystosowanie pomieszczeń. Z tego powodu art. 5 zdanie drugie ustanawia ograniczenie zobowiązania pracodawcy do przypadków, w których podjęcie środków nie obciąża pracodawcy w sposób nieproporcjonalny. W tym aspekcie dyrektywa postuluje właściwe wyważenie interesu niepełnosprawnego pracownika w otrzymaniu środków wsparcia oraz interesu pracodawcy, który nie musi bezwarunkowo godzić się na ingerencje w organizację swojego zakładu, jak również na straty ekonomiczne.

60. Jako wniosek tymczasowy należy zatem przyjąć, iż obniżenie wymiaru czasu pracy może należeć do środków przewidzianych w art. 5 dyrektywy 2000/78. Do kompetencji sądu krajowego należy dokonanie oceny, czy dany środek w konkretnym przypadku nie obciąża pracodawcy w sposób nieproporcjonalny.

C – *Pytanie czwarte*

1. Pierwsza część pytania czwartego

61. W ramach pierwszej części pytania czwartego Sø- og Handelsret zmierza do ustalenia, jak dalece przepis krajowy, który zezwala na skrócony okres wypowiedzenia z powodu nieobecności spowodowanych chorobą, koliduje z dyrektywą 2000/78, jeśli stosowany jest w sytuacjach, w których nieobecność była spowodowana niepełnosprawnością.

62. Jak wynika z art. 1 w związku z art. 2 ust. 2 dyrektywy 2000/78, zabroniona jest zarówno bezpośrednia jak i pośrednia dyskryminacja z powodu niepełnosprawności w zatrudnieniu i działalności zawodowej. Dyskryminacja bezpośrednia występuje w przypadku, gdy daną osobę z powodu niepełnosprawności traktuje się w porównywalnej sytuacji mniej przychylnie niż inną osobę. Dyskryminacja pośrednia występuje w przypadku, gdy pozornie neutralny przepis, kryterium lub praktyka może doprowadzić do szczególnie niekorzystnej sytuacji dla osób niepełnosprawnych, chyba że jest to uzasadnione. Merytoryczny zakres zastosowania dyrektywy zgodnie z jej art. 3 ust. 1 lit. c) wyraźnie obejmuje warunki zwalniania z pracy. Zatem najpierw należy rozważyć, czy skrócenie okresu wypowiedzenia może stanowić dyskryminację bezpośrednią czy pośrednią i czy w danym wypadku może być ona uzasadniona.

a) Niekorzystne traktowanie

63. W pierwszej kolejności chciałabym sprecyzować przedmiot kontroli: sąd odsyłający zwraca się jedynie o ustalenie zgodności z prawem Unii regulacji dopuszczającej skrócenie okresu wypowiedzenia ze względu na nieobecności spowodowane chorobą.

64. Inną kwestią jest nasuwające się w ramach niniejszej sprawy pytanie, w jakim stopniu nieobecności, będące wynikiem niepełnosprawności lub pozostające w związku z niepełnosprawnością, w ogóle mogą stanowić dopuszczalny powód wypowiedzenia. Jak stwierdził Trybunał, dyrektywa 2000/78 stoi na przeszkodzie wypowiedzeniu stosunku pracy ze względu na niepełnosprawność, które to, zważywszy na obowiązek wprowadzania racjonalnych usprawnień dla osób niepełnosprawnych, nie jest uzasadnione tym, że dana osoba nie pozostaje w dyspozycji do wykonywania najważniejszych czynności na danym stanowisku(23). Z powyższego można a contrario wysnuć wniosek, że wypowiedzenie umowy o pracę jest dopuszczalne, jeśli podjęcie uwzględniających potrzebę konkretnej sytuacji usprawnień służących przystosowaniu miejsca pracy pracownika nakładałoby na pracodawcę nieproporcjonalnie wysokie obciążenia lub pracownik z powodu swoich nieobecności nie pozostawałby w dyspozycji do wykonywania najważniejszych czynności na danym stanowisku. Moim zdaniem powyższe stwierdzenie Trybunału nie wyjaśnia w sposób

wyczerpujący kwestii dopuszczalności wypowiedzenia umowy o pracę z powodu nieobecności wskutek chorób wywołanych niepełnosprawnością. Udzielając odpowiedzi na przedłożone pytanie, będę zajmować się wyłącznie aspektem skrócenia okresu wypowiedzenia.

65. Jeśli niepełnosprawny pracownik jest nieobecny z powodu choroby „ogólnoustrojowej", to uwzględnienie tych okresów choroby przy skróceniu okresu wypowiedzenia nie stanowi niekorzystnego traktowania w porównaniu z pracownikiem, który nie jest niepełnosprawny. Prawdopodobieństwo zapadnięcia na chorobę taką jak przykładowo grypa z reguły nie ma związku z niepełnosprawnością i dotyka jednakowo pracowników z niepełnosprawnością i bez niej.

66. Niniejsza sprawa dotyczy jednakże nieobecności spowodowanych niepełnosprawnością. Sformułowanie § 5 ust. 2 FL jest na pierwszy rzut oka neutralne, gdyż dotyczy wszystkich pracowników, którzy byli nieobecni z powodu choroby dłużej niż 120 dni. Dlatego nie prowadzi ono do bezpośredniej dyskryminacji osób niepełnosprawnych. Wskazana regulacja nie nawiązuje bowiem ani do zabronionego kryterium rozróżniającego, jakim jest niepełnosprawność, ani nie wprowadza nierównego traktowania w oparciu o kryterium, które jest nierozerwalnie związane z niepełnosprawnością. Niepełnosprawność nie prowadzi bowiem w każdym przypadku nieuchronnie do zachorowań i spowodowanych chorobą nieobecności, dlatego nie można mówić o ich nierozerwalnym charakterze.

67. Powyższa sytuacja stanowi jednak dyskryminację pośrednią. O ile choroba ma związek z niepełnosprawnością, to odmienne sytuacje są traktowane w ten sam sposób. Niepełnosprawni pracownicy ponoszą z reguły o wiele większe ryzyko zapadnięcia na chorobę związaną z daną niepełnosprawnością niż pracownicy bez niepełnosprawności. Ci ostatni mogą zapaść jedynie na chorobę „ogólnoustrojową". Pracowników niepełnosprawnych dotyka dodatkowe ryzyko zapadnięcia jeszcze i na taką chorobę. Przepis dotyczący skróconego okresu wypowiedzenia jest zatem regulacją, która dyskryminuje pośrednio pracowników niepełnosprawnych w porównaniu z pracownikami bez niepełnosprawności.

68. Nie jest przekonujący argument niektórych uczestników postępowania, iż rozróżnienie między chorobami „ogólnoustrojowymi" a tymi spowodowanymi niepełnosprawnością nie jest użyteczne, gdyż pracownikom przysługuje prawo do nieujawnienia rodzaju zachorowania. Mianowicie istnieją możliwości zharmonizowania obu aspektów, na przykład poprzez włączenie do sprawy lekarza zakładowego.

b) Uzasadnienie

69. Zgodnie z art. 2 ust. 2 lit. b) ppkt (i) przepis taki jak § 5 ust. 2 FL jest uzasadniony, jeśli służy on osiągnięciu celu zgodnego z prawem, a środki mające służyć osiągnięciu tego celu są właściwe i konieczne. To sformułowanie obejmuje powszechnie uznane w prawie Unii wymogi, jakim powinno odpowiadać uzasadnienie nierównego traktowania(24).

70. Dana regulacja musi być zatem odpowiednia do osiągnięcia celu zgodnego z prawem. Ponadto regulacja ta musi być konieczna, co oznacza, iż zamierzony legalny cel nie może być osiągnięty poprzez łagodniejszy, równie odpowiedni środek. W końcu regulacja ta musi spełniać wymóg proporcjonalności sensu stricte, to znaczy nie może prowadzić do niedogodności wykraczających poza to, co jest konieczne do osiągnięcia zamierzonego celu(25).

71. W procesie kontroli powyższych kryteriów należy uwzględnić, iż państwa członkowskie dysponują szerokim zakresem uznania przy wyborze środków służących osiągnięciu swoich celów w dziedzinie polityki społecznej i polityki zatrudnienia(26).

72. Postanowienie odsyłające nie zawiera żadnych informacji dotyczących celów, których osiągnięciu służyć miałby § 5 ust. 2 FL. Znacznie utrudnia to ocenę. Dlatego dokonanie wyczerpującej oceny, czy będący przedmiotem sporu przepis jest uzasadniony, leżeć będzie w gestii sądu odsyłającego.

73. Rząd duński podniósł, iż § 5 ust. 2 FL stanowi próbę sprawiedliwego zrównoważenia interesów pracodawców i pracowników w sytuacjach długich nieobecności z powodu choroby. Ostatecznie służy on w szczególności interesom pracowników. Skrócenie okresu wypowiedzenia w przypadkach długich nieobecności z powodu choroby zachęca pracodawców nie do wypowiedzenia stosunku pracy choremu pracownikowi w najbliższym możliwym terminie, lecz do kontynuacji stosunku pracy, gdyż pracodawca wie, iż w przypadku bardzo długich nieobecności zostanie to zrównoważone przez skrócenie okresu wypowiedzenia.

74. Powyższe cele są zgodne z prawem, a owa regulacja przy uwzględnieniu przyznanego państwom członkowskim szerokiego marginesu uznania nie jest oczywiście nieodpowiednia(27) do ich osiągnięcia. Środek alternatywny, ale zarazem mniej inwazyjny, musiałby zintegrować się z resztą systemu regulacji prawa pracy. Bez dodatkowych informacji trudno jest ocenić, czy taki środek istnieje.

75. Rozstrzygające znaczenie ma kwestia, czy niedogodności niepełnosprawnych pracowników wywołane skróceniem okresu wypowiedzenia w jego aktualnym kształcie są proporcjonalne w stosunku do założonych celów, a zatem czy nie prowadzą one do nadmiernego naruszenia interesów osób zainteresowanych. Warunkiem powyższego jest znalezienie odpowiedniej równowagi między różnymi sprzecznymi interesami(28). W tym aspekcie nasuwa się pytanie, czy stosowna regulacja nie powinna również uwzględniać stopnia niepełnosprawności i szans danego pracownika na znalezienie innego zatrudnienia. Długość okresu wypowiedzenia ma dla pracownika tym większe znaczenie, im cięższa jest jego niepełnosprawność oraz im trudniejsze będzie znalezienie nowego zatrudnienia. Ocena tego w konkretnym przypadku należy do sądu odsyłającego.

76. W rezultacie rozważań dotyczących pierwszej części pytania czwartego należy stwierdzić, że dyrektywę 2000/78 należy interpretować w ten sposób, iż sprzeciwia się ona uregulowaniu krajowemu, które zezwala pracodawcy na rozwiązanie z pracownikiem stosunku pracy ze skróconym okresem wypowiedzenia z powodu nieobecności spowodowanych chorobą, jeżeli choroba wynika z niepełnosprawności. Nie dotyczy to sytuacji, gdy niekorzystne traktowanie jest merytorycznie uzasadnione, jak stanowi art. 2 ust. 2 lit. b) ppkt (i) dyrektywy 2000/78, przez zgodny z prawem cel, a środki prowadzące do osiągnięcia tego celu są właściwe i konieczne.

2. Druga część pytania czwartego

77. W drugiej części pytania czwartego sąd odsyłający zwraca się o wyjaśnienie, czy dyrektywa 2000/78 stoi na przeszkodzie skróceniu okresu wypowiedzenia, jeżeli nieobecność pracownika była spowodowana faktem, że pracodawca nie podjął w konkretnej sytuacji wymaganych w myśl art. 5 dyrektywy środków, aby umożliwić osobie niepełnosprawnej wykonywanie pracy.

78. W ramach pytania, jakie usprawnienia są właściwe w rozumieniu art. 5 dyrektywy, przeprowadza się analizę proporcjonalności. W tym kontekście przy wyważeniu interesów niepełnosprawnego pracownika i jego pracodawcy zostaje wyjaśnione, czy usprawnień, które muszą zostać podjęte, można oczekiwać od pracodawcy. W przypadku niepodjęcia przez pracodawcę oczekiwanych od niego tych właściwych usprawnień, nie wypełnia on zobowiązania z art. 5 dyrektywy i nie może wywodzić z tego korzyści prawnej. Zobowiązanie z art. 5 dyrektywy 2000/78 zostałoby pozbawione znaczenia, gdyby zaniechanie proporcjonalnych środków mogło uzasadnić dyskryminację niepełnosprawnego pracownika. Zgodnie z ratio legis tego przepisu nieobecność pracownika spowodowana zaniechaniem środka nie może zatem w żadnym wypadku uzasadniać skrócenia okresu wypowiedzenia.

79. W przypadku gdy zastosowanie skróconego okresu wypowiedzenia następuje ze względu na nieobecność pracownika spowodowaną faktem, że pracodawca nie podjął wymaganych w myśl art. 5 dyrektywy 2000/78 usprawnień, stanowi to niczym nieuzasadnione niekorzystne traktowanie.

VI – Wnioski

80. W świetle powyższych rozważań proponuję, aby Trybunał udzielił następujących odpowiedzi na przedłożone mu pytania:

1a) Pojęcie niepełnosprawności w rozumieniu dyrektywy 2000/78/WE ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy obejmuje ograniczenie, które w szczególności spowodowane jest dysfunkcjami fizycznymi, umysłowymi lub psychicznymi i które stanowi przeszkodę w uczestnictwie w życiu zawodowym.

1b) Dla celów definicji niepełnosprawności jest bez znaczenia, czy dana dysfunkcja została spowodowana chorobą; decydujące znaczenie ma jedynie kwestia, czy ograniczenie jest według wszelkiego prawdopodobieństwa długoterminowe.

1c) Również trwałe ograniczenie zdolności funkcjonalnej, które nie pociąga za sobą potrzeby specjalnych środków pomocniczych, a oznacza jedynie, że dana osoba nie jest zdolna do pracy w pełnym wymiarze czasu, należy uznać za niepełnosprawność w rozumieniu dyrektywy 2000/78.

2. Obniżenie wymiaru czasu pracy można zaliczyć do środków objętych art. 5 dyrektywy 2000/78. Do kompetencji sądu odsyłającego należy dokonanie oceny, czy dany środek w konkretnym przypadku nie obciąża pracodawcy w sposób nieproporcjonalny.

3. Dyrektywę 2000/78 należy interpretować w ten sposób, iż sprzeciwia się ona uregulowaniu krajowemu, które zezwala pracodawcy na rozwiązanie z pracownikiem stosunku pracy ze skróconym okresem wypowiedzenia z powodu nieobecności spowodowanych chorobą, jeżeli choroba wynika z niepełnosprawności. Nie dotyczy to sytuacji, gdy niekorzystne traktowanie jest merytorycznie uzasadnione, jak stanowi art. 2 ust. 2 lit. b) ppkt (i) dyrektywy 2000/78, przez zgodny z prawem cel, a środki prowadzące do osiągnięcia tego celu są właściwe i konieczne. W przypadku gdy zastosowanie skróconego czasu wypowiedzenia następuje ze względu na nieobecność pracownika spowodowaną faktem, że pracodawca nie podjął wymaganych w myśl art. 5 dyrektywy usprawnień, stanowi to niczym nieuzasadnione niekorzystne traktowanie.

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1 – Język oryginału: niemiecki.

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2 – Dyrektywa Rady z dnia 27 listopada 2000 r. ustanawiająca ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy (Dz.U. L 303, s. 16, zwana dalej „dyrektywą 2000/78”).

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3 – Wyrok z dnia 11 czerwca 2006 r. w sprawie C-13/05, Zb.Orz. s. I-6467.

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4 – Ratyfikowana przez Unię Europejską w dniu 23 grudnia 2010 r. (zwana dalej „konwencją NZ”). Zobacz decyzja Rady 2010/48/WE z dnia 26 listopada 2009 r. w sprawie zawarcia przez Wspólnotę Europejską Konwencji Narodów Zjednoczonych o prawach osób niepełnosprawnych (Dz.U. 2010, L 23, s. 35).

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5 – Lov om forbud mod forskelsbehandling på arbejdsmarkedet (ustawa o zakazie dyskryminacji na rynku pracy).

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6 – Lov om retsforholdet mellem arbejdsgivere og funktionærer Funktionærlov (ustawa o pracownikach, zwana dalej „FL”).

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7 – Związek pracowników branży handlowej i pracowników biurowych w Danii.

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8 – System flexjob jest duńską regulacją dotyczącą państwowych dopłat do wynagrodzeń przy zatrudnieniu osób o trwale zmniejszonej zdolności do pracy.

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9 – Wyżej wymieniony w przypisie 3 wyrok w sprawie Chacón Navas, pkt 43.

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10 – Ibidem, pkt 45.

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11 – Zobacz także ww. w przypisie 3 opinia rzecznika generalnego L.A. Geelhoeda w sprawie Chacón Navas, pkt 66.

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12 – Zobacz podobnie wyroki: z dnia 10 września 1996 r. w sprawie C-61/94 Komisja przeciwko Niemcom, Rec. s. I-3989, pkt 52; z dnia 12 stycznia 2006 r. w sprawie C-311/04 Algemene Scheeps Agentuur Dordrecht, Zb.Orz. s. I-609, pkt 25; z dnia 3 czerwca 2008 r. w sprawie C-308/06 Intertanko i in., Zb.Orz. s. I-4057, pkt 42; a także z dnia 3 września 2008 r. w sprawach połączonych C-402/05 P i C-415/05 P Kadi i Al Barakaat International Foundation przeciwko Radzie i Komisji, Zb.Orz. s. I-6351, pkt 307; z dnia 21 grudnia 2011 r. w sprawie C-366/10 Air Transport Association of America i in., dotychczas nieopublikowany w Zbiorze, pkt 50.

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13 – Wyżej wymieniony w przypisie 12 wyrok w sprawie Komisja przeciwko Niemcom, pkt 52; wyroki: z dnia 14 lipca 1998 r. w sprawie C-341/95 Bettati, Rec. s. I-4355, pkt 20; z dnia 9 stycznia 2003 r. w sprawie C-76/00 P Petrotub i Republica, Rec. s. I-79, pkt 57; z dnia 14 maja 2009 r. w sprawie C-161/08 Internationaal Verhuis- en Transportbedrijf Jan de Lely, Zb.Orz. s. I-4075, pkt 38.

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14 – Wyżej wymieniony w przypisie 3 wyrok w sprawie Chacón Navas, pkt 46.

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15 – Ibidem, pkt 57.

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16 – Wyrok z dnia 17 lipca 2008 r. w sprawie C-303/06 Coleman, Zb.Orz. s. I-5603, pkt 46.

17 – US Surpreme Court, Bragdon v. Abbott, 524 US 624 [1998], § 12102 ust. 1 (A) ADA 1990 potwierdza niepełnosprawność, gdy zachodzi „a physical […] impairment that substantially limits one or more of [an individual's] major life activities".

18 – Również Europejski Trybunał Praw Człowieka (ETPC) uznał zachorowanie na cukrzycę typu I, które zostało zakwalifikowane przez władze krajowe jako nieznaczne, za niepełnosprawność dla celów ochrony przed dyskryminacją, wyrok ETPC z dnia 30 kwietnia 2009 r. (Glor przeciwko Szwajcarii, nr 13444/04) wydany w związku z art. 14 EKPC, w którym uznano zachorowanie na cukrzycę za niepełnosprawność.

19 – Wyżej wymieniony w przypisie 3 wyrok w sprawie Chacón Navas, pkt 45.

20 – W angielskiej wersji językowej „long-term [...]impairments", we francuskiej „incapacités […] durables".

21 – Dyrektywa Rady 97/81/EWG z dnia 15 grudnia 1997 r. dotycząca Porozumienia ramowego dotyczącego pracy w niepełnym wymiarze godzin zawartego przez Europejską Unię Konfederacji Przemysłowych i Pracodawców (UNICE), Europejskie Centrum Przedsiębiorstw Publicznych (CEEP) oraz Europejską Konfederację Związków Zawodowych (ETUC) (Dz.U. L 14, s. 9).

22 – Zobacz motywy 8, 9, 11 i 16 dyrektywy 2000/78.

23 – Wyżej wymieniony w przypisie 3 wyrok w sprawie Chacón Navas, pkt 51.

24 – Zobacz także moja opinia z dnia 6 maja 2010 r. w sprawie C-499/08 Andersen, Zb.Orz. s. I-9343, pkt 42.

25 – Wyroki: z dnia 12 lipca 2001 r. w sprawie C-189/01 Jippes i in., Rec. s. I-5689, pkt 81; z dnia 7 lipca 2009 r. w sprawie C-558/07 S.P.C.M. i in., Zb.Orz. s. I-5783, pkt 41; z dnia 8 lipca 2010 r. w sprawie C-343/09 Afton Chemical, Zb.Orz. s. I-7023, pkt 45 i przytoczone tam orzecznictwo.

26 – W zakresie dyskryminacji ze względu na wiek zob. wyroki: z dnia 16 października 2007 r. w sprawie C-411/05 Palacios de la Villa, Zb.Orz. s. I-8531, pkt 68; z dnia 12 października 2010 r. w sprawie C-45/09 Rosenbladt, Zb.Orz. s. I-9391, pkt 41.

27 – Zobacz ww. w przypisie 26 wyrok w sprawie Palacios de la Villa, pkt 72; wyrok z dnia 12 stycznia 2010 r. w sprawie C-341/08 Petersen, Zb.Orz. s. I-47, pkt 70.

28 – Zobacz ww. w przypisie 24 moja opinia w sprawie Andersen, pkt 68; moja opinia z dnia 2 października 2012 r. w sprawie C-286/12 Komisja przeciwko Węgrom, dotychczas nieopublikowana w Zbiorze, pkt 78.

WYROK TRYBUNAŁU (wielka izba)

z dnia 17 lipca 2008 r.(*)

Polityka społeczna – Dyrektywa 2000/78/WE – Równość traktowania w zakresie zatrudnienia i pracy – Artykuły 1, art. 2 ust. 1, art. 2 ust. 2 lit. a) i art. 2 ust. 3 oraz art. 3 ust. 1 lit. c) – Dyskryminacja bezpośrednia ze względu na niepełnosprawność – Molestowanie związane z niepełnosprawnością – Rozwiązanie stosunku pracy z pracownikiem, który sam nie jest niepełnosprawny, lecz ma niepełnosprawne dziecko – Włączenie – Ciężar dowodu

W sprawie C-303/06

mającej za przedmiot wniosek o wydanie, na podstawie art. 234 WE, orzeczenia w trybie prejudycjalnym, złożony przez Employment Tribunal, London South (Zjednoczone Królestwo) postanowieniem z dnia 6 lipca 2006 r., które wpłynęło do Trybunału w dniu 10 lipca 2006 r., w postępowaniu:

S. Coleman

przeciwko

Attridge Law,

Steve'owi Law,

TRYBUNAŁ (wielka izba),

w składzie: V. Skouris, prezes, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts i A. Tizzano, prezesi izb, M. Ilešič, J. Klučka, A. Ó Caoimh (sprawozdawca), T. von Danwitz i A. Arabadjiev, sędziowie,

rzecznik generalny: M. Poiares Maduro,

sekretarz: L. Hewlett, główny administrator,

uwzględniając procedurę pisemną i po przeprowadzeniu rozprawy w dniu 9 października 2007 r.,

rozważywszy uwagi przedstawione:

– w imieniu S. Coleman przez R. Allena, QC, oraz P. Michella, barrister,

– w imieniu rządu Zjednoczonego Królestwa przez V. Jackson, działającą w charakterze pełnomocnika, wspieraną przez N. Painesa, QC,

– w imieniu rządu greckiego przez K. Georgiadisa oraz Z. Chatzipavlou, działających w charakterze pełnomocników,

– w imieniu Irlandii przez N. Traversa, BL,

– w imieniu rządu włoskiego przez I.M. Braguglię, działającego w charakterze pełnomocnika, wspieranego przez W. Ferrante, avvocato dello Stato,

– w imieniu rządu litewskiego przez D. Kriaučiūnasa, działającego w charakterze pełnomocnika,

– w imieniu rządu niderlandzkiego przez H.G. Sevenster oraz C. ten Dam, działające w charakterze pełnomocników,

– w imieniu rządu szwedzkiego przez A. Falk, działającą w charakterze pełnomocnika,

– w imieniu Komisji Wspólnot Europejskich przez J. Enegrena oraz N. Yerrell, działających w charakterze pełnomocników,

po zapoznaniu się z opinią rzecznika generalnego na posiedzeniu w dniu 31 stycznia 2008 r.,

wydaje następujący

Wyrok

1 Wniosek o wydanie orzeczenia w trybie prejudycjalnym dotyczy wykładni dyrektywy Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy (Dz.U. L 303, s. 16).

2 Wniosek ten został złożony w ramach sporu zawisłego między S. Coleman, skarżącą w postępowaniu przed sądem krajowym a kancelarią adwokacką Attridge Law oraz wspólnikiem tej kancelarii, Steve'em Law (zwanymi razem dalej „byłym pracodawcą") w przedmiocie przymuszenia skarżącej w postępowaniu przed sądem krajowym, według jej twierdzeń, do rozwiązania stosunku pracy z pracodawcą.

Ramy prawne

Uregulowania wspólnotowe

3 Dyrektywa 2000/78 przyjęta została na podstawie art. 13 WE. Jej motywy szósty, jedenasty, szesnasty, siedemnasty, dwudziesty, dwudziesty siódmy, trzydziesty pierwszy i trzydziesty siódmy mają następujące brzmienie:

„(6) Wspólnotowa karta socjalnych podstawowych praw pracowników uznaje znaczenie walki z dyskryminacją we wszystkich jej postaciach, włącznie z potrzebą podjęcia właściwych działań na rzecz integracji społecznej i gospodarczej osób starszych i niepełnosprawnych.

[…]

(11) Dyskryminacja ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną może być przeszkodą w realizacji celów traktatu WE, w szczególności w zakresie wysokiego poziomu zatrudnienia i ochrony socjalnej, podnoszenia poziomu i jakości życia, spójności gospodarczej i społecznej, solidarności i swobodnego przepływu osób.

[…]

(16) Przyjęcie środków uwzględniających potrzeby osób niepełnosprawnych w miejscu pracy jest najważniejszym czynnikiem w walce z dyskryminacją osób niepełnosprawnych.

(17) Niniejsza dyrektywa nie nakłada wymogu, aby osoba, która nie jest kompetentna ani zdolna bądź dyspozycyjna do wykonywania najważniejszych czynności na danym stanowisku lub kontynuacji danego kształcenia, była przyjmowana do pracy, awansowana lub dalej zatrudniana, nie naruszając obowiązku wprowadzania racjonalnych zmian uwzględniających potrzeby osób niepełnosprawnych.

[…]

(20) Należy przyjąć właściwe, to znaczy skuteczne i praktyczne środki w celu przystosowania miejsca pracy z uwzględnieniem niepełnosprawności, na przykład przystosowując pomieszczenia lub wyposażenie, czas pracy, podział zadań lub ofertę kształceniową lub integracyjną.

[…]

(27) W zaleceniu 86/379/EWG z dnia 24 lipca 1986 r. w sprawie zatrudniania we Wspólnocie osób niepełnosprawnych [Dz.U. L 225, s. 43] Rada określiła ramy, w których podane są przykłady pozytywnych działań mających wspierać zatrudnienie i kształcenie osób niepełnosprawnych, a w rezolucji z dnia 17 czerwca 1999 r. w sprawie [równych] możliwości zatrudnienia osób niepełnosprawnych [Dz.U. C 186, s. 3] potwierdziła szczególną wagę, jaką przywiązuje się w szczególności do rekrutacji, dalszego zatrudniania i kształcenia oraz kształcenia ustawicznego osób niepełnosprawnych.

[…]

(31) Wprowadzenie przepisów dotyczących ciężaru dowodu wymaga, od momentu zaistnienia domniemania dyskryminacji i, w przypadkach gdy fakt ten zostanie potwierdzony, skutecznego stosowania zasady równego traktowania, w której ciężar dowodu przypadnie na pozwanego. Jednakże pozwany nie ma obowiązku udowadniania, że powód jest wyznawcą danej religii, posiada określone przekonania, jest w szczególny sposób niepełnosprawny, jest w danym wieku lub określonej orientacji seksualnej.

[…]

(37) Zgodnie z zasadą pomocniczości określoną w art. 5 traktatu WE cel niniejszej dyrektywy, to znaczy stworzenie we Wspólnocie obszaru działania w sferze równości zatrudnienia i pracy, nie może być w wystarczającym stopniu realizowany przez państwa członkowskie, powinien więc, ze względu na rozmiary i rezultaty akcji, być lepiej realizowany na poziomie wspólnotowym. Zgodnie z zasadą proporcjonalności określoną we wspomnianym artykule niniejsza dyrektywa nie wykracza ponad to, co jest konieczne dla osiągnięcia [tego] celu".

4 Zgodnie z art. 1 dyrektywy 2000/78 „celem niniejszej dyrektywy jest wyznaczenie ogólnych ram dla walki z dyskryminacją ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w odniesieniu do zatrudnienia i pracy, w celu realizacji w państwach członkowskich zasady równego traktowania".

5 Dyrektywa stanowi w art. 2 ust. 1–3, zatytułowanym „Pojęcie dyskryminacji":

„1. Do celów niniejszej dyrektywy »zasada równego traktowania« oznacza brak jakichkolwiek form bezpośredniej lub pośredniej dyskryminacji z przyczyn określonych w art. 1.

2. Do celów ust. 1:

a) dyskryminacja bezpośrednia występuje, w przypadku gdy osobę traktuje się mniej przychylnie niż traktuje się, traktowano lub traktowano by inną osobę w porównywalnej sytuacji, z jakiejkolwiek przyczyny wymienionej w art. 1;

b) dyskryminacja pośrednia występuje, w przypadku gdy przepis, kryterium lub pozornie neutralna praktyka może doprowadzić do szczególnej niekorzystnej sytuacji dla osób danej religii lub przekonań, niepełnosprawności, wieku lub orientacji seksualnej, w stosunku do innych osób, chyba że:

i) taki przepis, kryterium lub praktyka jest obiektywnie uzasadniona zgodnym z prawem celem, a środki mające służyć osiągnięciu tego celu są właściwe i konieczne, lub

ii) jeżeli w przypadku osób w określony sposób niepełnosprawnych pracodawca lub każda osoba, do której odnosi się niniejsza dyrektywa, jest zobowiązany, na mocy przepisów krajowych, podejmować właściwe środki zgodnie z zasadami określonymi w art. 5, w celu zlikwidowania niedogodności spowodowanych tym przepisem, kryterium lub praktyką.

3. Molestowanie uważa się za formę dyskryminacji w rozumieniu ust. 1, jeżeli ma miejsce niepożądane zachowanie mające związek z jedną z przyczyn określonych w art. 1, a jego celem lub skutkiem jest naruszenie godności osoby i stworzenie onieśmielającej, wrogiej, poniżającej, upokarzającej lub uwłaczającej atmosfery. W tym znaczeniu pojęcie molestowania może być definiowane zgodnie z ustawodawstwem i krajową praktyką państw członkowskich.

[…]".

6 Zgodnie z art. 3 ust. 1 dyrektywy 2000/78:

„W granicach kompetencji Wspólnoty niniejszą dyrektywę stosuje się do wszystkich osób, zarówno sektora publicznego, jak i prywatnego, włącznie z instytucjami publicznymi, w odniesieniu do:

[…]

c) warunków zatrudnienia i pracy, łącznie z warunkami zwalniania i wynagradzania;

[…]".

7 Wspomniana dyrektywa przewiduje w art. 5, zatytułowanym „Racjonalne usprawnienia dla osób niepełnosprawnych":

„W celu zagwarantowania przestrzegania zasady równego traktowania osób niepełnosprawnych przewiduje się wprowadzenie racjonalnych usprawnień. Oznacza to, że pracodawca podejmuje właściwe środki, z uwzględnieniem potrzeb konkretnej sytuacji, aby umożliwić osobie niepełnosprawnej dostęp do pracy, wykonywanie jej lub rozwój zawodowy bądź kształcenie, o ile środki te nie nakładają na pracodawcę nieproporcjonalnie wysokich obciążeń. […]".

8 Artykuł 7 tej dyrektywy, zatytułowany „Działanie pozytywne" ma następujące brzmienie:

„1. W celu zapewnienia całkowitej równości w życiu zawodowym zasada równości traktowania nie stanowi przeszkody dla utrzymywania lub przyjmowania przez państwo członkowskie szczególnych środków mających zapobiegać lub wyrównywać niedogodności, u podstaw których leży jedna z przyczyn określonych w art. 1.

2. W odniesieniu do osób niepełnosprawnych zasada równego traktowania nie stanowi przeszkody dla prawa państw członkowskich do utrzymywania lub przyjmowania przepisów dotyczących ochrony zdrowia i bezpieczeństwa w miejscu pracy, ani środków mających na celu stworzenie lub utrzymanie przepisów bądź ułatwień w celu ochrony lub wspierania integracji w środowisku pracy".

9 Artykuł 10 dyrektywy 2000/78, zatytułowany „Ciężar dowodu" przewiduje:

„1. Zgodnie z ich krajowymi systemami sądowymi państwa członkowskie podejmują niezbędne środki dla zapewnienia, aby strona pozwana musiała udowodnić, że nie wystąpiło pogwałcenie zasady równego traktowania, w przypadku gdy osoby, które uważają się za pokrzywdzone w związku z nieprzestrzeganiem wobec nich zasady równego traktowania, ustalą przed sądem lub innym właściwym organem fakty, które nasuwają przypuszczenie o zaistnieniu bezpośredniej i pośredniej dyskryminacji.

2. Ustęp 1 nie stanowi przeszkody dla ustanawiania przez państwa członkowskie zasad dowodowych korzystniejszych dla strony skarżącej".

10 Zgodnie z art. 18 akapit pierwszy dyrektywy 2000/78 państwa członkowskie były zobowiązane do przyjęcia przepisów ustawowych, wykonawczych i administracyjnych niezbędnych do jej wykonania do dnia 2 grudnia 2003 r. Jednakże zgodnie z art. 18 ust. 2:

„W celu uwzględnienia szczególnych warunków państwa członkowskie mogą, o ile zaistnieje taka potrzeba, dysponować dodatkowym terminem trzech lat, licząc od dnia 2 grudnia 2003 r., to znaczy w sumie sześć lat na wprowadzenie w życie przepisów niniejszej dyrektywy dotyczących dyskryminacji ze względu na wiek i niepełnosprawność. W tym wypadku niezwłocznie powiadamiają o tym Komisję. Każde państwo członkowskie, które korzysta z dodatkowego terminu, przedstawia Komisji corocznie raport na temat kroków, jakie podjęło w celu uporania się z dyskryminacją ze względu na wiek i niepełnosprawność oraz postępu we wprowadzeniu w życie dyrektywy. Komisja przedstawia roczny raport Radzie".

11 Ponieważ Zjednoczone Królestwo Wielkiej Brytanii i Irlandii Północnej zwróciło się o skorzystanie z dodatkowego terminu na wprowadzenie w życie przepisów tej dyrektywy, upływa on wobec tego państwa członkowskiego w dniu 2 grudnia 2006 r.

Uregulowania krajowe

12 Według Disability Discrimination Act 1995 (ustawy o dyskryminacji ze względu na niepełnosprawność z 1995 r., zwanej dalej „DDA") każdy przejaw dyskryminacji osób niepełnosprawnych związany w szczególności z zatrudnieniem jest niezgodny z prawem.

13 Disability Discrimination Act 1995 (Amendment) Regulations 2003 (ustawa z 2003 r. zmieniająca ustawę z 1995 r. o dyskryminacji ze względu na niepełnosprawność), która weszła w życie w dniu 1 października 2004 r., zmieniła drugą część DDA, regulującą kwestie zatrudnienia przy okazji transpozycji dyrektywy 2000/78 do porządku prawnego Zjednoczonego Królestwa.

14 Zgodnie z art. 3A ust. 1 DDA, w brzmieniu zmienionym ustawą z 2003 r. (zwaną dalej „DDA z 2003 r."):

„[…] dyskryminacja wobec osoby niepełnosprawnej ma miejsce wówczas, gdy:

a) z powodu związanego z niepełnosprawnością, na którą cierpi osoba niepełnosprawna, traktowana jest ona mniej korzystnie niż inne osoby, których powód ten nie dotyczy lub nie dotyczyłby, oraz

b) nie można wykazać, że takie traktowanie jest uzasadnione".

15 Artykuł 3A ust. 4 DDA z 2003 r. precyzuje jednak, że traktowanie osoby niepełnosprawnej nie może w żadnym razie być uzasadnione, jeśli równoważne jest z dyskryminacją bezpośrednią w rozumieniu art. 3A ust. 5, który ma następujące brzmienie:

„Dyskryminacja bezpośrednia wobec osoby niepełnosprawnej ma miejsce wówczas, gdy z uwagi na niepełnosprawność, na którą cierpi osoba niepełnosprawna, jest ona traktowana w sposób mniej korzystny niż osoba, która nie jest dotknięta taką szczególną niepełnosprawnością, a której właściwe cechy, w tym umiejętności, odpowiadają cechom osoby niepełnosprawnej lub nie różnią się od nich znacząco".

16 Pojęcie molestowania zostało zdefiniowane w sposób następujący w art. 3B DDA z 2003 r.:

„1) […] osoba niepełnosprawna jest poddana molestowaniu wówczas, gdy z powodu związanego z niepełnosprawnością, na którą cierpi osoba niepełnosprawna, ma miejsce niepożądane zachowanie, którego celem lub skutkiem jest:

a) naruszenie godności osoby niepełnosprawnej lub

b) stworzenie wokół niej onieśmielającej, wrogiej, poniżającej, upokarzającej lub uwłaczającej atmosfery.

2) Uważa się, że zachowanie wywołuje skutek, o którym mowa w ust. 1 lit. a) lub b), jeśli w świetle wszystkich okoliczności, a w szczególności tego, co odczuwa osoba niepełnosprawna, można racjonalnie uznać, że ma taki skutek".

17 Na podstawie art. 4 ust. 2 lit. d) DDA z 2003 r. pracodawca nie może dyskryminować osoby niepełnosprawnej, którą zatrudnia, poprzez rozwiązanie z nią stosunku pracy lub narażenie jej na jakąkolwiek inną szkodę.

18 Artykuł 4 ust. 3 lit. a) i b) DDA z 2003 r. przewiduje, że pracodawca, działając w charakterze pracodawcy, nie może również molestować osoby niepełnosprawnej, którą zatrudnia lub która ubiega się o pracę u niego.

Postępowanie przed sądem krajowym i pytania prejudycjalne

19 S. Coleman pracowała dla swego byłego pracodawcy od stycznia 2001 r. w charakterze sekretarza prawnego.

20 W 2002 r. urodziła syna, który cierpi na ataki bezdechu oraz wrodzoną wiotkość oskrzeli i krtani. Stan jej syna wymaga specjalistycznej i szczególnej opieki. Skarżąca w postępowaniu przed sądem krajowym zapewnia synowi zasadniczą opiekę, jakiej ten potrzebuje.

21 W dniu 4 marca 2005 r. S. Coleman z własnej woli odeszła z pracy wskutek redukcji zatrudnienia („voluntary redundancy"), co spowodowało rozwiązanie umowy o pracę z jej byłym pracodawcą.

22 W dniu 30 sierpnia 2005 r. wniosła powództwo do Employment Tribunal, London South przeciwko byłemu pracodawcy, w którym podnosi, że została przymuszona do rozwiązania stosunku pracy („constructive unfair dismissal") i że traktowano ją mniej przychylnie niż innych pracowników z tego względu, że jest głównym opiekunem niepełnosprawnego dziecka. Twierdzi, że takie traktowanie zmusiło ją do zaprzestania pracy na rzecz byłego pracodawcy.

23 Z postanowienia odsyłającego wynika, że istotne elementy stanu faktycznego w sprawie przed sądem krajowym nie zostały jeszcze w pełni ustalone, ponieważ pytania prejudycjalne stanowią jedynie kwestię wstępną. Sąd krajowy zawiesił bowiem postępowanie w przedmiocie części skargi dotyczącej rozwiązania stosunku pracy z S. Coleman, lecz w dniu 17 lutego 2006 r. przeprowadził wstępną rozprawę poświęconą badaniu zarzutu dyskryminacji.

24 Kwestię wstępną podniesioną przez ten sąd stanowi to, czy skarżąca w postępowaniu przed sądem krajowym może powoływać się na przepisy prawa krajowego, w szczególności transponujące dyrektywę 2000/78, celem podniesienia przeciwko byłemu pracodawcy zarzutu dyskryminacji, którą – jak twierdzi – wobec niej stosowano, ponieważ traktowano ją mniej korzystnie w związku z niepełnosprawnością, na którą cierpi jej syn.

25 Z brzmienia postanowienia odsyłającego wynika, że jeśli wykładnia dyrektywy 2000/78 dokonana przez Trybunał byłaby sprzeczna z interpretacją proponowaną przez S. Coleman, to prawo krajowe stałoby na przeszkodzie temu, aby żądanie podnoszone przez nią przed sądem krajowym zostało uwzględnione.

26 Z postanowienia odsyłającego wynika również, że zgodnie z prawem Zjednoczonego Królestwa, podczas rozprawy wstępnej dotyczącej kwestii prawnej, sąd rozpatrujący sprawę zakłada, że okoliczności faktyczne przedstawiają się tak, jak przedstawiła je strona skarżąca. W postępowaniu przed sądem krajowym przypuszcza się, że okoliczności faktyczne sporu są następujące:

– po powrocie z urlopu macierzyńskiego S. Coleman jej były pracodawca odmówił jej powrotu na stanowisko pracy, jakie zajmowała dotychczas, podczas gdy rodzicom dzieci, które nie były niepełnosprawne, zezwolono na powrót na to samo stanowisko;

– były pracodawca odmówił również przyznania jej takiej samej elastyczności czasu pracy oraz takich samych warunków pracy, z jakich korzystali inni pracownicy, będący rodzicami dzieci, które nie były niepełnosprawne;

– S. Coleman była określana jako „leniwa", gdy występowała o dni wolne od pracy w celu sprawowania opieki nad dzieckiem, podczas gdy rodzice dzieci, które nie były niepełnosprawne, uzyskiwali zgodę na dni wolne w celu opieki nad dziećmi;

– oficjalna skarga na złe traktowanie, którą S. Coleman złożyła, nie została rozpatrzona prawidłowo, a ona sama czuła się zmuszona do wycofania skargi;

– czyniono obraźliwe i nie na miejscu komentarze wobec niej i jej dziecka; tego rodzaju komentarze nie zostały wygłoszone pod adresem innych pracowników występujących o dni wolne lub ubiegających się o elastyczny czas pracy w związku z opieką nad dziećmi niebędącymi osobami niepełnosprawnymi oraz

– ponieważ okazjonalnie spóźniała się do pracy z powodu problemów związanych z opieką nad dzieckiem, poinformowano ją, że zostanie zwolniona z pracy, jeżeli jeszcze raz się spóźni; tego rodzaju groźba nie została skierowana do pozostałych pracowników, gdy spóźniali się do pracy z powodu problemów związanych z opieką nad dziećmi, niebędącymi osobami niepełnosprawnymi.

27 Uznając, że w sporze zawisłym przed nim powstały pytania dotyczące wykładni prawa wspólnotowego, Employment Tribunal, London South postanowił zawiesić postępowanie i zwrócić się do Trybunału z następującymi pytaniami prejudycjalnymi:

„1) Czy w ramach zakazu dyskryminacji ze względu na niepełnosprawność dyrektywa [2000/78] chroni przed bezpośrednią dyskryminacją i molestowaniem jedynie osoby, które same są niepełnosprawne?

2) Jeżeli odpowiedź na pytanie pierwsze jest przecząca, to czy dyrektywa [2000/78] chroni pracowników, którzy, sami nie będąc niepełnosprawnymi, są traktowani mniej przychylnie lub molestowani ze względu na ich więź z osobą niepełnosprawną?

3) Jeżeli pracodawca traktuje pracownika mniej przychylnie niż traktuje lub traktowałby innych pracowników i stwierdzone zostało, że powodem takiego traktowania pracownika jest to, iż pracownik ma niepełnosprawnego syna, nad którym sprawuje opiekę, to czy traktowanie to stanowi dyskryminację bezpośrednią, naruszającą zasadę równego traktowania ustanowioną przez tę dyrektywę [2000/78]?

4) Jeżeli pracodawca molestuje pracownika i stwierdzone zostało, że powodem tego traktowania pracownika jest, iż pracownik ma niepełnosprawnego syna, nad którym sprawuje opiekę, to czy molestowanie to narusza zasadę równego traktowania ustanowioną przez tę dyrektywę [2000/78]?".

W przedmiocie dopuszczalności

28 Rząd niderlandzki uważa, że chociaż pytania, z którymi zwrócił się sąd krajowy, dotyczą prawdziwego sporu, to jednak podaje w wątpliwość dopuszczalność postanowienia odsyłającego ze względu na to, że ponieważ chodzi o kwestie wstępne podniesione podczas rozprawy wstępnej, sporny stan faktyczny nie został jeszcze w pełni ustalony. Rząd ten zwrócił uwagę na to, że podczas rozprawy wstępnej sąd krajowy zakłada, że okoliczności faktyczne przedstawiają się tak, jak przedstawiła je strona skarżąca.

29 W tym względzie należy przypomnieć, że przewidziana w art. 234 WE procedura odesłania prejudycjalnego ustanawia ścisłą współpracę między sądami krajowymi a Trybunałem, opartą na podziale zadań między nimi. Z art. 234 akapit drugi WE jasno wynika, że do sądu krajowego należy podjęcie decyzji, w którym stadium postępowania sąd ten powinien przedłożyć Trybunałowi pytanie prejudycjalne (zob. wyroki: z dnia 10 marca 1981 r. w sprawach połączonych 36/80 i 71/80 Irish Creamery Milk Suppliers Association i in., Rec. s. 735, pkt 5 i z dnia 30 marca 2000 r. w sprawie C-236/98 JämO, Rec. s. I-2189, pkt 30).

30 Należy zauważyć, że w sprawie przed sądem krajowym sąd krajowy stwierdził, że jeśli Trybunał miałby dokonać wykładni dyrektywy 2000/78 w sposób nieodpowiadający interpretacji proponowanej przez S. Coleman, to jej żądania w postępowaniu przed sądem krajowym nie mogłyby zostać uwzględnione. Sąd krajowy postanowił zatem, jak na to zezwala prawo Zjednoczonego Królestwa, zbadać kwestię, czy ta dyrektywa powinna być interpretowana w taki sposób, że znajduje zastosowanie do rozwiązania umowy o pracę z pracownikiem w sytuacji takiej jak sytuacja S. Coleman przed ustaleniem, czy rzeczywiście była ona traktowana mniej korzystnie lub molestowana. Właśnie dlatego pytania prejudycjalne zostały przedstawione przy wyjściu z założenia, że okoliczności faktyczne postępowania przed sądem krajowym są takie jak streszczone w pkt 26 niniejszego wyroku.

31 Skoro do Trybunału zwrócono się z wnioskiem o wykładnię prawa wspólnotowego, który nie pozostaje bez związku z rzeczywistością lub przedmiotem sporu w postępowaniu przed sądem krajowym i skoro Trybunał posiada niezbędne informacje, aby odpowiedzieć w sposób użyteczny na postawione mu pytania, dotyczące możliwości zastosowania dyrektywy 2000/78 do tego sporu, powinien on na nie odpowiedzieć, nie stawiając sobie pytań odnośnie do domniemań w zakresie stanu faktycznego, na których opiera się sąd krajowy i których sprawdzenie należy w następnej kolejności do sądu krajowego, o ile okaże się to konieczne (zob. podobnie wyrok z dnia 27 października 1993 r. w sprawie C-127/92 Enderby, Rec. s. I-5535, pkt 12).

32 W tych okolicznościach zatem wniosek o wydanie orzeczenia w trybie prejudycjalnym należy uznać za dopuszczalny.

W przedmiocie pytań prejudycjalnych

W przedmiocie pierwszej części pytania pierwszego, a także w przedmiocie pytania drugiego i trzeciego

33 Poprzez te pytania, które należy rozpatrywać łącznie, sąd krajowy zmierza zasadniczo do ustalenia, czy wykładni dyrektywy 2000/78, a w szczególności art. 1 oraz art. 2 ust. 1 i art. 2 ust. 2 lit. a), należy dokonywać w ten sposób, że zakazują one dyskryminacji bezpośredniej ze względu na niepełnosprawność wyłącznie wobec pracownika, który sam jest niepełnosprawny, lub czy zasady równego traktowania i zakazu dyskryminacji bezpośredniej stosują się również do pracownika, który sam nie jest niepełnosprawny, lecz który, jak w sprawie przed sądem krajowym, jest mniej korzystnie traktowany z uwagi na niepełnosprawność swego dziecka, któremu zapewnia zasadniczą opiekę stosowną do stanu zdrowia.

34 Artykuł 1 dyrektywy 2000/78 określa jej cel, jakim jest wyznaczenie ogólnych ram dla walki z dyskryminacją ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w odniesieniu do zatrudnienia i pracy.

35 Artykuł 2 ust. 1 tej dyrektywy definiuje zasadę równego traktowania jako zasadę oznaczającą brak jakichkolwiek form bezpośredniej lub pośredniej dyskryminacji z przyczyn określonych w art. 1, a tym samym ze względu na niepełnosprawność.

36 Zgodnie z art. 2 ust. 2 lit. a) dyskryminacja bezpośrednia występuje, w przypadku gdy osobę traktuje się mniej przychylnie niż traktuje się, traktowano lub traktowano by inną osobę w porównywalnej sytuacji, ze względu między innymi na niepełnosprawność.

37 Na podstawie art. 3 ust. 1 lit. c) dyrektywę 2000/78 stosuje się, w granicach kompetencji Wspólnoty, do wszystkich osób, zarówno sektora publicznego, jak i prywatnego, włącznie z instytucjami publicznymi, w odniesieniu do warunków zatrudnienia i pracy, łącznie z warunkami zwalniania i wynagradzania.

38 Tym samym, z przepisów dyrektywy 2000/78 nie wynika, by zasada równego traktowania, którą dyrektywa ma zapewniać, była ograniczona do osób dotkniętych niepełnosprawnością w rozumieniu tej dyrektywy. Wprost przeciwnie, ma ona na celu walkę z wszelkimi formami dyskryminacji ze względu na niepełnosprawność w odniesieniu do zatrudnienia i pracy. Zasada równego traktowania bowiem, ustanowiona w tej dyrektywie w tym obszarze stosuje się nie do jednej kategorii określonych osób, lecz w zależności od przyczyn, o których mowa w art. 1 dyrektywy. Wykładnię taką potwierdza brzmienie art. 13 WE, stanowiącego podstawę prawną dyrektywy 2000/78, który powierza Wspólnocie kompetencje do podjęcia środków niezbędnych w celu zwalczania wszelkiej dyskryminacji ze względu, między innymi, na niepełnosprawność.

39 Bezsporne jest, że dyrektywa 2000/78 zawiera wiele przepisów znajdujących zastosowanie, jak wynika z ich brzmienia, wyłącznie do osób niepełnosprawnych. I tak art. 5 określa, że w celu zagwarantowania przestrzegania zasady równego traktowania osób niepełnosprawnych przewiduje się wprowadzenie racjonalnych usprawnień. Oznacza to, że pracodawca podejmuje właściwe środki, z uwzględnieniem potrzeb konkretnej sytuacji, aby umożliwić osobie niepełnosprawnej dostęp do pracy, wykonywanie jej lub rozwój zawodowy bądź kształcenie, o ile środki te nie nakładają na pracodawcę nieproporcjonalnie wysokich obciążeń.

40 Artykuł 7 ust. 2 tej dyrektywy przewiduje również, że w odniesieniu do osób niepełnosprawnych zasada równego traktowania nie stanowi przeszkody dla prawa państw członkowskich do utrzymywania lub przyjmowania przepisów dotyczących ochrony zdrowia i bezpieczeństwa w miejscu pracy, ani środków mających na celu stworzenie lub utrzymanie przepisów bądź ułatwień w celu ochrony lub wspierania integracji w środowisku pracy.

41 Rządy Zjednoczonego Królestwa, grecki, włoski i niderlandzki utrzymują, w świetle zarówno przepisów przywołanych w dwóch poprzednich punktach, jak i motywów szesnastego, siedemnastego i dwudziestego siódmego dyrektywy 2000/78, że przewidziany w niej zakaz bezpośredniej dyskryminacji nie może być interpretowany tak, że dotyczy sytuacji takiej, jak sytuacja skarżącej w postępowaniu przed sądem krajowym, skoro ona sama nie jest niepełnosprawna. Na przepisy tej dyrektywy mogą, według nich, powoływać się tylko osoby, które w sytuacji porównywalnej z sytuacją innych osób są traktowane mniej przychylnie lub znajdują się w sytuacji niekorzystnej z uwagi na ich własne cechy.

42 Jednak należy podnieść w tym względzie, że to, iż przepisy przywołane w pkt 39 i 40 niniejszego wyroku dotyczą szczególnie osób dotkniętych niepełnosprawnością, wynika z okoliczności, że chodzi tu o przepisy mające na celu działania pozytywne na rzecz samej osoby niepełnosprawnej albo szczególne działania, które byłyby pozbawione znaczenia lub mogłyby okazać się nieproporcjonalne, gdyby nie zostały ograniczone tylko do osób dotkniętych niepełnosprawnością. Jak wynika z motywów szesnastego i dwudziestego dyrektywy, chodzi tu o środki uwzględniające potrzeby osób niepełnosprawnych w miejscu pracy i przystosowujące miejsce pracy z uwzględnieniem niepełnosprawności tych osób. Takie działania mają więc szczególnie na celu umożliwienie i wspieranie integracji osób niepełnosprawnych w środowisku pracy, i z tego względu mogą dotyczyć tylko tych osób, jak również obowiązków nakładanych na pracodawców i, w danym przypadku, na państwa członkowskie w stosunku do nich.

43 Tym samym okoliczność, że dyrektywa 2000/78 zawiera przepisy mające na celu uwzględnienie szczególnych potrzeb osób niepełnosprawnych, nie pozwala na wysnucie wniosku, że zasada równego traktowania, którą ustanawia, powinna być interpretowana w sposób ścisły, to znaczy zakazujący wyłącznie dyskryminacji bezpośredniej ze względu na niepełnosprawność i obejmujący wyłącznie same osoby niepełnosprawne. Ponadto motyw szósty tej dyrektywy, przywołując Wspólnotową kartę socjalnych praw podstawowych pracowników, odnosi się zarówno do walki z dyskryminacją we wszystkich jej postaciach, jak i do potrzeby podjęcia właściwych działań na rzecz integracji społecznej i gospodarczej osób niepełnosprawnych.

44 Rządy Zjednoczonego Królestwa, włoski i niderlandzki utrzymują również, że ścisła wykładnia zakresu podmiotowego stosowania dyrektywy 2000/78 wynika z wyroku z dnia 11 lipca 2006 r. w sprawie C-13/05 Chacón Navas, Zb.Orz. s. I-6467. Według rządu włoskiego w wyroku tym Trybunał utrzymał ścisłą wykładnię pojęcia niepełnosprawności i jego znaczenia w stosunkach pracy.

45 W ww. wyroku w sprawie Chacón Navas Trybunał zdefiniował pojęcie niepełnosprawności, a w pkt 51 i 52 orzekł, że zakaz dyskryminacji ze względu na niepełnosprawność, w zakresie rozwiązania umowy o pracę, zawarty w art. 2 ust. 1 i w art. 3 ust. 1 lit. c) dyrektywy 2000/78, stoi na przeszkodzie rozwiązaniu umowy o pracę ze względu na niepełnosprawność, które, zważywszy na obowiązek wprowadzania racjonalnych usprawnień dla osób niepełnosprawnych, nie jest uzasadnione tym, że dana osoba nie jest kompetentna ani zdolna bądź nie pozostaje w dyspozycji do wykonywania najważniejszych czynności na danym stanowisku. Jednak z takiej wykładni nie wynika, by zasada równego traktowania zdefiniowana w art. 2 ust. 1 tej dyrektywy oraz zakaz dyskryminacji bezpośredniej przewidziany w art. 2 ust. 2 lit. a) nie mogły znajdować zastosowania do sytuacji takiej jak sytuacja w sprawie przed sądem krajowym, jeśli rzekomo niekorzystne traktowanie pracownika ma miejsce ze względu na niepełnosprawność jego dziecka, któremu pracownik ten zapewnia zasadniczą opiekę, jakiej wymaga stan dziecka.

46 O ile bowiem w pkt 56 ww. wyroku w sprawie Chacón Navas Trybunał doprecyzował, że zakresu stosowania dyrektywy 2000/78 nie należy rozszerzać, w świetle art. 13 WE, poza dyskryminację z przyczyn wymienionych w sposób wyczerpujący w art. 1 tejże dyrektywy, a tym samym osoba, z którą pracodawca rozwiązał stosunek pracy wyłącznie ze względu na chorobę, nie jest objęta zakresem ogólnych ram ustanowionych dyrektywą 2000/78, o tyle Trybunał nie orzekł, że zasada równego traktowania oraz zakres podmiotowy stosowania tej dyrektywy powinny, w odniesieniu do tych przyczyn, być interpretowane w sposób ścisły.

47 Jeśli chodzi o cele wytyczone przez dyrektywę 2000/78, to zmierza ona, jak wynika z pkt 34 i 38 niniejszego wyroku, do wyznaczenia ogólnych ram dla walki z dyskryminacją z przyczyn wymienionych w art. 1 tej dyrektywy, wśród których znajduje się również niepełnosprawność w odniesieniu do zatrudnienia i pracy, w celu realizacji w państwach członkowskich zasady równego traktowania. Z motywu trzydziestego siódmego tej dyrektywy wynika, że ma ona również na celu stworzenie we Wspólnocie obszaru działania w sferze równości zatrudnienia i pracy.

48 Jak utrzymują S. Coleman, rządy litewski i szwedzki oraz Komisja, wspomniane cele, jak i skuteczność dyrektywy 2000/78 byłyby naruszone, gdyby pracownik znajdujący się w sytuacji takiej jak skarżąca w postępowaniu przed sądem krajowym nie mógł opierać się na zakazie dyskryminacji bezpośredniej przewidzianym w art. 2 ust. 2 lit. a) tej dyrektywy wówczas, gdyby zostało wykazane, że był traktowany mniej korzystnie niż inny pracownik jest, był lub byłby traktowany w porównywalnej sytuacji, ze względu na niepełnosprawność swego dziecka, i to nawet wówczas, gdy pracownik ten sam nie jest niepełnosprawny.

49 W tym względzie z jedenastego motywu tej dyrektywy wynika, że prawodawca wspólnotowy również uznał, że dyskryminacja ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną może być przeszkodą w realizacji celów traktatu, w szczególności w zakresie zatrudnienia.

50 Tymczasem, jeśli w sytuacji takiej jak sytuacja w sprawie przed sądem krajowym osoba poddana dyskryminacji bezpośredniej ze względu na niepełnosprawność sama nie jest niepełnosprawna, to niemniej jednak to właśnie niepełnosprawność stanowi, według S. Coleman, przyczynę mniej korzystnego traktowania, którego stała się jakoby ofiarą. Jak wynika z pkt 38 niniejszego wyroku, dyrektywa 2000/78, która ma na celu walkę z wszelkimi formami dyskryminacji ze względu na niepełnosprawność w odniesieniu do zatrudnienia i pracy, stosuje się nie do jednej kategorii określonych osób, lecz w zależności od przyczyn, o których mowa w art. 1 dyrektywy.

51 Jeśli zostanie wykazane, że pracownik znajdujący się w sytuacji takiej jak w postępowaniu przed sądem krajowym został poddany dyskryminacji bezpośredniej ze względu na niepełnosprawność, wykładnia dyrektywy 2000/78 ograniczająca jej zastosowanie tylko do

osób niepełnosprawnych mogłaby pozbawić tę dyrektywę dużej części jej skuteczności oraz ograniczyć ochronę, którą ma gwarantować.

52 Co do ciężaru dowodu znajdującego zastosowanie w sprawie przed sądem krajowym należy w pierwszej kolejności przypomnieć, że na podstawie art. 10 ust. 1 dyrektywy 2000/78 państwa członkowskie podejmują, zgodnie z ich krajowymi systemami sądowymi, niezbędne środki dla zapewnienia, aby strona pozwana musiała udowodnić, że nie wystąpiło pogwałcenie zasady równego traktowania, w przypadku gdy osoby, które uważają się za pokrzywdzone w związku z nieprzestrzeganiem wobec nich zasady równego traktowania, ustalą przed sądem lub innym właściwym organem fakty, które nasuwają przypuszczenie o zaistnieniu bezpośredniej i pośredniej dyskryminacji. Zgodnie z art. 10 ust. 2 tej dyrektywy ust. 1 nie stanowi przeszkody dla ustanawiania przez państwa członkowskie zasad dowodowych korzystniejszych dla strony skarżącej.

53 W sprawie przed sądem krajowym to na S. Coleman ciąży zatem obowiązek, zgodnie z art. 10 ust. 1 dyrektywy 2000/78, przedstawienia przed sądem krajowym, faktów pozwalających domniemywać istnienie dyskryminacji bezpośredniej ze względu na niepełnosprawność zakazanej na mocy dyrektywy.

54 Zgodnie z art. 10 ust. 1 dyrektywy 2000/78 oraz z jej motywem trzydziestym pierwszym zastosowanie zasad dotyczących ciężaru dowodu ma miejsce od chwili, gdy istnieje domniemanie dyskryminacji. W przypadku gdyby S. Coleman przedstawiła fakty pozwalające domniemywać istnienie dyskryminacji bezpośredniej, skuteczne stosowanie zasady równego traktowania wymagałoby wówczas, by ciężar dowodu spoczywał na pozwanych w postępowaniu przed sądem krajowym, którzy musieliby udowodnić, że zasada ta nie została naruszona.

55 W tym kontekście pozwani mogliby kwestionować istnienie takiego naruszenia poprzez wykazanie za pomocą wszelkich środków prawnych, między innymi, że traktowanie, jakiemu został poddany pracownik, jest uzasadnione obiektywnymi czynnikami i niezwiązane z jakąkolwiek dyskryminacją ze względu na niepełnosprawność, jak również z jakimkolwiek stosunkiem, jaki łączy tego pracownika z osobą niepełnosprawną.

56 Biorąc powyższe pod uwagę, na pierwszą część pytania pierwszego oraz na pytania drugie i trzecie należy odpowiedzieć tak, że wykładni dyrektywy 2000/78, a w szczególności art. 1 oraz art. 2 ust. 1 i art. 2 ust. 2 lit. a) należy dokonywać w ten sposób, że zakaz dyskryminacji bezpośredniej, jaki przewidują, nie ogranicza się tylko do osób, które same są niepełnosprawne. Jeśli pracodawca traktuje pracownika, który sam nie jest niepełnosprawny, mniej przychylnie niż traktuje, traktował lub traktowałby innego pracownika w porównywalnej sytuacji i gdy wykazano, że mniej korzystne traktowanie tego pracownika związane jest z niepełnosprawnością jego dziecka, któremu zapewnia on zasadniczą opiekę stosowną do potrzeb, to takie traktowanie jest sprzeczne z zakazem dyskryminacji bezpośredniej, o której mowa w art. 2 ust. 2 lit. a) tej dyrektywy.

W przedmiocie drugiej części pytania pierwszego oraz w przedmiocie pytania czwartego

57 Poprzez te pytania, które należy rozpatrywać łącznie, sąd krajowy zmierza zasadniczo do ustalenia, czy wykładni dyrektywy 2000/78, a w szczególności jej art. 1 oraz art. 2 ust. 1 i 3 należy dokonywać w ten sposób, że zakazują one molestowania związanego z niepełnosprawnością wyłącznie wobec pracownika, który sam jest niepełnosprawny, lub czy zakaz molestowania stosuje się również do pracownika, który sam nie jest niepełnosprawny, lecz wobec którego, jak w sprawie przed sądem krajowym, ma miejsce niepożądane zachowanie stanowiące molestowanie i mające związek z niepełnosprawnością jego dziecka, któremu pracownik ten zapewnia zasadniczą opiekę, jakiej wymaga stan zdrowia tego dziecka.

58 Ponieważ molestowanie uważa się, na podstawie art. 2 ust. 3 dyrektywy 2000/78, za formę dyskryminacji w rozumieniu ust. 1 tego samego artykułu, to należy zauważyć, że z tych samych powodów, które zostały przedstawione w pkt 34–51 niniejszego wyroku, wykładni tej dyrektywy, a w szczególności jej art. 1 oraz art. 2 ust. 1 i 3 należy dokonywać w ten

sposób, że przewidziany w nich zakaz molestowania nie jest ograniczony tylko do osób, które same są niepełnosprawne.

59 Jeśli zostanie wykazane, że mające miejsce wobec pracownika, który sam nie jest niepełnosprawny, niepożądane zachowanie stanowiące molestowanie ma związek z niepełnosprawnością jego dziecka, któremu pracownik ten zapewnia zasadniczą opiekę, stosownie do potrzeb tego dziecka, to takie zachowanie jest sprzeczne z zasadą równego traktowania ustanowioną w tej dyrektywie, a w szczególności z zakazem molestowania, o którym mowa w art. 2 ust. 3 dyrektywy.

60 W tym względzie należy jednak przypomnieć, że zgodnie z art. 2 ust. 3 tej dyrektywy pojęcie molestowania może być definiowane zgodnie z ustawodawstwem i krajową praktyką państw członkowskich.

61 Jeśli chodzi o zasady ciężaru dowodu, mające zastosowanie do sytuacji takiej jak sytuacja w postępowaniu przed sądem krajowym, to należy stwierdzić, że ponieważ molestowanie uważa się za formę dyskryminacji w rozumieniu art. 2 ust. 1 dyrektywy 2000/78, to takie same zasady jak te przedstawione w pkt 52–55 niniejszego wyroku stosują się do molestowania.

62 Tym samym, jak wynika z pkt 54 niniejszego wyroku, zgodnie z art. 10 ust. 1 dyrektywy 2000/78 oraz z jej motywem trzydziestym pierwszym, zastosowanie zasad dotyczących ciężaru dowodu ma miejsce od chwili, gdy istnieje domniemanie dyskryminacji. W przypadku gdyby S. Coleman przedstawiła fakty pozwalające domniemywać istnienie molestowania, skuteczne stosowanie zasady równego traktowania wymagałoby wówczas, by ciężar dowodu spoczywał na pozwanych w postępowaniu przed sądem krajowym, którzy musieliby udowodnić, że w okolicznościach zaistniałych w sprawie przed sądem krajowym nie miało miejsca molestowanie.

63 Biorąc powyższe pod uwagę, na drugą część pytania pierwszego oraz na pytanie czwarte należy odpowiedzieć tak, że wykładni dyrektywy 2000/78, a w szczególności jej art. 1 oraz art. 2 ust. 1 i 3 należy dokonywać w ten sposób, że przewidziany w nich zakaz molestowania nie jest ograniczony tylko do osób, które same są niepełnosprawne. Jeśli zostanie wykazane, że mające miejsce wobec pracownika, który sam nie jest niepełnosprawny, niepożądane zachowanie stanowiące molestowanie ma związek z niepełnosprawnością jego dziecka, któremu pracownik ten zapewnia zasadniczą opiekę, stosownie do potrzeb tego dziecka, to takie zachowanie jest sprzeczne z zakazem molestowania, o którym mowa w art. 2 ust. 3 dyrektywy.

W przedmiocie kosztów

64 Dla stron postępowania przed sądem krajowym niniejsze postępowanie ma charakter incydentalny, dotyczy bowiem kwestii podniesionej przed tym sądem, do niego zatem należy rozstrzygnięcie o kosztach. Koszty poniesione w związku z przedstawieniem uwag Trybunałowi, inne niż poniesione przez strony postępowania przed sądem krajowym, nie podlegają zwrotowi.

Z powyższych względów Trybunał (wielka izba) orzeka, co następuje:

1) Wykładni dyrektywy Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy, a w szczególności jej art. 1 oraz art. 2 ust. 1 i art. 2 ust. 2 lit. a), należy dokonywać w ten sposób, że zakaz dyskryminacji bezpośredniej, jaki przewidują, nie ogranicza się tylko do osób, które same są niepełnosprawne. Jeśli pracodawca traktuje pracownika, który sam nie jest niepełnosprawny, mniej przychylnie niż traktuje, traktował lub traktowałby innego pracownika w porównywalnej sytuacji i gdy wykazano, że mniej korzystne traktowanie tego pracownika związane jest z niepełnosprawnością jego dziecka, któremu zapewnia on zasadniczą opiekę

stosowną do potrzeb, to takie traktowanie jest sprzeczne z zakazem dyskryminacji bezpośredniej, o której mowa w art. 2 ust. 2 lit. a) tej dyrektywy.

2) **Wykładni dyrektywy 2000/78, a w szczególności jej art. 1 oraz art. 2 ust. 1 i 3 należy dokonywać w ten sposób, że przewidziany w nich zakaz molestowania nie jest ograniczony tylko do osób, które same są niepełnosprawne. Jeśli zostanie wykazane, że mające miejsce wobec pracownika, który sam nie jest niepełnosprawny, niepożądane zachowanie stanowiące molestowanie ma związek z niepełnosprawnością jego dziecka, któremu pracownik ten zapewnia zasadniczą opiekę, stosownie do potrzeb tego dziecka, to takie zachowanie jest sprzeczne z zakazem molestowania, o którym mowa w art. 2 ust. 3 dyrektywy.**

Podpisy

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* Język postępowania: angielski.

WYROK TRYBUNAŁU (wielka izba)

z dnia 11 lipca 2006 r. (*)

Dyrektywa 2000/78/WE – Równość traktowania w dziedzinie zatrudnienia i pracy – Pojęcie niepełnosprawności

W sprawie C-13/05

mającej za przedmiot wniosek o wydanie, na podstawie art. 234 WE, orzeczenia w trybie prejudycjalnym, złożony przez Juzgado de lo Social n° 33 de Madrid (Hiszpania) postanowieniem z dnia 7 stycznia 2005 r., które wpłynęło do Trybunału w dniu 19 stycznia 2005 r., w postępowaniu:

Sonia Chacón Navas

przeciwko

Eurest Colectividades SA,

TRYBUNAŁ (wielka izba),

w składzie: V. Skouris, prezes, P. Jann, C. W. A. Timmermans, A. Rosas, K. Schiemann i J. Makarczyk, prezesi izb, J.-P. Puissochet, N. Colneric (sprawozdawca), K. Lenaerts, P. Kūris, E. Juhász, E. Levits i A. Ó Caoimh, sędziowie,

rzecznik generalny: L. A. Geelhoed,

sekretarz: R. Grass,

uwzględniając procedurę pisemną,

rozważywszy uwagi przedstawione:

– w imieniu Eurest Colectividades SA przez M. R. Sanz Garcíę-Muro, abogada,

– w imieniu rządu hiszpańskiego przez E. Braquehaisa Conesę, działającego w charakterze pełnomocnika,

– w imieniu rządu czeskiego przez T. Bočeka, działającego w charakterze pełnomocnika,

– w imieniu rządu niemieckiego przez M. Lummę i C. Schulze-Bahr, działających w charakterze pełnomocników,

– w imieniu rządu niderlandzkiego przez H. G. Sevenster, działającą w charakterze pełnomocnika,

– w imieniu rządu austriackiego przez C. Pesendorfer, działającą w charakterze pełnomocnika,

– w imieniu rządu Zjednoczonego Królestwa przez C. White, działającą w charakterze pełnomocnika, wspieraną przez T. Warda, barrister,

– w imieniu Komisji Wspólnot Europejskich przez I. Martinez del Peral Cagigal i D. Martina, działających w charakterze pełnomocników,

po zapoznaniu się z opinią rzecznika generalnego na posiedzeniu w dniu 16 marca 2006 r.,

wydaje następujący

Wyrok

1 Wniosek o wydanie orzeczenia w trybie prejudycjalnym dotyczy wykładni dyrektywy Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy (Dz.U. L 303, str. 16) odnośnie do dyskryminacji ze względu na niepełnosprawność oraz, pomocniczo, odnośnie do ewentualnego zakazu dyskryminacji ze względu na chorobę.

2 Wniosek ten został przedstawiony w ramach sporu pomiędzy S. Chacón Navas a spółką Eurest Colectividades SA (zwaną dalej „Eurestem") w przedmiocie rozwiązania umowy o pracę w związku z przerwaniem świadczenia pracy z powodu choroby.

Ramy prawne

Uregulowania wspólnotowe

3 Artykuł 136 akapit pierwszy WE stanowi:

„Wspólnota i państwa członkowskie, świadome podstawowych praw socjalnych wyrażonych w Europejskiej karcie społecznej, podpisanej w Turynie 18 października 1961 roku oraz we wspólnotowej Karcie socjalnych praw podstawowych pracowników z 1989 roku, mają na celu promowanie zatrudnienia, poprawę warunków życia i pracy, tak aby umożliwić ich wyrównanie z jednoczesnym zachowaniem postępu, odpowiednią ochronę socjalną, dialog między partnerami społecznymi, rozwój zasobów ludzkich pozwalający podnosić i utrzymać poziom zatrudnienia oraz przeciwdziałanie wyłączeniu".

4 Artykuł 137 ust. 1 i 2 WE przyznaje Wspólnocie kompetencje w zakresie wspierania i uzupełniania działań państw członkowskich, aby osiągnąć cele określone w art. 136 WE, m. in. w dziedzinie integracji osób wyłączonych z rynku pracy oraz zwalczania wyłączenia społecznego.

5 Dyrektywa 2000/78 została przyjęta na podstawie art. 13 WE w jego brzmieniu przed wejściem w życie traktatu z Nicei, który przewidywał:

„Bez uszczerbku dla innych postanowień niniejszego Traktatu i w granicach kompetencji, które Traktat powierza Wspólnocie, Rada, stanowiąc jednomyślnie na wniosek Komisji i po konsultacji z Parlamentem Europejskim, może podjąć środki niezbędne w celu zwalczania wszelkiej dyskryminacji ze względu na płeć, rasę lub pochodzenie etniczne, religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną".

6 Artykuł 1 dyrektywy 2000/78 stanowi:

„Celem niniejszej dyrektywy jest wyznaczenie ogólnych ram dla walki z dyskryminacją ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w odniesieniu do zatrudnienia i pracy, w celu realizacji w państwach członkowskich zasady równego traktowania".

7 Motywy dyrektywy mają następujące brzmienie:

„(11) Dyskryminacja ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną może być przeszkodą w realizacji celów traktatu WE, w szczególności w zakresie wysokiego poziomu zatrudnienia i ochrony socjalnej, podnoszenia poziomu i jakości życia, spójności gospodarczej i społecznej, solidarności i swobodnego przepływu osób.

(12) W tym celu wszelka bezpośrednia i pośrednia dyskryminacja ze względu na wyznawaną religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w zakresie regulowanym niniejszą dyrektywą powinna być w całej Wspólnocie zakazana. […]

[…]

(16) Przyjęcie środków uwzględniających potrzeby osób niepełnosprawnych w miejscu pracy jest najważniejszym czynnikiem w walce z dyskryminacją osób niepełnosprawnych.

(17) Niniejsza dyrektywa nie nakłada wymogu, aby osoba, która nie jest kompetentna ani zdolna bądź [pozostaje w dyspozycji] do wykonywania najważniejszych czynności na danym stanowisku lub kontynuacji danego kształcenia, była przyjmowana do pracy, awansowana lub dalej zatrudniana, nie naruszając obowiązku wprowadzania racjonalnych zmian uwzględniających potrzeby osób niepełnosprawnych.

[…]

(27) W zaleceniu 86/379/EWG z dnia 24 lipca 1986 r. w sprawie zatrudniania we Wspólnocie osób niepełnosprawnych [Dz.U. L 225, str. 43] Rada określiła ramy, w których podane są przykłady pozytywnych działań mających wspierać zatrudnienie i kształcenie osób niepełnosprawnych, a w rezolucji z dnia 17 czerwca 1999 r. w sprawie możliwości zatrudnienia osób niepełnosprawnych potwierdziła szczególną wagę, jaką przywiązuje się w szczególności do rekrutacji, dalszego zatrudniania i kształcenia oraz kształcenia ustawicznego osób niepełnosprawnych".

8 Artykuł 2 ust. 1 i 2 dyrektywy 2000/78 przewiduje:

„1. Do celów niniejszej dyrektywy »zasada równego traktowania« oznacza brak jakichkolwiek form bezpośredniej lub pośredniej dyskryminacji z przyczyn określonych w art. 1".

2. Do celów ust. 1:

a) dyskryminacja bezpośrednia występuje, w przypadku gdy osobę traktuje się mniej przychylnie niż traktuje się, traktowano lub traktowano by inną osobę w porównywalnej sytuacji, z jakiejkolwiek przyczyny wymienionej w art. 1;

b) dyskryminacja pośrednia występuje, w przypadku gdy przepis, kryterium lub pozornie neutralna praktyka może doprowadzić do [tego, że] os[oby] [wyznające] [określoną] religi[ę] lub [mające określone] przekona[nia], [osoby niepełnosprawne], [w określonym] wieku lub [o określonej] orientacji seksualnej, [znajdą się w] szczególnie niekorzystnej sytuacji w stosunku do innych osób, chyba że:

i) taki przepis, kryterium lub praktyka jest obiektywnie uzasadniona zgodnym z prawem celem, a środki mające służyć osiągnięciu tego celu są właściwe i konieczne, lub

ii) […] w przypadku osób w określony[m] [stopniu] niepełnosprawnych, pracodawca lub każda osoba, do której odnosi się niniejsza dyrektywa, jest zobowiązany, na mocy przepisów krajowych, podejmować właściwe środki zgodnie z zasadami określonymi w art. 5, w celu zlikwidowania niedogodności spowodowanych tym przepisem, kryterium lub praktyką".

9 Zgodnie z art. 3 tej dyrektywy:

„1. W granicach kompetencji Wspólnoty niniejszą dyrektywę stosuje się do wszystkich osób, zarówno sektora publicznego jak i prywatnego, włącznie z instytucjami publicznymi, w odniesieniu do:

[…]

c) warunków zatrudnienia i pracy, łącznie z warunkami [rozwiązywania umowy o pracę] i wynagradzania;

[…]”.

10 Artykuł 5 tej dyrektywy stanowi:

„W celu zagwarantowania przestrzegania zasady równego traktowania osób niepełnosprawnych przewiduje się wprowadzenie racjonalnych usprawnień. Oznacza to, że pracodawca podejmuje właściwe środki, z uwzględnieniem potrzeb konkretnej sytuacji, aby umożliwić osobie niepełnosprawnej dostęp do pracy, wykonywanie jej lub rozwój zawodowy bądź kształcenie, o ile środki te nie nakładają na pracodawcę nieproporcjonalnie wysokich obciążeń. Obciążenia te nie są nieproporcjonalne, jeżeli są w wystarczającym stopniu rekompensowane ze środków istniejących w ramach polityki prowadzonej przez dane państwo członkowskie na rzecz osób niepełnosprawnych”.

11 Wspólnotowa Karta socjalnych praw podstawowych pracowników przyjęta podczas posiedzenia Rady Europejskiej w Strasburgu w dniu 9 grudnia 1989 r., do której odwołuje się art. 136 ust. 1 WE, stanowi w pkt 26:

„Każdej osobie niepełnosprawnej, niezależnie od pochodzenia i rodzaju niepełnosprawności, należy zapewnić dodatkowe konkretne działania, mające na celu zwiększenie społecznej i zawodowej integracji.

Działania te muszą być dostosowane do możliwości ich beneficjantów oraz dotyczyć w szczególności szkoleń zawodowych, ergonomii, dostępności, mobilności, środków transportu i mieszkalnictwa”.

Uregulowania krajowe

12 Zgodnie z art. 14 hiszpańskiej konstytucji:

„Obywatele Hiszpanii są równi wobec prawa, bez jakiejkolwiek dyskryminacji ze względu na urodzenie, rasę, płeć, religię, poglądy lub z jakiegokolwiek innego względu lub na sytuację osobistą czy społeczną”.

13 Królewski dekret ustawodawczy nr 1/1995 z dnia 24 marca 1995 r. zatwierdzający znowelizowany tekst Estatuto de los Trabajadores (statutu pracowników) (BOE nr 75 z dnia 29 marca 1995 r., str. 9654, zwanego dalej „statutem pracowników”), dokonuje rozróżnienia pomiędzy niezgodnym z prawem rozwiązaniem umowy o pracę a nieważnym rozwiązaniem umowy o pracę.

14 Artykuł 55 ust. 5 i 6 statutu pracowników stanowi:

„5. Każde rozwiązanie umowy o pracę, które ma za podstawę dyskryminację zakazaną na mocy Konstytucji lub ustawy lub które wiąże się z naruszeniem praw podstawowych czy swobód publicznych przyznanych pracownikom, uważa się za nieważne.

[…]

6. Nieważne rozwiązanie umowy o pracę skutkuje natychmiastowym przywróceniem do pracy pracownika oraz wypłatą zaległego wynagrodzenia”.

15 Z art. 56 ust. 1 i 2 statutu pracowników wynika, że w przypadku niezgodnego z prawem rozwiązania umowy o pracę pracownik traci pracę i wypłacone zostaje mu odszkodowanie, chyba że pracodawca postanowi o jego przywróceniu do pracy.

16 Co do zakazu dyskryminacji w stosunkach pracy art. 17 statutu pracowników, w brzmieniu zmienionym ustawą 62/2003 z dnia 30 grudnia 2003 r. wprowadzającą środki podatkowe, administracyjne i socjalne (BOE nr 313 z dnia 31 grudnia 2003, str. 46874), który ma na celu transpozycję dyrektywy 2000/78 do prawa hiszpańskiego, stanowi:

„1. Przepisy wykonawcze, klauzule zawarte w porozumieniach zbiorowych, indywidualne umowy o pracę oraz jednostronne decyzje pracodawcy stanowiące bezpośrednio lub pośrednio dyskryminację negatywną ze względu na wiek lub niepełnosprawność lub także dyskryminację pozytywną lub negatywną w dziedzinie zatrudnienia, wynagrodzenia, czasu pracy lub innych warunków pracy ze względu na płeć, rasę, narodowość, stan cywilny, sytuację społeczną, religię lub przekonania, poglądy polityczne, orientację seksualną, przynależność lub jej brak do związków zawodowych oraz przystąpienie do ich umów, związki pokrewieństwa z innymi pracownikami w ramach zakładu oraz język używany w państwie hiszpańskim są uważane za nieważne i pozbawione skutków.

[…]".

Postępowanie przed sądem krajowym i pytania prejudycjalne

17 S. Chacón Navas pracowała na rzecz Eurestu, spółki specjalizującej się w żywieniu zbiorowym. W dniu 14 października 2003 r. musiała przerwać pracę z powodu choroby i, zgodnie z informacjami publicznych służb zdrowia, z których pomocy korzystała, nie była w stanie w krótkim okresie ponownie podjąć działalności zawodowej. Sąd krajowy nie przekazał żadnej informacji na temat choroby, na jaką cierpiała S. Chacón Navas.

18 W dniu 28 maja 2004 r. Eurest poinformował S. Chacón Navas o rozwiązaniu z nią umowy o pracę bez przedstawienia przyczyny, uznając jednakże niezgodność z prawem takiego rozwiązania i oferując jej odszkodowanie.

19 W dniu 29 czerwca 2004 r. S. Chacón Navas wniosła pozew przeciwko Eurestowi, podnosząc, że rozwiązanie umowy o pracę było nieważne z uwagi na nierówność traktowania i dyskryminację wobec niej zastosowaną, których powodem było przerwanie przez nią pracy przed ośmioma miesiącami. Zażądała, aby sąd nakazał Eurestowi jej przywrócenie do pracy na poprzednie stanowisko.

20 Sąd krajowy podnosi, iż w związku z brakiem innych ustaleń lub dowodów w aktach sprawy, z odwrócenia ciężaru dowodu wynika, że należy uznać, że rozwiązanie umowy o pracę z S. Chacón Navas nastąpiło wyłącznie z powodu przerwy w świadczeniu przez nią pracy z powodu choroby.

21 Sąd krajowy podnosi, iż w orzecznictwie sądów hiszpańskich istnieją precedensy, zgodnie z którymi taki rodzaj rozwiązania umowy o pracę kwalifikuje się jako niezgodny z prawem, a nie nieważny, gdyż okoliczność choroby nie została wyraźnie wymieniona w prawie hiszpańskim wśród przyczyn dyskryminacji zakazanej w stosunkach między podmiotami prywatnymi.

22 Jednakże sąd krajowy podnosi, iż istnieje związek przyczynowy pomiędzy chorobą a niepełnosprawnością. W celu określenia pojęcia „niepełnosprawność" należałoby odwołać się do Międzynarodowej klasyfikacji funkcjonowania, niepełnosprawności i zdrowia (ICF) opracowanej przez Światową Organizację Zdrowia. Wynika z niej, że pojęcie „niepełnosprawność" jest pojęciem ogólnym, które obejmuje uszkodzenia i czynniki ograniczające aktywność i uczestnictwo w życiu społecznym. Choroba może pociągać za sobą uszkodzenia, które spowodują niepełnosprawność osoby.

23 Zważywszy na to, że choroba może często pociągać za sobą nieodwracalną niepełnosprawność, sąd krajowy uważa, że pracownicy powinni podlegać ochronie we właściwym czasie na podstawie zakazu dyskryminacji ze względu na niepełnosprawność. Rozwiązanie przeciwne pozbawiałoby treści ochronę żądaną przez prawodawcę, gdyż w ten sposób możliwe byłoby stosowanie niekontrolowanych praktyk dyskryminacyjnych.

24 W przypadku gdyby uznano, że niepełnosprawność i choroba są dwoma różnymi pojęciami, a uregulowania wspólnotowe nie znajdują bezpośredniego zastosowania do drugiego z nich, sąd krajowy proponuje, by stwierdzić, że choroba stanowi niewyszczególnioną wyraźnie osobistą cechę, którą można dołączyć do listy przyczyn, ze względu na które dyrektywa 2000/78 zakazuje wszelkiej dyskryminacji. Takie ustalenia wynikałyby z art. 13 WE w związku z art. 136 WE i 137 WE, jak również z art. II-21 projektu traktatu ustanawiającego konstytucję dla Europy.

25 W tych okolicznościach Juzgado de lo Social n° 33 de Madrid postanowił zawiesić postępowanie i zwrócić się do Trybunału z następującymi pytaniami prejudycjalnymi:

„1) Czy dyrektywa 2000/78, która ustanawia w art. 1 ogólne ramy walki z dyskryminacją ze względu na niepełnosprawność, obejmuje zakresem swojej ochrony pracownicę, z którą rozwiązano umowę o pracę wyłącznie z powodu jej choroby?

2) Ewentualnie, w przypadku odpowiedzi przeczącej na pierwsze pytanie i uznania, że okoliczność choroby nie należy do zakresu ochrony przyznanej w dyrektywie 2000/78 przed dyskryminacją ze względu na niepełnosprawność:

Czy chorobę można uznać za dodatkową osobistą cechę, ze względu na którą dyrektywa 2000/78 zakazuje dyskryminacji?".

W przedmiocie dopuszczalności postanowienia odsyłającego

26 Komisja podaje w wątpliwość dopuszczalność postawionych pytań z uwagi na to, że opis okoliczności faktycznych w postanowieniu odsyłającym nie jest wyczerpujący.

27 W tym względzie należy zauważyć, że mimo braku jakichkolwiek wskazówek dotyczących rodzaju i ewentualnego przebiegu choroby S. Chacón Navas Trybunał dysponuje wystarczającymi informacjami, aby móc udzielić użytecznej odpowiedzi na postawione pytania.

28 Z postanowienia odsyłającego wynika, że z S. Chacón Navas, która przerwała świadczenie pracy z powodu choroby i nie była w stanie w krótkim okresie ponownie podjąć działalności zawodowej, została rozwiązana umowa o pracę według sądu krajowego wyłącznie dlatego, że z powodu choroby przerwała pracę. Z postanowienia tego wynika również, że sąd krajowy uważa, iż istnieje związek przyczynowy pomiędzy chorobą a niepełnosprawnością i że pracownik znajdujący się w sytuacji takiej jak S. Chacón Navas powinien podlegać ochronie na podstawie zakazu dyskryminacji ze względu na niepełnosprawność.

29 Główne pytanie dotyczy zatem wykładni pojęcia „niepełnosprawność" w rozumieniu dyrektywy 2000/78. Wykładnia, jaką Trybunał nada temu pojęciu, ma umożliwić sądowi krajowemu zbadanie, czy S. Chacón Navas była, w chwili rozwiązania umowy o pracę z powodu swojej choroby, osobą niepełnosprawną w rozumieniu tej dyrektywy, korzystającą z ochrony na podstawie jej art. 3 ust. 1 lit. c).

30 Pytanie pomocnicze odwołuje się do choroby jako „cechy osobistej" i stąd dotyczy wszelkiego rodzaju chorób.

31 Eurest uważa, że wniosek o wydanie orzeczenia w trybie prejudycjalnym nie jest dopuszczalny, gdyż sądy hiszpańskie, a w szczególności Tribunal Supremo, orzekły już w przeszłości, uwzględniając uregulowania wspólnotowe, że rozwiązanie umowy o pracę z pracownikiem, który przerwał pracę z powodu choroby, nie stanowi samo w sobie takiej dyskryminacji. Jednakże okoliczność, iż sąd krajowy dokonał już wykładni uregulowań wspólnotowych, nie może stanowić o niedopuszczalności wniosku o wydanie orzeczenia w trybie prejudycjalnym.

32 Co do argumentu Eurestu, iż należałoby uznać, że spółka rozwiązała umowę o pracę z S. Chacón Navas niezależnie od okoliczności przerwania przez nią pracy z powodu choroby, gdyż jej usługi w tym czasie przestały już być niezbędne, to należy przypomnieć, że

w ramach postępowania, o którym mowa w art. 234 WE, opartego na wyraźnym rozdziale zadań sądów krajowych i Trybunału, wszelka ocena stanu faktycznego sprawy należy do sądu krajowego. Tak samo jedynie do sądu krajowego, przed którym zawisł spór i na którym spoczywa odpowiedzialność za przyszły wyrok, należy, przy uwzględnieniu okoliczności konkretnej sprawy, zarówno ocena, czy dla wydania wyroku jest niezbędne uzyskanie orzeczenia prejudycjalnego, jak również ocena znaczenia pytań, które zadaje Trybunałowi. W konsekwencji, jeśli postawione pytania dotyczą wykładni prawa wspólnotowego, Trybunał jest, co do zasady, zobowiązany do wydania orzeczenia (zob. w szczególności wyroki: z dnia 25 lutego 2003 r. w sprawie C-326/00 IKA, Rec. str. I-1703, pkt 27 i z dnia 12 kwietnia 2005 r. w sprawie C-145/03 Keller, Rec. str. I-2529, pkt 33).

33 Jednakże Trybunał wskazał jednocześnie, iż w szczególnych okolicznościach do niego należy zbadanie, czy jest on kompetentny w sprawie, jaka jest mu przekazywana przez sąd krajowy (zob. podobnie wyrok z dnia 16 grudnia 1981 r. w sprawie 244/80 Foglia, Rec. str. 3045, pkt 21). Odmowa wydania orzeczenia w przedmiocie pytania prejudycjalnego zadanego przez sąd krajowy jest dopuszczalna jedynie wówczas, gdy wykładnia prawa wspólnotowego, o którą zwraca się sąd krajowy, pozostaje w sposób oczywisty bez związku ze stanem faktycznym czy przedmiotem postępowania przed sądem krajowym lub też gdy problem ma charakter hipotetyczny, lub gdy Trybunał nie dysponuje informacjami co do okoliczności faktycznych i prawnych niezbędnymi do udzielenia użytecznej odpowiedzi na pytania, które zostały mu postawione (zob. w szczególności wyroki: z dnia 13 marca 2001 r. w sprawie C-379/98 PreussenElektra, Rec. str. I-2099, pkt 39 i z dnia 19 lutego 2002 r. w sprawie C-35/99 Arduino, Rec. str. I-1529, pkt 25).

34 Ponieważ przesłanki te nie zostały spełnione w niniejszym przypadku, wniosek o wydanie orzeczenia w trybie prejudycjalnym jest dopuszczalny.

W przedmiocie pytań prejudycjalnych

W przedmiocie pytania pierwszego

35 Przez swoje pierwsze pytanie sąd krajowy zmierza zasadniczo do ustalenia, czy ogólne ramy walki z dyskryminacją ze względu na niepełnosprawność ustanowione przez dyrektywę 2000/78 zapewniają ochronę osobie, z którą pracodawca rozwiązał umowę o pracę wyłącznie z powodu jej choroby.

36 Jak wynika z art. 3 ust. 1 lit. c) dyrektywy 2000/78, dyrektywa ta stosuje się, w granicach kompetencji przyznanych Wspólnocie, do wszystkich osób w zakresie m.in. warunków rozwiązania umowy o pracę.

37 W tych granicach ogólne ramy walki z dyskryminacją ze względu na niepełnosprawność ustanowione przez dyrektywę 2000/78 stosują się w zakresie rozwiązania umowy o pracę.

38 W celu udzielenia odpowiedzi na postawione pytanie należy najpierw dokonać wykładni pojęcia „niepełnosprawność” w rozumieniu dyrektywy 2000/78, a następnie zbadać, w jakim zakresie osoby niepełnosprawne są przez nią chronione odnośnie do rozwiązania umowy o pracę.

W przedmiocie pojęcia „niepełnosprawność”

39 Pojęcie „niepełnosprawność” nie jest zdefiniowane w samej dyrektywie 2000/78. Dyrektywa ta nie odsyła również do systemów prawnych państw członkowskich dla celów definicji tego pojęcia.

40 Zarówno względy jednolitego stosowania prawa wspólnotowego, jak i zasady równości wskazują na to, że treści przepisu prawa wspólnotowego, który nie zawiera wyraźnego odesłania do prawa państw członkowskich dla określenia jego znaczenia i zakresu, należy zwykle nadać w całej Wspólnocie autonomiczną i jednolitą wykładnię, którą należy ustalić, uwzględniając kontekst przepisu i cel danego uregulowania (zob. w szczególności wyroki:

z dnia 18 stycznia 1984 r. w sprawie 327/82 Ekro, Rec. str. 107, pkt 11 i z dnia 9 marca 2006 r. w sprawie C-323/03 Komisja przeciwko Hiszpanii, Zb.Orz. str. I-2161, pkt 32).

41 Jak wynika z art. 1 dyrektywy 2000/78, jej celem jest wyznaczenie ogólnych ram dla walki z dyskryminacją z przyczyn wymienionych w tym przepisie, wśród których znajduje się także niepełnosprawność w odniesieniu do zatrudnienia i pracy.

42 Zważywszy na ten cel, pojęcie „niepełnosprawność" w rozumieniu dyrektywy 2000/78 powinno, zgodnie z zasadą przywołaną w pkt 40 niniejszego wyroku, stanowić przedmiot autonomicznej i jednolitej wykładni.

43 Dyrektywa 2000/78 dotyczy walki z pewnymi rodzajami dyskryminacji w odniesieniu do zatrudnienia i pracy. W tych okolicznościach pojęcie „niepełnosprawność" należy rozumieć jako ograniczenie, wynikające konkretnie z naruszenia funkcji fizycznych, umysłowych lub psychicznych, które stanowi przeszkodę dla danej osoby w uczestnictwie w życiu zawodowym.

44 Jednakże, używając pojęcia „niepełnosprawność" w art. 1 tej dyrektywy, prawodawca rozmyślnie wybrał pojęcie, które różni się od pojęcia „choroby". Proste zrównanie tych dwóch pojęć jest zatem wykluczone.

45 Zgodnie z brzmieniem motywu szesnastego dyrektywy 2000/78 „[p]rzyjęcie środków uwzględniających potrzeby osób niepełnosprawnych w miejscu pracy jest najważniejszym czynnikiem w walce z dyskryminacją osób niepełnosprawnych". Znaczenie, jakie prawodawca wspólnotowy przyznał środkom uwzględniającym organizację stanowiska pracy w zależności od niepełnosprawności, wskazuje na to, że przewidział on sytuacje, w których istnieją długookresowe przeszkody w uczestnictwie w życiu zawodowym. Aby ograniczenie wchodziło w zakres pojęcia „niepełnosprawność", musi istnieć zatem prawdopodobieństwo, iż jest ono długoterminowe.

46 Dyrektywa 2000/78 nie zawiera żadnej wskazówki pozwalającej przypuszczać, że pracownicy podlegają ochronie z tytułu zakazu dyskryminacji ze względu na niepełnosprawność w przypadku jakiejkolwiek choroby.

47 Z powyższych rozważań wynika, że osoba, z którą pracodawca rozwiązał umowę o pracę wyłącznie z powodu choroby, nie jest objęta ogólnymi ramami ustanowionymi w celu walki z dyskryminacją ze względu na niepełnosprawność przez dyrektywę 2000/78.

W przedmiocie ochrony osób niepełnosprawnych w zakresie rozwiązania umowy o pracę

48 Niekorzystne traktowanie ze względu na niepełnosprawność nie jest sprzeczne z ochroną ustanowioną w dyrektywie 2000/78, o ile nie stanowi dyskryminacji w rozumieniu art. 2 ust. 1 tejże dyrektywy.

49 Zgodnie z motywem siedemnastym dyrektywy 2000/78 dyrektywa ta nie nakłada wymogu, aby osoba, która nie jest kompetentna ani zdolna bądź nie pozostaje w dyspozycji do wykonywania najważniejszych czynności na danym stanowisku lub kontynuowania danego kształcenia, była przyjmowana do pracy, awansowana lub dalej zatrudniana, bez naruszenia obowiązku wprowadzania racjonalnych zmian uwzględniających potrzeby osób niepełnosprawnych.

50 Zgodnie z art. 5 dyrektywy 2000/78 w celu zagwarantowania przestrzegania zasady równego traktowania w odniesieniu do osób niepełnosprawnych przewiduje się wprowadzenie racjonalnych usprawnień. Przepis ten uściśla, iż oznacza to, że pracodawca podejmuje właściwe środki, z uwzględnieniem potrzeb w konkretnej sytuacji, aby umożliwić osobie niepełnosprawnej dostęp do pracy, wykonywanie jej lub rozwój zawodowy bądź kształcenie, o ile środki te nie nakładają na pracodawcę nieproporcjonalnie wysokich obciążeń.

51 Zakaz dyskryminacji ze względu na niepełnosprawność, w zakresie rozwiązania umowy o pracę, zawarty w art. 2 ust. 1 i w art. 3 ust. 1 lit. c) dyrektywy 2000/78, stoi na przeszkodzie rozwiązaniu umowy o pracę ze względu na niepełnosprawność, które, zważywszy na obowiązek wprowadzania racjonalnych usprawnień dla osób niepełnosprawnych, nie jest uzasadnione tym, że dana osoba nie jest kompetentna ani zdolna bądź nie pozostaje w dyspozycji do wykonywania najważniejszych czynności na danym stanowisku.

52 Z powyższych rozważań wynika, że na pytanie pierwsze należy odpowiedzieć w ten sposób, że:

– osoba, z którą pracodawca rozwiązał umowę o pracę wyłącznie z powodu choroby, nie jest objęta ogólnymi ramami ustanowionymi w celu walki z dyskryminacją ze względu na niepełnosprawność przez dyrektywę 2000/78;

– zakaz dyskryminacji ze względu na niepełnosprawność, w zakresie rozwiązania umowy o pracę, zawarty w art. 2 ust. 1 i w art. 3 ust. 1 lit. c) dyrektywy 2000/78, stoi na przeszkodzie rozwiązaniu umowy o pracę ze względu na niepełnosprawność, które, zważywszy na obowiązek wprowadzania racjonalnych usprawnień dla osób niepełnosprawnych, nie jest uzasadnione tym, że dana osoba nie jest kompetentna ani zdolna bądź nie pozostaje w dyspozycji do wykonywania najważniejszych czynności na danym stanowisku.

W przedmiocie pytania drugiego

53 Poprzez swoje drugie pytanie sąd krajowy zmierza zasadniczo do ustalenia czy chorobę można uznać za dodatkową przyczynę, ze względu na które dyrektywa 2000/78 zakazuje wszelkiej dyskryminacji.

54 W tym względzie należy stwierdzić, że żaden przepis traktatu WE nie zawiera zakazu dyskryminacji ze względu na chorobę jako taką.

55 Artykuł 13 WE, jak również art. 137 WE w związku z art. 136 WE dotyczą jedynie uregulowania kompetencji Wspólnoty. Ponadto poza dyskryminacją ze względu na niepełnosprawność art. 13 WE nie dotyczy dyskryminacji ze względu na chorobę jako taką i stąd nie może stanowić podstawy prawnej dla podjęcia działań przez Radę w celu walki z taką dyskryminacją.

56 Bezsporne jest, że wśród praw podstawowych stanowiących integralną część ogólnych zasad prawa wspólnotowego znajduje się ogólna zasada niedyskryminacji. Zasada ta wiąże państwa członkowskie, gdy sporna sytuacja krajowa w sprawie w postępowaniu przed sądem krajowym objęta jest zakresem stosowania prawa wspólnotowego (zob. podobnie wyroki: z dnia 12 grudnia 2002 r. w sprawie C-442/00 Rodríguez Caballero, Rec. str. I-11915, pkt 30 i 32, jak również z dnia 12 czerwca 2003 r. w sprawie C-112/00 Schmidberger, Rec. str. I-5659, pkt 75 oraz przywołane orzecznictwo). Jednakże nie wynika z tego, że zakres stosowania dyrektywy 2000/78 powinien być w drodze analogii rozszerzony poza dyskryminację z przyczyn wymienionych w sposób wyczerpujący w art. 1 tejże dyrektywy.

57 W rezultacie na pytanie drugie należy odpowiedzieć w ten sposób, że nie można uznać choroby jako takiej za jeszcze jedną z przyczyn, ze względu na które dyrektywa 2000/78 zakazuje wszelkiej dyskryminacji.

W przedmiocie kosztów

58 Dla stron postępowania przed sądem krajowym niniejsze postępowanie ma charakter incydentalny, dotyczy bowiem kwestii podniesionej przed tym sądem, do niego zatem należy rozstrzygnięcie o kosztach. Koszty poniesione w związku z przedstawieniem uwag Trybunałowi, inne niż poniesione przez strony postępowania przed sądem krajowym, nie podlegają zwrotowi.

Z powyższych względów Trybunał (wielka izba) orzeka, co następuje:

1) **Osoba, z którą pracodawca rozwiązał umowę o pracę wyłącznie z powodu choroby, nie jest objęta ogólnymi ramami ustanowionymi w celu walki z dyskryminacją ze względu na niepełnosprawność przez dyrektywę Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającą ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy.**

2) **Zakaz dyskryminacji ze względu na niepełnosprawność, w zakresie rozwiązania umowy o pracę, zawarty w art. 2 ust. 1 i w art. 3 ust. 1 lit. c) dyrektywy 2000/78, stoi na przeszkodzie rozwiązaniu umowy o pracę ze względu na niepełnosprawność, które, zważywszy na obowiązek wprowadzania racjonalnych usprawnień dla osób niepełnosprawnych, nie jest uzasadnione tym, że dana osoba nie jest kompetentna ani zdolna bądź nie pozostaje w dyspozycji do wykonywania najważniejszych czynności na danym stanowisku.**

3) **Nie można uznać choroby jako takiej za jeszcze jedną z przyczyn, ze względu na które dyrektywa 2000/78 zakazuje wszelkiej dyskryminacji.**

Podpisy

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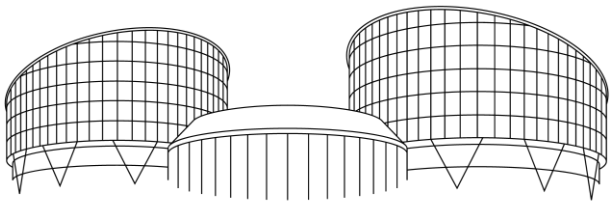
* Język postępowania: hiszpański.



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;

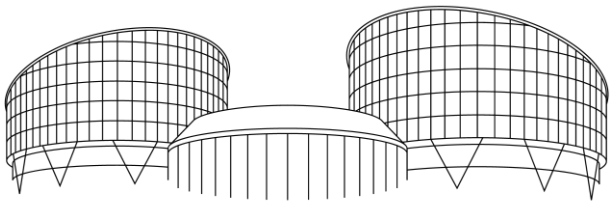
6. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 25,000 (twenty-five thousand euros) in respect of non-pecuniary damage, to be converted into the Russian 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;

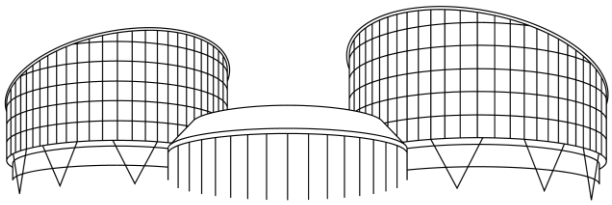
5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to 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;

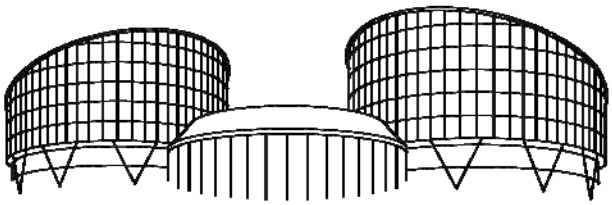
4. *Holds* that there has been a violation of Article 3 of the Convention under its procedural limb;

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;

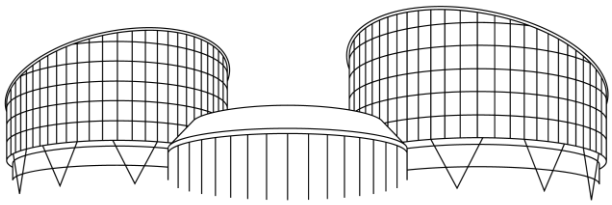
(iii) any tax that may be chargeable on the above amounts;

(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).

KOMISJA WSPÓLNOT EUROPEJSKICH

Bruksela, dnia 2.7.2008
KOM(2008) 426 wersja ostateczna

2008/0140 (CNS)

Wniosek

DYREKTYWA RADY

w sprawie wprowadzenia w życie zasady równego traktowania osób bez względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną

{SEK(2008) 2180}
{SEK(2008) 2181}

(przedstawione przez Komisję)

UZASADNIENIE

1. KONTEKST WNIOSKU

Podstawa i cele wniosku

Celem niniejszego wniosku jest wprowadzenie w życie poza rynkiem pracy zasady równego traktowania osób bez względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną. We wniosku określa się ramy zakazu dyskryminacji ze względu na wyżej wymienione powody oraz ustala jednolity minimalny poziom ochrony w obrębie Unii Europejskiej dla osób, które doznały takiej dyskryminacji.

Wniosek ten uzupełnia istniejące wspólnotowe ramy prawne, zgodnie z którymi zakaz dyskryminacji ze względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną ma zastosowanie jedynie w zakresie zatrudnienia, pracy i szkolenia zawodowego[1].

Kontekst ogólny

Komisja ogłosiła w swoim programie działalności legislacyjnej i prac przyjętym w dniu 23 października 2007 r.[2], że przedstawi nowe inicjatywy w celu uzupełnienia wspólnotowych ram prawnych dotyczących zapobiegania dyskryminacji.

Obecny wniosek jest przedstawiany jako część „Odnowionej agendy społecznej: możliwości, dostęp i solidarność w Europie XXI wieku”[3] i towarzyszy komunikatowi „Niedyskryminacja i równość szans: odnowione zobowiązanie”[4].

Państwa członkowskie i Wspólnota Europejska podpisały Konwencję NZ o prawach osób niepełnosprawnych. Konwencja ta opiera się na zasadach niedyskryminacji, udziału i integracji społecznej, równości szans i dostępności. Wniosek dotyczący zawarcia Konwencji przez Wspólnotę Europejską został przedstawiony Radzie[5].

Obowiązujące przepisy w dziedzinie, której dotyczy wniosek

Niniejszy wniosek opiera się na dyrektywach 2000/43/WE, 2000/78/WE i 2004/113/WE[6], zgodnie z którymi zakazuje się dyskryminacji ze względu na płeć, pochodzenie rasowe lub etniczne, wiek, niepełnosprawność, orientację seksualną, religię lub światopogląd[7].

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1 Dyrektywa 2000/43/WE z dnia 29 czerwca 2000 r. wprowadzająca w życie zasadę równego traktowania osób bez względu na pochodzenie rasowe lub etniczne (Dz.L. L 180 z 19.7.2000, s. 22) oraz dyrektywa 2000/78/WE z dnia 27 listopada 2000 r. ustanawiająca ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy (Dz.U. L 303 z 2.12.2000, s. 16).

2 COM(2007) 640.

3 COM(2008) 412.

4 COM(2008) 420.

5 [COM(2008) XXX].

6 Dyrektywa 2004/113/WE z dnia 13 grudnia 2004 r. wprowadzająca w życie zasadę równego traktowania mężczyzn i kobiet w zakresie dostępu do towarów i usług oraz dostarczania towarów i usług (Dz.U. L 373 z 21.12.2004, s. 37).

7 Dyrektywa 2000/43/WE z dnia 29 czerwca 2000 r. wprowadzająca w życie zasadę równego traktowania osób bez względu na pochodzenie rasowe lub etniczne (Dz.L. L 180 z 19.7.2000) oraz dyrektywa 2000/78/WE z dnia 27 listopada 2000 r. ustanawiająca ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy (Dz.U. L 303 z 2.12.2000).

Dyskryminacja ze względu na rasę lub pochodzenie etniczne jest zakazana w zakresie zatrudnienia, pracy i szkolenia zawodowego, jak również w obszarach niezwiązanych z zatrudnieniem, takich jak ochrona socjalna, opieka zdrowotna, edukacja i dostęp do powszechnie dostępnych towarów i usług, w tym do mieszkań. Dyskryminacja ze względu na płeć jest zakazana w obrębie tych samych obszarów, z wyjątkiem edukacji, mediów i reklamy. Dyskryminacja ze względu na wiek, religię i światopogląd, orientację seksualną i niepełnosprawność jest jednak zakazana jedynie w zakresie zatrudnienia, pracy i szkolenia zawodowego.

Dyrektywy 2000/43/WE i 2000/78/WE należało przetransponować do prawa krajowego do 2003 r., z wyjątkiem przepisów dotyczących dyskryminacji ze względu na wiek i niepełnosprawność, w odniesieniu do których termin transpozycji został przedłużony o trzy lata. W 2006 r. Komisja przyjęła sprawozdanie dotyczące wdrożenia dyrektywy 2000/43/WE[8], a dnia 19 czerwca 2008 r. przyjęto sprawozdanie dotyczące wdrożenia dyrektywy 2000/78/WE[9]. Z wyjątkiem jednego, wszystkie państwa członkowskie dokonały transpozycji wspomnianych dyrektyw. Dyrektywę 2004/113/WE należało przetransponować do końca 2007 r.

Pojęcia i zasady przedstawione w niniejszym wniosku opierają się w miarę możliwości na pojęciach i zasadach uwzględnionych w obowiązujących dyrektywach przyjętych na podstawie art. 13 TWE.

Spójność z pozostałymi obszarami polityki i celami Unii

Niniejszy wniosek opiera się na rozwijanej od czasu traktatu z Amsterdamu strategii zwalczania dyskryminacji i jest spójny z ogólnymi celami Unii Europejskiej, a w szczególności ze strategią lizbońską na rzecz wzrostu gospodarczego i zatrudnienia oraz celami europejskiego procesu ochrony socjalnej i integracji społecznej. Pomoże on zadbać o podstawowe prawa obywateli, zgodnie z Kartą praw podstawowych UE.

2. KONSULTACJE Z ZAINTERESOWANYMI STRONAMI ORAZ OCENA SKUTKÓW

Konsultacje

Przygotowując niniejszą inicjatywę, Komisja starała się włączyć w prace wszystkie potencjalnie zainteresowane podmioty, zadbano również o to, aby ci, którzy mogli chcieć przedstawić swoje uwagi, mieli taką możliwość i czas na ich przedstawienie. Europejski Rok Równych Szans dla Wszystkich dostarczył wyjątkowej okazji, aby zwrócić uwagę na problemy i zachęcić do uczestnictwa w debacie.

Należy także wspomnieć o publicznych konsultacjach internetowych[10], badaniu przeprowadzonym wśród przedsiębiorstw[11] oraz o pisemnych konsultacjach i spotkaniach z partnerami społecznymi i organizacjami pozarządowymi na szczeblu europejskim, działającymi w obszarze niedyskryminacji[12]. Zarówno konsultacje z ogółem społeczeństwa,

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8 COM(2006) 643 wersja ostateczna.

9 COM(2008) 225.

10 Z pełnymi wynikami konsultacji można zapoznać się na stronie: 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

jak i z organizacjami pozarządowymi, dowiodły zapotrzebowania na przepisy UE podnoszące poziom ochrony przed dyskryminacją. Niektórzy opowiedzieli się także za dyrektywami skupiającymi się szczególnie na dyskryminacji ze względu na niepełnosprawność i płeć. Konsultacje z Europejskim Panelem Testów Biznesowych wykazały, że zdaniem przedsiębiorców korzystne byłoby wyrównanie poziomu ochrony przed dyskryminacją w całej UE. Partnerzy społeczni reprezentujący przedsiębiorstwa byli co do zasady przeciwni wprowadzaniu nowych przepisów, wiążących się w ich przekonaniu ze zwiększeniem biurokracji i kosztów, natomiast związki zawodowe popierały wprowadzenie takich przepisów.

Odpowiedzi otrzymane w ramach konsultacji uwydatniły obawy co do tego, w jaki sposób szereg wrażliwych obszarów zostanie potraktowanych w nowej dyrektywie, oraz również ujawniły nieporozumienia dotyczące granic bądź zakresu kompetencji Wspólnoty. W proponowanej dyrektywie odniesiono się do tych obaw i wyraźnie określono granice kompetencji Wspólnoty. W ramach tych granic Wspólnota ma przyznane artykułem 13 Traktatu WE prawo działania, a działanie na szczeblu UE wydaje się najlepszym rozwiązaniem.

W odpowiedziach podkreślono również szczególny charakter dyskryminacji związanej z niepełnosprawnością i środków potrzebnych do jej zwalczania. Kwestiami tymi zajęto się w osobnym artykule.

Wyrażano obawy, że nowa dyrektywa spowoduje koszty dla przedsiębiorstw, ale należy podkreślić, że niniejszy wniosek opiera się w dużej mierze na pojęciach stosowanych w obowiązujących dyrektywach, które są dobrze znane podmiotom gospodarczym. Co do środków skierowanych przeciwko dyskryminacji ze względu na niepełnosprawność, pojęcie racjonalnych usprawnień jest dobrze znane przedsiębiorstwom, ponieważ zostało określone w dyrektywie 2000/78/WE. We wniosku Komisji określono czynniki, które należy uwzględnić, oceniając, co jest „racjonalne".

Wskazano również, że w dyrektywie 2000/78/WE, odmiennie niż w przypadku pozostałych dwóch dyrektyw, nie wymaga się od państw członkowskich powołania organów ds. równości. Zwrócono również uwagę na potrzebę stawienia czoła dyskryminacji różnego rodzaju, na przykład poprzez zdefiniowanie jej jako dyskryminacji i zapewnienie skutecznych środków zaradczych. Te kwestie wykraczają poza zakres niniejszej dyrektywy, lecz nic nie stoi na przeszkodzie podejmowaniu przez państwa członkowskie działań w tych obszarach.

Ponadto wskazano, że ustalony w dyrektywie 2004/113/WE zakres ochrony przed dyskryminacją ze względu na płeć nie jest tak rozległy, jak w dyrektywie 2000/43/WE, i że problem ten należy uwzględnić w nowych przepisach. Komisja nie podjęła obecnie tej sugestii, ponieważ termin transpozycji dyrektywy 2004/113/WE właśnie upłynął. W 2010 r. Komisja będzie jednak składać sprawozdanie dotyczące wdrożenia tej dyrektywy i może zaproponować zmiany w miarę potrzeby.

Gromadzenie i wykorzystanie wiedzy specjalistycznej

Przeprowadzone w 2006 r. badanie[13] wykazało, że z jednej strony większość krajów zapewnia w pewnej formie ochronę prawną wykraczającą poza obecne wymogi WE w większości zbadanych obszarów, a z drugiej strony stwierdzono znaczne różnice między krajami co do

[13] http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/mapstrand1_en.pdf

stopnia i charakteru tej ochrony. Badanie wykazało również, że bardzo niewiele krajów przeprowadziło ocenę skutków ex ante w odniesieniu do przepisów zakazujących dyskryminacji. W kolejnym badaniu[14] poddano analizie charakter i zakres dyskryminacji poza obszarem zatrudnienia w UE oraz jej potencjalne (bezpośrednie i pośrednie) koszty dla obywateli i całego społeczeństwa.

Ponadto Komisja wykorzystała sprawozdania Europejskiej Sieci Niezależnych Ekspertów w dziedzinie niedyskryminacji, zwłaszcza sporządzony przez nią przegląd pt. „Opracowywanie ustaw antydyskryminacyjnych w Europie"[15] oraz badanie nt. „Zwalczanie dyskryminacji różnego rodzaju: praktyki, polityka i ustawy"[16].

Istotne znaczenie miały również wyniki specjalnego badania Eurobarometru[17] oraz błyskawicznego badania Eurobarometru z lutego 2008 r.[18]

Ocena skutków

W sprawozdaniu z oceny skutków[19] zbadano występowanie dyskryminacji poza rynkiem pracy. Stwierdzono w nim, że o ile niedyskryminacja jest uważana za jedną z podstawowych wartości UE, to w praktyce poziom ochrony prawnej zabezpieczającej te wartości różni się w zależności od państwa członkowskiego i w zależności od przyczyny dyskryminacji. Wskutek tego osoby zagrożone dyskryminacją często w mniejszym stopniu są w stanie w pełni uczestniczyć w życiu społecznym i gospodarczym, co ma szkodliwe skutki zarówno dla takich osób, jak i dla całego społeczeństwa.

W sprawozdaniu określono trzy cele, które powinna spełnić każda ewentualna inicjatywa:

- zwiększyć ochronę przed dyskryminacją;
- zagwarantować pewność prawną podmiotom gospodarczym i potencjalnym ofiarom we wszystkich państwach członkowskich;
- wzmacniać integrację społeczną i sprzyjać pełnemu uczestnictwu wszystkich grup osób w życiu społecznym i gospodarczym.

Spośród różnych środków, co do których ustalono, że mogłyby przyczynić się do osiągnięcia wspomnianych celów, wybrano sześć wariantów do dalszej analizy, w szczególności brak nowych działań na szczeblu UE, samoregulację, zalecenia oraz jedną lub więcej dyrektyw zawierających zakaz dyskryminacji poza sferą zatrudnienia.

W każdym przypadku państwa członkowskie będą musiały wdrożyć Konwencję NZ o prawach osób niepełnosprawnych, w której odmowę dokonania racjonalnych usprawnień zdefiniowano jako dyskryminację. Prawnie wiążący środek, zgodnie z którym zakazana jest

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[14] Dokument ten będzie dostępny pod adresem: 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

[17] Specjalne badanie Eurobarometru nr 296 na temat dyskryminacji w UE: http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm oraz http://ec.europa.eu/public_opinion/archives/eb_special_en.htm

[18] Badanie Flash Eurobarometr nr 232; http://ec.europa.eu/public_opinion/flash/fl_232_en.pdf.

[19] Dokument ten będzie dostępny pod adresem: http://ec.europa.eu/employment_social/fundamental_rights/org/imass_en.htm

dyskryminacja ze względu na niepełnosprawność, pociąga za sobą koszty finansowe wynikające z konieczności dokonania przystosowań, ale istnieją również korzyści płynące z pełniejszej integracji gospodarczej i społecznej grup stojących obecnie w obliczu dyskryminacji.

Ze sprawozdania wynika, że właściwą reakcją na istniejące problemy byłaby dyrektywa uwzględniająca różne przyczyny dyskryminacji, opracowana z poszanowaniem zasad pomocniczości i proporcjonalności. Tylko nieliczne państwa członkowskie ustanowiły już prawie pełną ochronę prawną, natomiast większość pozostałych państw zapewnia częściową ochronę, lecz nie tak wszechstronną. Dostosowanie prawa wynikające z nowych przepisów WE miałoby zatem różny zakres.

Komisja otrzymała wiele skarg dotyczących dyskryminacji w sektorze ubezpieczeń i bankowości. Wykorzystywanie przez ubezpieczycieli i banki wieku lub niepełnosprawności do celów oceny profilu ryzyka klientów niekoniecznie stanowi dyskryminację – zależy to od produktu. Komisja zainicjuje dialog z branżą ubezpieczeń i bankowości oraz z innymi właściwymi zainteresowanymi podmiotami, aby osiągnąć lepsze wspólne porozumienie co do obszarów, w których wiek lub niepełnosprawność są istotnymi czynnikami przy opracowywaniu produktów oferowanych w tych sektorach i ustalaniu ich cen.

3. ASPEKTY PRAWNE

Podstawa prawna

Wniosek opiera się na art. 13 ust. 1 Traktatu WE.

Pomocniczość i proporcjonalność

Zasada pomocniczości ma zastosowanie, o ile wniosek nie wchodzi w zakres wyłącznych kompetencji Wspólnoty. Cele wniosku nie mogą być osiągnięte w sposób wystarczający przez państwa członkowskie, ponieważ tylko środek ogólnowspólnotowy może zapewnić minimalny jednolity poziom ochrony przed dyskryminacją ze względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną we wszystkich państwach członkowskich. Dzięki wspólnotowemu aktowi prawnemu osiąga się pewność prawną co do praw i obowiązków podmiotów gospodarczych i obywateli, w tym również przemieszczających się między państwami członkowskimi. Doświadczenia dotyczące wcześniejszych dyrektyw przyjętych na mocy art. 13 ust. 1 TWE dowodzą, że dyrektywy te wywarły korzystny wpływ na osiągnięcie lepszej ochrony przed dyskryminacją. Zgodnie z zasadą proporcjonalności niniejsza proponowana dyrektywa nie wykracza poza to, co jest konieczne do osiągnięcia wyznaczonych celów.

Ponadto krajowe tradycje i podejścia w dziedzinach takich jak opieka zdrowotna, ochrona socjalna i edukacja wydają się bardziej zróżnicowane niż w dziedzinach związanych z zatrudnieniem. Cechą tych dziedzin jest prawo dokonywania uzasadnionych wyborów o charakterze społecznym w obszarach, które wchodzą w zakres kompetencji krajowych.

Różnorodność europejskich społeczeństw jest jednym z atutów Europy i należy ją szanować zgodnie z zasadą pomocniczości. Decyzje dotyczące kwestii takich jak organizacja i treść edukacji, uznawanie stanu cywilnego i rodzinnego, przysposobienie, prawa reprodukcyjne i inne podobne zagadnienia w najlepszy sposób podejmowane są na szczeblu krajowym. W związku z powyższym niniejsza dyrektywa nie zawiera wymogu, aby którekolwiek państwo

członkowskie zmieniało swe obecne ustawy i praktyki związane z tymi kwestiami. Nie ma ona również wpływu na krajowe przepisy regulujące działalność kościołów i innych organizacji religijnych ani na ich stosunki z państwem. Tak więc na przykład pozostanie wyłączną domeną państw członkowskich podejmowanie decyzji w sprawach takich jak ewentualne zezwolenie na selektywne przyjmowanie do szkół, zakazywanie noszenia lub wywieszania symboli religijnych w szkołach lub zezwalanie na to, ewentualne uznawanie małżeństw osób tej samej płci oraz podejmowanie decyzji co do charakteru stosunków między religią zorganizowaną a państwem.

Wybór instrumentów

Dyrektywa jest instrumentem, który w najlepszy sposób zapewnia spójny minimalny poziom ochrony przed dyskryminacją w całej UE, pozwalając wyjść poza minimalne normy poszczególnym państwom członkowskim, które pragną to zrobić. Pozwala ona również państwom wybrać najwłaściwsze środki egzekucji i sankcje. Dotychczasowe doświadczenia w dziedzinie zapobiegania dyskryminacji dowodzą, że dyrektywa jest najwłaściwszym instrumentem.

Tabela korelacji

Państwa członkowskie mają obowiązek przekazania Komisji tekstu przepisów krajowych przyjętych w celu transpozycji dyrektywy oraz tabeli korelacji między tymi przepisami a dyrektywą.

Europejski Obszar Gospodarczy

Niniejszy tekst ma znaczenie dla Europejskiego Obszaru Gospodarczego, a dyrektywa, w następstwie decyzji Wspólnego Komitetu EOG, będzie miała zastosowanie dla niebędących członkami UE krajów należących do Europejskiego Obszaru Gospodarczego.

4. WPŁYW NA BUDŻET

Wniosek nie ma wpływu finansowego na budżet Wspólnoty.

5. SZCZEGÓŁOWE WYJAŚNIENIE POSZCZEGÓLNYCH PRZEPISÓW

Artykuł 1: Cel

Głównym celem dyrektywy jest walka z dyskryminacją ze względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną oraz wprowadzenie w życie zasady równego traktowania w obszarach innych niż zatrudnienie. W dyrektywie nie zakazuje się zróżnicowanego traktowania ze względu na płeć objętego art. 13 i 141 Traktatu WE oraz pochodnym prawodawstwem wtórnym.

Artykuł 2: Pojęcie dyskryminacji

Definicja zasady równego traktowania opiera się na definicjach zawartych we wcześniejszych dyrektywach przyjętych na mocy art. 13 ust. 1 TWE [jak również na odpowiednim orzecznictwie Europejskiego Trybunału Sprawiedliwości].

Dyskryminację bezpośrednią stanowi odmienne traktowanie kogoś wyłącznie z powodu jego lub jej wieku, niepełnosprawności, religii lub światopoglądu i orientacji seksualnej. Dyskryminacja pośrednia jest bardziej złożonym pojęciem, ponieważ ma miejsce, gdy z pozoru neutralna zasada lub praktyka w rzeczywistości ma szczególnie niekorzystny wpływ na osobę lub grupę osób posiadających określoną cechę. Autor tej zasady lub praktyki może nie zdawać sobie sprawy z jej praktycznych konsekwencji, dlatego zamiar dyskryminowania nie ma znaczenia. Podobnie jak w dyrektywach 2000/43/WE, 2000/78/WE i 2002/73/WE[20], można uzasadnić dyskryminację pośrednią (jeśli „taki przepis, kryterium lub praktyka jest obiektywnie uzasadniona zgodnym z prawem celem, a środki mające służyć osiągnięciu tego celu są właściwe i konieczne").

Molestowanie jest formą dyskryminacji. Niepożądane zachowanie może przybierać różne formy, od ustnych lub pisemnych uwag do gestów lub zachowań, lecz musi być na tyle poważne, aby stwarzać onieśmielającą, upokarzającą lub uwłaczającą atmosferę. Ta definicja jest identyczna, jak definicje zawarte w innych dyrektywach przyjętych na mocy art. 13.

Odmowa racjonalnego usprawnienia uważana jest za formę dyskryminacji. Jest to zgodne z Konwencją NZ o prawach osób niepełnosprawnych oraz spójne z dyrektywą 2000/78/WE. Pewne różnice w traktowaniu ze względu na wiek mogą być prawnie dopuszczalne, jeśli są uzasadnione zgodnym z prawem celem, a środki mające służyć osiągnięciu tego celu są właściwe i konieczne (próba proporcjonalności).

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[20] Dz.U. L 269 z 5.10.2002.

W obowiązujących dyrektywach przyjętych na mocy art. 13 TWE w odniesieniu do zakazu dyskryminacji pośredniej dopuszczono odstępstwa z uwagi na „istotne i determinujące wymogi zawodowe", zezwolono na różne traktowanie ze względu na wiek oraz, w kontekście dyskryminacji ze względu na płeć, dopuszczono odstępstwa w zakresie dostępu do towarów i usług. Chociaż obecny wniosek nie obejmuje zatrudnienia, będą różnice w traktowaniu w obszarach wymienionych w art. 3, które powinny zostać dopuszczone. Ponieważ jednak wyjątki od ogólnej zasady równości powinny być określone w sposób zawężający, wymagane jest podwójne badanie pod kątem uzasadnionego celu i proporcjonalnego sposobu jego osiągnięcia (tj. w możliwie najmniej dyskryminujący sposób).

Dodano specjalną zasadę dotyczącą usług ubezpieczeniowych i bankowych, uznając fakt, że wiek i niepełnosprawność mogą stanowić zasadniczy element oceny ryzyka w odniesieniu do pewnych produktów, a zatem wpływać na ustalanie ich ceny. Jeśli w ogóle nie zezwoli się ubezpieczycielom na uwzględnianie wieku i niepełnosprawności, pozostała część osób ubezpieczonych będzie musiała ponieść w całości dodatkowe koszty, co spowodowałoby wyższe koszty łączne i mniejszą dostępność ochrony ubezpieczeniowej dla konsumentów. Stosowanie czynników wieku i niepełnosprawności w ocenie ryzyka musi opierać się na dokładnych danych i statystykach.

Dyrektywa nie ma wpływu na krajowe środki odnoszące się do zapewnienia bezpieczeństwa publicznego, utrzymania porządku publicznego, zapobiegania działaniom podlegającym sankcjom karnym i zapewnienia ochrony zdrowia oraz praw i wolności innych osób.

Artykuł 3: Zakres

Dyskryminacja ze względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną jest zakazana zarówno w sektorze publicznym, jak i prywatnym w zakresie:

- ochrony socjalnej, łącznie z zabezpieczeniem społecznym i opieką zdrowotną;
- przywilejów socjalnych;
- edukacji;
- dostępu do towarów i usług publicznie dostępnych oraz ich dostarczania, włącznie z mieszkaniami.

W odniesieniu do dostępu do towarów i usług zakresem dyrektywy objęte są tylko działania o charakterze zawodowym lub handlowym.. Innymi słowy, transakcje między osobami prywatnymi działającymi w prywatnym charakterze nie będzie objęte tym przepisem – wynajmowanie pokoju we własnym domu nie musi być tak samo traktowane jak wynajmowanie pokoi przez hotel. Poszczególne obszary są objęte zakresem dyrektywy tylko w zakresie, w jakim dana kwestia należy do kompetencji Wspólnoty. Tak więc na przykład organizacja systemu szkolnictwa, działania związane ze szkoleniami i treść tych szkoleń, w tym organizacja edukacji osób niepełnosprawnych, należą do państw członkowskich, które mogą również wprowadzić różnice w traktowaniu w odniesieniu do dostępu do religijnych instytucji edukacyjnych. Przykładowo, szkoła mogłaby urządzić specjalne przedstawienie tylko dla dzieci w określonym wieku, a szkoła wyznaniowa miałaby prawo organizować wycieczki szkolne związane z tematami religijnymi.

W tekście wyraźnie określono, że kwestie związane ze stanem cywilnym i rodzinnym, w tym z przysposobieniem, pozostają poza zakresem dyrektywy. To samo dotyczy praw reprodukcyjnych. Państwa członkowskie mają swobodę decydowania, czy ustanawiać i uznawać *prawnie* rejestrowane związki partnerskie, czy też nie. Jednak z chwilą, gdy zgodnie z prawem krajowym związki takie zostaną uznane za porównywalne ze związkami małżonków, zasada równego traktowania będzie miała zastosowanie[21].

W art. 3 stwierdza się, że dyrektywa nie ma wpływu na ustawy krajowe dotyczące świeckiego charakteru państwa i jego instytucji oraz statusu organizacji religijnych. Państwa członkowskie mogą więc zezwalać na noszenie symboli religijnych w szkołach lub zakazywać go. Rożnice w traktowaniu ze względu na przynależność państwową również nie są objęte dyrektywą.

Artykuł 4: Równe traktowanie osób niepełnosprawnych

Skuteczny dostęp osób niepełnosprawnych do ochrony socjalnej, świadczeń z zabezpieczenia społecznego, opieki zdrowotnej, edukacji oraz dostęp do powszechnie dostępnych towarów i usług, w tym mieszkań, oraz ich dostarczanie planowane są z wyprzedzeniem. Ten obowiązek ograniczony jest zastrzeżeniem, że jeśli stwarzałoby to nieproporcjonalne obciążenie lub wymagało dokonania poważnych zmian produktu lub usługi, nie musi to być wykonane.

W niektórych przypadkach potrzebne mogą być indywidualne środki w zakresie racjonalnych usprawnień w celu zapewnienia skutecznego dostępu dla danej osoby niepełnosprawnej. Podobnie jak we wcześniej wspomnianym przypadku, ma to miejsce jedynie, jeśli nie stwarzałoby to nieproporcjonalnego obciążenia. W artykule podano niewyczerpujący wykaz czynników, które mogą być brane pod uwagę przy ustalaniu, czy obciążenie jest nieproporcjonalne, co pozwala uwzględnić szczególną sytuację małych, średnich i mikroprzedsiębiorstw.

Pojęcie racjonalnych usprawnień funkcjonuje już w sferze zatrudnienia na mocy dyrektywy 2000/78/WE, a zatem państwa członkowskie i przedsiębiorstwa mają doświadczenie w jego stosowaniu. To, co mogłoby być właściwie dla dużej korporacji lub organu publicznego, nie musi być odpowiednie dla małego lub średniego przedsiębiorstwa. Wymóg dokonywania racjonalnych usprawnień nie oznacza wyłącznie czynienia fizycznych zmian, lecz może pociągać za sobą alternatywne sposoby świadczenia usługi.

Artykuł 5: Działanie pozytywne

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Jest rzeczą jasną, że w wielu przypadkach formalna równość nie prowadzi do równości w praktyce. Może zachodzić potrzeba wprowadzenia szczególnych środków mających na celu zapobieganie przypadkom nierówności i ich naprawianie. Państwa członkowskie mają różne tradycje i praktyki w zakresie działania pozytywnego, a zgodnie z tym artykułem państwa członkowskie mogą przewidzieć działania pozytywne, ale nie są do tego zobowiązane.

Artykuł 6: Wymogi minimalne

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Zgodnie z tym artykułem państwa członkowskie mogą zapewnić wyższy poziom ochrony niż poziom gwarantowany przez dyrektywę; artykuł zawiera również potwierdzenie, że nie należy w

[21] Wyrok ETS z 1.4.2008 w sprawie C-267/06 Tadao Maruko.

trakcie wdrażania dyrektywy obniżać poziomu ochrony przed dyskryminacją wcześniej przyznanego przez państwa członkowskie.

Artykuł 7: Ochrona praw

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Jednostki powinny mieć możliwość egzekwowania swego prawa do niedyskryminacji. W związku z powyższym w artykule tym postanawia się, zgodnie z orzeczeniem Europejskiego Trybunału Sprawiedliwości w sprawie Coote[22], że osoby, które uważają, że stały się ofiarami dyskryminacji, powinny mieć możność skorzystania z procedur administracyjnych lub sądowych, nawet w przypadku gdy dobiegła końca sytuacja, w której domniemana dyskryminacja miała miejsce.

Prawo do skutecznej ochrony prawnej jest wzmocnione dzięki zezwoleniu organizacjom, które mają uzasadniony interes w walce przeciwko dyskryminacji, na pomoc ofiarom dyskryminacji w trakcie procedur sądowych lub administracyjnych. Przepis ten nie ma wpływu na krajowe przepisy dotyczące terminów wszczynania postępowań.

Artykuł 8: Ciężar dowodu

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Ogólną zasadą w postępowaniach sądowych jest, że osoba, która coś twierdzi, musi to udowodnić. W sprawach dotyczących dyskryminacji często jest jednak niezwykle trudno uzyskać dowody konieczne do udowodnienia zarzutów, jako że często dowody te znajdują się w posiadaniu pozwanego. Problem ten został uwzględniony przez Europejski Trybunał Sprawiedliwości[23] oraz przez prawodawcę wspólnotowego w dyrektywie 97/80/WE[24].

Przeniesienie ciężaru dowodu ma zastosowanie we wszystkich sprawach, w których zarzuca się naruszenie zasady równego traktowania, w tym w sprawach, w których na mocy art. 7 ust. 2 biorą udział stowarzyszenia i organizacje. Podobnie jak to ma miejsce w przypadku wcześniejszych dyrektyw, wspomniane wyżej przeniesienie ciężaru dowodu nie ma zastosowania w sytuacjach, w których postawienie zarzutów dyskryminacji powoduje ściganie w drodze postępowania karnego.

Artykuł 9: Represjonowanie

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Skuteczna ochrona prawna musi zawierać w sobie ochronę przed odwetem. Zagrożenie odwetem może odstraszać ofiary dyskryminacji od korzystania z przysługujących im praw, dlatego należy zapewnić ochronę przed wszelkim niekorzystnym traktowaniem osobom korzystającym z praw przyznanych niniejszą dyrektywą. Artykuł ten ma takie samo brzmienie, jak odpowiednie artykuły w dyrektywach 2000/43/WE i 2000/78/WE.

Artykuł 10: Rozpowszechnianie informacji

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Doświadczenie oraz sondaże wskazują, że jednostki są źle lub niewystarczająco poinformowane o swoich prawach. Im skuteczniejszy będzie system informacji publicznej i zapobieganie, tym rzadziej

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22 Sprawa C-185/97 [1998], Rec. s. I-5199.

23 Danfoss, sprawa 109/88. [1989] Rec. s. 03199.

24 Dz.U. L 14 z 20.1.1998.

zachodzić będzie potrzeba korzystania z indywidualnych śrdokow zaradczych. Przepis ten powiela odpowiednie przepisy w dyrektywach 2000/43/WE, 2000/78/WE i 2002/113/WE.

Artykuł 11: Dialog z zainteresowanymi stronami

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Celem tego przepisu jest wspieranie dialogu między właściwymi organami publicznymi i podmiotami takimi jak organizacje pozarządowe, które mają uzasadniony interes w przyczynianiu się do zwalczania dyskryminacji ze względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną. Podobny przepis znajduje się we wcześniejszych dyrektywach antydyskryminacyjnych.

Artykuł 12: Instytucje wspierające równość traktowania

Przepis ten jest wspólny dla dwóch dyrektyw przyjętych na mocy art. 13. Zgodnie z tym artykułem wymaga się, aby państwa członkowskie wyznaczyły na szczeblu krajowym organ lub organy („organ ds. równości") mające wspierać równe traktowanie wszystkich osób bez dyskryminacji ze względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną.

Przepis ten jest powieleniem przepisów dyrektywy 2000/43/WE w zakresie, w jakim dotyczą one dostępu do towarów i usług oraz ich dostarczania, a także opiera się na równoważnych przepisach w dyrektywach 2002/73/WE[25] i 2004/113/WE. W przepisie tym określa się minimalne kompetencje mające zastosowanie wobec organów na szczeblu krajowym, działających niezależnie na rzecz wspierania zasady równego traktowania. Państwa członkowskie mogą zdecydować, że będą to te same organy, które zostały już powołane na mocy wcześniejszych dyrektyw.

Sprostanie prawnym wyzwaniom jest zarówno trudne, jak i kosztowne dla osób, które uważają, że były dyskryminowane. Główną rolą organów ds. równości jest udzielanie niezależnej pomocy ofiarom dyskryminacji. Organy te muszą mieć również możność prowadzenia niezależnych badań dotyczących dyskryminacji i publikowania sprawozdań i zaleceń w kwestiach związanych z dyskryminacją.

Artykuł 13: Zgodność

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Równe traktowanie oznacza wyeliminowanie dyskryminacji powodowanej przez jakiekolwiek przepisy ustawowe, wykonawcze i administracyjne, a zatem w dyrektywie wymaga się od państw członkowskich uchylenia wszelkich takich przepisów. Podobnie jak we wcześniejszym prawodawstwie, w dyrektywie wymaga się unieważnienia bądź zmiany wszelkich przepisów sprzecznych z zasadą równego traktowania, lub też umożliwienia ich unieważnienia bądź zmiany, jeśli zostaną zakwestionowane.

Artykuł 14: Sankcje

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Zgodnie z orzecznictwem Trybunału Sprawiedliwości[26] w tekście postanawia się, że nie powinno być

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[25] Dyrektywa 2002/73/WE zmieniająca dyrektywę Rady 76/207/EWG w sprawie wprowadzenia w życie zasady równego traktowania mężczyzn i kobiet w zakresie dostępu do zatrudnienia, kształcenia i awansu zawodowego oraz warunków pracy (Dz.U. L 269 z 5.10.2002, s. 15).

[26] Sprawy C-180/95 Draehmpaehl, Rec. 1997 I, s. 2195 oraz C-271/91 Marshall, Rec. 1993 I, s. 4367.

górnego limitu dla odszkodowań wypłacanych w przypadkach naruszenia zasady równego traktowania. Przepis ten nie wymaga wprowadzenia sankcji karnych.

Artykuł 15: Wykonanie

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Zgodnie z tym przepisem państwa członkowskie powinny w ciągu dwóch lat dokonać transpozycji dyrektywy do prawa krajowego i przekazać Komisji tekst przepisów krajowych. Państwa członkowskie mogą postanowić, że obowiązek zapewnienia skutecznego dostępu dla osób niepełnosprawnych ma zastosowanie dopiero cztery lata po przyjęciu dyrektywy.

Artykuł 16: Sprawozdanie

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Zawiera on wymóg składania przez Komisję Parlamentowi Europejskiemu i Radzie sprawozdania dotyczącego stosowania niniejszej dyrektywy na podstawie informacji udzielanych przez państwa członkowskie. W sprawozdaniu tym uwzględnia się opinie partnerów społecznych, zainteresowanych organizacji pozarządowych oraz Agencji UE ds. Praw Podstawowych.

Artykuł 17: Wejście w życie

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13. Dyrektywa wejdzie w życie z dniem jej opublikowania w Dzienniku Urzędowym.

Artykuł 18: Adresaci

Przepis ten jest wspólny dla wszystkich dyrektyw przyjętych na mocy art. 13 i zawiera wyraźne stwierdzenie, że dyrektywa jest skierowana do państw członkowskich.

2008/0140 (CNS)

Wniosek

DYREKTYWA RADY

w sprawie wprowadzenia w życie zasady równego traktowania osób bez względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną

RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat ustanawiający Wspólnotę Europejską, w szczególności jego art. 13 ust. 1,

uwzględniając wniosek Komisji[27],

uwzględniając opinię Parlamentu Europejskiego[28],

uwzględniając opinię Europejskiego Komitetu Ekonomiczno-Społecznego[29],

uwzględniając opinię Komitetu Regionów[30],

a także mając na uwadze, co następuje:

(1) Zgodnie z art. 6 Traktatu o Unii Europejskiej Unia Europejska opiera się na zasadach wolności, demokracji, poszanowania praw człowieka i podstawowych wolności oraz państwa prawnego, które są wspólne dla wszystkich państw członkowskich. Unia Europejska szanuje prawa podstawowe zagwarantowane w Europejskiej konwencji o ochronie praw człowieka i podstawowych wolności oraz wynikające z tradycji konstytucyjnych wspólnych dla państw członkowskich, jako zasady ogólne prawa wspólnotowego.

(2) Prawo każdej osoby do równości wobec prawa i do ochrony przed dyskryminacją jest powszechnym prawem uznanym w Powszechnej deklaracji praw człowieka, Konwencji NZ w sprawie likwidacji wszelkich form dyskryminacji kobiet, Międzynarodowej konwencji w sprawie likwidacji wszelkich form dyskryminacji rasowej, Paktach NZ: Pakcie praw obywatelskich i politycznych oraz Pakcie praw gospodarczych, społecznych i kulturalnych, Konwencji NZ o prawach osób niepełnosprawnych, Europejskiej konwencji o ochronie praw człowieka i podstawowych wolności oraz Europejskiej karcie społecznej, których sygnatariuszami są [wszystkie] państwa członkowskie. W szczególności definicja dyskryminacji zawarta w Konwencji NZ o prawach osób niepełnosprawnych obejmuje odmowę racjonalnego usprawnienia.

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27 Dz.U. C, , s. .
28 Dz.U. C, , s. .
29 Dz.U. C, , s. .
30 Dz.U. C, , s. .

(3) Niniejsza dyrektywa uwzględnia prawa podstawowe i przestrzega zasad uznanych przede wszystkim w Karcie praw podstawowych Unii Europejskiej. Artykuł 10 Karty uznaje prawo do wolności myśli, sumienia i religii. Artykuł 21 zakazuje dyskryminacji, w tym ze względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną. Artykuł 26 uznaje prawo osób niepełnosprawnych do korzystania ze środków mających zapewnić ich niezależność.

(4) Europejski Rok Osób Niepełnosprawnych 2003, Europejski Rok Równych Szans dla Wszystkich 2007 oraz Europejski Rok Dialogu Międzykulturowego 2008 podkreśliły z jednej strony utrzymywanie się dyskryminacji, a z drugiej strony korzyści płynące z różnorodności.

(5) Rada Europejska obradująca dnia 14 grudnia 2007 r. w Brukseli zachęcała państwa członkowskie do zwiększenia wysiłków zmierzających do zapobiegania dyskryminacji oraz zwalczania jej na rynku pracy i poza nim[31].

(6) Parlament Europejski wzywał do rozszerzenia ochrony przed dyskryminacją w prawie Unii Europejskiej[32].

(7) W swoim komunikacie „Odnowiona agenda społeczna: możliwości, dostęp i solidarność w Europie XXI wieku”[33] Komisja Europejska podkreśliła, że w społeczeństwach, w których każda jednostka postrzegana jest jako posiadająca jednakową wartość, żadne sztuczne bariery ani działania dyskryminacyjne nie powinny powstrzymywać ludzi od korzystania z tych możliwości.

(8) W celu zapobiegania dyskryminacji ze względu na płeć, pochodzenie rasowe i etniczne, religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną oraz zwalczania jej Wspólnota przyjęła trzy instrumenty prawne[34] na podstawie art. 13 ust. 1 Traktatu WE. Instrumenty te podkreśliły wagę istnienia przepisów prawnych w walce z dyskryminacją. W szczególności dyrektywa 2000/78/WE ustanawia ogólne warunki ramowe dla równego traktowania ze względu na religię lub światopogląd, niepełnosprawność, wiek i orientację seksualną w zakresie zatrudnienia i pracy. Poza dziedziną zatrudnienia, w państwach członkowskich widoczne są jednak rozbieżności w zakresie stopnia i formy ochrony przed dyskryminacją ze wspomnianych przyczyn.

(9) Przepisy prawne powinny zatem zakazywać dyskryminacji, której podstawą jest religia lub światopogląd, niepełnosprawność, wiek lub orientacja seksualna w licznych obszarach poza rynkiem pracy, łącznie z ochroną socjalną, edukacją i dostępem do niej oraz zaopatrywaniem w towary i usługi, w tym mieszkania. Ustawodawstwo powinno udostępniać środki zapewniające osobom niepełnosprawnym jednakowy dostęp do przedmiotowych dziedzin.

(10) Dyrektywa 2000/78/WE zabrania dyskryminacji w dostępie do szkolenia zawodowego; konieczne jest uzupełnienie tej ochrony poprzez rozszerzenie zakazu dyskryminacji w odniesieniu do kształcenia, które nie jest uważane za szkolenie zawodowe.

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31 Konkluzje Prezydencji z posiedzenia Rady Europejskiej w Brukseli z dnia 14 grudnia 2007 r., punkt 50

32 Rezolucja z dnia 20 maja 2008 r. P6_TA-PROV(2008)0212.

33 COM(2008) 412

34 Dyrektywa 2000/43/WE, dyrektywa 2000/78/WE i dyrektywa 2004/113/WE

(11) Niniejsza dyrektywa nie powinna naruszać kompetencji państw członkowskich w dziedzinach takich jak edukacja, zabezpieczenie społeczne i opieka zdrowotna. Dyrektywa powinna także pozostawać bez uszczerbku dla zasadniczej roli i szerokiego zakresu uprawnień państw członkowskich w zakresie zapewniania, zlecania i organizowania usług świadczonych w ogólnym interesie gospodarczym.

(12) Na pojęcie dyskryminacji składają się: dyskryminacja bezpośrednia i dyskryminacja pośrednia, molestowanie, nakłanianie do dyskryminacji oraz odmowa racjonalnego usprawnienia.

(13) Wprowadzając w życie zasadę równego traktowania bez względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną, zgodnie z art. 3 ust. 2 Traktatu WE, Wspólnota dąży do wyeliminowania nierówności i wspierania równego traktowania mężczyzn i kobiet, w szczególności mając na uwadze fakt, że kobiety są często ofiarami różnego rodzaju dyskryminacji.

(14) Ocena faktów, które nasuwają przypuszczenie istnienia dyskryminacji bezpośredniej lub pośredniej, powinna pozostać w kompetencji sądów krajowych lub innych właściwych organów, zgodnie zasadami prawa krajowego lub praktyką krajową. Zasady te mogą w szczególności przewidywać, że fakt występowania dyskryminacji pośredniej można udowodnić przy wykorzystaniu wszelkich środków, w tym na podstawie danych statystycznych.

(15) Czynniki aktuarialne oraz czynniki ryzyka związane z niepełnosprawnością i wiekiem stosowane są w zakresie ubezpieczeń, usług bankowych i innych usług finansowych. W przypadku wykazania, że czynniki te są czynnikami kluczowymi dla oceny ryzyka, nie powinny być one postrzegane jako dyskryminacyjne.

(16) Każda osoba korzysta ze swobody zawierania umów, łącznie ze swobodą wyboru kontrahenta transakcji. Niniejsza dyrektywa nie ma zastosowania do transakcji gospodarczych zawieranych przez poszczególne osoby, jeżeli transakcje te nie wchodzą w zakres ich działalności zawodowej lub gospodarczej.

(17) Zakaz dyskryminacji nie może naruszać poszanowania innych podstawowych praw i wolności, w tym ochrony prywatności i życia rodzinnego oraz działań wykonywanych w tym kontekście, a także wolności religii i wolności zrzeszania się. Niniejsza dyrektywa nie narusza przepisów krajowych regulujących stan cywilny lub stosunki rodzinne, w tym prawa reprodukcyjne. Nie narusza to także świeckiego charakteru państwa, instytucji lub organów państwowych lub systemu kształcenia.

(18) Za organizację i treść kształcenia odpowiedzialne są państwa członkowskie. Komunikat Komisji w sprawie kompetencji na XXI wiek: agenda dotycząca europejskiej współpracy szkół podkreśla konieczność poświęcenia szczególnej uwagi dzieciom znajdującym się w niekorzystnej sytuacji oraz mającym specjalne potrzeby edukacyjne. W dostępie do instytucji edukacyjnych prawo krajowe może w szczególności przewidywać różnice oparte na religii lub światopoglądzie. Państwa członkowskie mogą także zezwolić na noszenie lub umieszczanie w szkołach symboli religijnych bądź tego zakazać.

(19) W swojej Deklaracji nr 11 w sprawie statusu kościołów i organizacji niewyznaniowych, załączonej do Aktu końcowego traktatu amsterdamskiego, Unia

Europejska w wyraźny sposób uznała, że szanuje i nie narusza statusu, z którego, na mocy prawa krajowego, korzystają kościoły i stowarzyszenia lub wspólnoty religijne w państwach członkowskich, oraz że szanuje w równym stopniu status organizacji filozoficznych i niewyznaniowych. Środki umożliwiające osobom niepełnosprawnym skuteczny i niedyskryminacyjny dostęp do sektorów objętych niniejszą dyrektywą odgrywają znaczącą rolę w urzeczywistnianiu pełnej równości. Ponadto w niektórych przypadkach konieczne mogą być indywidualne środki w zakresie racjonalnego usprawnienia w celu zapewnienia takiego dostępu. W żadnym przypadku środki te nie mogą nakładać nieproporcjonalnych obciążeń. W ocenie, czy obciążenia są nieproporcjonalne, należy wziąć pod uwagę wiele czynników, w tym wielkość, zasoby oraz charakter organizacji. Zasada racjonalnych usprawnień i nieproporcjonalnych obciążeń jest ustanowiona w dyrektywie 2000/78/WE oraz w Konwencji NZ o prawach osób niepełnosprawnych.

(20) Wymogi prawne[35] i normy dotyczące dostępu w odniesieniu do niektórych obszarów zostały ustanowione na poziomie europejskim. Art. 16 rozporządzenia Rady 1083/2006 z dnia 11 lipca 2006 r. ustanawiającego przepisy ogólne dotyczące Europejskiego Funduszu Rozwoju Regionalnego, Europejskiego Funduszu Społecznego oraz Funduszu Spójności i uchylającego rozporządzenie (WE) nr 1260/1999[36] zawiera natomiast wymóg, aby dostępność dla osób niepełnosprawnych była jednym kryteriów uwzględnianych przy definiowaniu działań współfinansowanych z funduszy strukturalnych. Rada podkreśliła także konieczność wprowadzenia środków gwarantujących dostęp ludzi niepełnosprawnych do infrastruktury kulturalnej i działań kulturalnych[37].

(21) Zakaz dyskryminacji powinien pozostawać bez uszczerbku dla utrzymywania lub przyjmowania przez państwa członkowskie środków mających zapobiegać niekorzystnej sytuacji grupy osób danej religii lub światopoglądu, osób niepełnosprawnych, znajdujących się w określonym wieku lub o określonej orientacji seksualnej lub rekompensować taką sytuację. Środki takie mogą zezwalać na istnienie organizacji osób danej religii lub o określonym światopoglądzie, osób niepełnosprawnych, znajdujących się w określonym wieku lub o określonej orientacji seksualnej, jeżeli głównym celem tych organizacji jest wspieranie szczególnych potrzeb tych osób.

(22) Niniejsza dyrektywa ustanawia wymogi minimalne, pozostawiając państwom członkowskim możliwość przyjęcia lub utrzymania przepisów bardziej korzystnych. Wdrożenie niniejszej dyrektywy nie może usprawiedliwiać regresu w stosunku do sytuacji już istniejącej w każdym państwie członkowskim.

(23) Osoby, które były dyskryminowane ze względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną, powinny dysponować odpowiednimi środkami ochrony prawnej. W celu zapewnienia skuteczniejszego poziomu ochrony stowarzyszenia, organizacje i inne osoby prawne powinny posiadać upoważnienie do uczestnictwa w postępowaniu sądowym, także w imieniu każdej

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35 Rozporządzenie (WE) nr 1107/2006 i rozporządzenie (WE) nr 1371/2007

36 Dz.U. L 210 z 31.7.2006, s. 25. Rozporządzenie ostatnio zmienione rozporządzeniem (WE) nr 1989/2006 (Dz.U. L 411 z 30.12.2006, s. 6).

37 Dz.U. C 134 z 7.6.2003, s.7

ofiary albo jako jej wsparcie, nie naruszając zasad procedury krajowej dotyczących przedstawicielstwa i obrony przez sądem.

(24) Należy dostosować zasadę ciężaru dowodu do sytuacji, w której dyskryminacja jest oczywista; dla skutecznego stosowania zasady równego traktowania w przypadku przedłożenia dowodów takiej dyskryminacji ciężar dowodu należy przenieść na pozwanego. Pozwany nie ma jednak obowiązku udowodnienia, że powód jest wyznawcą danej religii, posiada określony światopogląd, jest w szczególny sposób niepełnosprawny, jest w danym wieku lub jest osobą o określonej orientacji seksualnej.

(25) Skuteczne wprowadzenie w życie zasady równego traktowania wymaga odpowiedniej ochrony sądowej przed represjonowaniem.

(26) W swojej rezolucji dotyczącej dalszych działań po zakończeniu Europejskiego Roku Równych Szans dla Wszystkich 2007 Rada zachęcała do pełnego zaangażowania społeczeństwa obywatelskiego, w tym organizacji reprezentujących ludzi narażonych na ryzyko dyskryminacji, partnerów społecznych i zainteresowanych stron, w opracowanie polityki i programów mających na celu zapobieganie dyskryminacji oraz promocję równouprawnienia i równych szans na poziomie europejskim i krajowym.

(27) Doświadczenie zdobyte na gruncie stosowania dyrektyw 2000/43/WE i 2004/113/WE pokazuje, że ochrona przed dyskryminacją ze względów, o których mowa w niniejszej dyrektywie, zostałaby wzmocniona, gdyby w każdym państwie członkowskim istniał jeden lub więcej organów wyposażonych w kompetencje do analizy konkretnych problemów, badania możliwych rozwiązań i świadczenia ofiarom konkretnej pomocy.

(28) Przy wykonywaniu swoich uprawnień i obowiązków wynikających z niniejszej dyrektywy organy te powinny działać w sposób zgodny z zasadami paryskimi NZ dotyczącymi statusu i funkcjonowania instytucji krajowych w zakresie ochrony i promowania praw człowieka.

(29) Państwa członkowskie powinny wprowadzić skuteczne, proporcjonalne i odstraszające sankcje stosowane w przypadkach nieprzestrzegania zobowiązań wynikających z niniejszej dyrektywy.

(30) Zgodnie z zasadą pomocniczości oraz zasadą proporcjonalności, określonymi w art. 5 Traktatu WE, cel niniejszej dyrektywy, jakim jest zapewnienie we wszystkich państwach członkowskich wspólnego poziomu ochrony przed dyskryminacją, nie może być osiągnięty w sposób wystarczający przez państwa członkowskie, natomiast z uwagi na rozmiary lub skutki proponowanych działań możliwe jest lepsze jego osiągnięcie na poziomie Wspólnoty. Niniejsza dyrektywa nie wykracza poza to, co jest konieczne do osiągnięcia tych celów.

(31) Zgodnie z ust. 34 porozumienia międzyinstytucjonalnego w sprawie lepszego stanowienia prawa zachęca się państwa członkowskie do opracowania i opublikowania, dla ich własnych celów i w interesie Wspólnoty, własnych tabel, które będą stanowić możliwie najszerszy obraz korelacji pomiędzy niniejszą dyrektywą a środkami transpozycji, oraz do udostępnienia tych tabel ogółowi społeczeństwa,

PRZYJMUJE NINIEJSZĄ DYREKTYWĘ:

Rozdział 1
PRZEPISY OGÓLNE

Artykuł 1
Cel

Niniejsza dyrektywa ustanawia ramy dla walki z dyskryminacją ze względu na religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną, co ma zapewnić wprowadzenie w życie w państwach członkowskich zasady równego traktowania w obszarach innych niż zatrudnienie i praca.

Artykuł 2
Pojęcie dyskryminacji

1. Dla celów niniejszej dyrektywy „zasada równego traktowania" oznacza brak jakichkolwiek form dyskryminacji bezpośredniej lub pośredniej z przyczyn, o których mowa w art. 1.

2. Dla celów ust. 1:

a) dyskryminacja bezpośrednia występuje w przypadku, gdy daną osobę traktuje się mniej przychylnie, niż traktuje się, traktowano lub traktowano by inną osobę w porównywalnej sytuacji, z jakiejkolwiek przyczyny, o której mowa w art. 1;

b) dyskryminacja pośrednia ma miejsce w przypadku, gdy z pozoru neutralny przepis, kryterium lub praktyka może doprowadzić do szczególnej niekorzystnej sytuacji dla osób określonej religii lub światopoglądu, osób o określonej niepełnosprawności, w określonym wieku lub o określonej orientacji seksualnej, w stosunku do innych osób, chyba że taki przepis, kryterium lub praktyka są obiektywnie uzasadnione słusznym celem, a środki mające służyć ich osiągnięciu są właściwe i konieczne.

3. Molestowanie uważane jest za formę dyskryminacji w rozumieniu ust. 1, jeżeli ma miejsce niepożądane zachowanie związane z przyczynami, o których mowa w art. 1, a jego celem lub skutkiem jest naruszenie godności osoby i stworzenie onieśmielającej, wrogiej, poniżającej, upokarzającej lub uwłaczającej atmosfery.

4. Nakłanianie do dyskryminacji osób z jakiejkolwiek przyczyny, o której mowa w art. 1, uważane jest za dyskryminację w rozumieniu ust. 1.

5. Odmowa racjonalnego usprawnienia, w szczególności w przypadku, o którym mowa w art. 4 ust. 1 lit. b) niniejszej dyrektywy, w odniesieniu do osób niepełnosprawnych, uważana jest za dyskryminację w rozumieniu ust. 1.

6. Bez uszczerbku dla ust. 2 państwa członkowskie mogą przewidzieć, że różnice w traktowaniu ze względu na wiek nie stanowią dyskryminacji, jeżeli, w kontekście prawa krajowego, uzasadnione są słusznym celem, a środki mające służyć jego osiągnięciu są właściwe i konieczne. Dyrektywa nie wyklucza w szczególności ustalenia określonej granicy wieku dla dostępu do świadczeń społecznych, kształcenia oraz do niektórych towarów lub usług.

7. Bez uszczerbku dla ust. 2, w zakresie usług finansowych państwa członkowskie mogą zezwolić na proporcjonalne różnice w traktowaniu, jeżeli, w stosunku do danego produktu, odniesienie do wieku lub niepełnosprawności jest czynnikiem kluczowym w ocenie ryzyka opartej na odpowiednich i dokładnych danych aktuarialnych lub statystycznych.

8. Niniejsza dyrektywa nie narusza środków natury ogólnej przewidzianych w prawie krajowym, które w społeczeństwie demokratycznym są niezbędne do zapewnienia bezpieczeństwa publicznego, utrzymania porządku i zapobiegania działaniom podlegającym sankcjom karnym oraz zapewnienia ochrony zdrowia i ochrony praw i wolności innych osób.

Artykuł 3
Zakres

1. W granicach kompetencji powierzonych Wspólnocie zakaz dyskryminacji stosuje się do wszystkich osób, zarówno sektora publicznego, jak i prywatnego, łącznie z instytucjami publicznymi, w odniesieniu do:

a) ochrony socjalnej, łącznie z zabezpieczeniem społecznym i opieką zdrowotną;

b) przywilejów socjalnych;

c) edukacji;

d) dostępu do towarów i innych usług powszechnie dostępnych, w tym mieszkań, oraz dostarczanie ich.

Litera d) ma zastosowanie do poszczególnych osób tylko w zakresie, w jakim prowadzą własną działalność zawodową lub gospodarczą.

2. Niniejsza dyrektywa nie narusza przepisów krajowych regulujących stan cywilny lub stosunki rodzinne, w tym prawa reprodukcyjne.

3. Niniejsza dyrektywa nie narusza odpowiedzialności państw członkowskich za treść nauczania, działalność i organizację ich systemów kształcenia, łącznie z zapewnieniem kształcenia integracyjnego. W dostępie do instytucji edukacyjnych państwa członkowskie mogą przewidzieć różnice w traktowaniu, oparte na religii lub światopoglądzie.

4. Niniejsza dyrektywa nie narusza ustawodawstwa krajowego zapewniającego świeckość państwa, instytucji lub organów państwowych lub systemu kształcenia albo dotyczącego statusu i działalności kościołów i innych organizacji, których podstawą jest religia lub światopogląd. Niniejsza dyrektywa nie narusza także ustawodawstwa krajowego promującego równość kobiet i mężczyzn.

5. W zakres niniejszej dyrektywy nie wchodzi zróżnicowane traktowanie ze względu na przynależność państwową; dyrektywa nie narusza przepisów oraz warunków dotyczących wjazdu i pobytu obywateli państw trzecich oraz bezpaństwowców na terytorium państw członkowskich i wszelkiego traktowania związanego ze statusem prawnym danych obywateli państw trzecich i bezpaństwowców.

Artykuł 4
Równe traktowanie osób niepełnosprawnych

1. W celu zagwarantowania przestrzegania zasady równego traktowania osób niepełnosprawnych:

a) Środki konieczne dla umożliwienia osobom niepełnosprawnym skutecznego, niedyskryminacyjnego dostępu do ochrony socjalnej, przywilejów socjalnych, opieki zdrowotnej, edukacji oraz dostępu do powszechnie dostępnych towarów i usług, w tym mieszkań i transportu, oraz ich dostarczania planowane są z wyprzedzeniem, łącznie z dokonaniem odpowiednich zmian lub modyfikacji. Środki takie nie powinny nakładać nieproporcjonalnych obciążeń, nie wymagają zasadniczych zmian w zakresie ochrony socjalnej, przywilejów socjalnych, opieki zdrowotnej, edukacji lub danych towarów i usług ani nie wymagają zapewnienia odpowiednich rozwiązań alternatywnych.

b) Bez uszczerbku dla obowiązku zapewnienia skutecznego, niedyskryminacyjnego dostępu i w zależności od potrzeby konkretnego przypadku zapewnia się racjonalne usprawnienia, chyba że wiązałoby się to z nieproporcjonalnym obciążeniem.

2. Dla celów oceny, czy środki niezbędne dla przestrzegania ust. 1 wiązałyby się z nieproporcjonalnym obciążeniem, należy w szczególności wziąć pod uwagę wielkość, zasoby i charakter organizacji, szacowany koszt, cykl życia towarów i usług oraz możliwe korzyści ze zwiększenia dostępu dla osób niepełnosprawnych. Obciążenia te nie są nieproporcjonalne, jeżeli w wystarczającym stopniu są rekompensowane ze środków istniejących w ramach polityki równego traktowania prowadzonej przez dane państwo członkowskie.

3. Niniejsza dyrektywa nie narusza przepisów prawa wspólnotowego lub przepisów krajowych w zakresie dostępu do szczególnych towarów i usług.

Artykuł 5
Pozytywne działanie

Dla zapewnienia urzeczywistnienia pełnej równości zasada równego traktowania nie stanowi przeszkody w utrzymywaniu lub przyjmowaniu przez państwo członkowskie szczególnych środków mających zapobiegać niedogodnościom związanym z religią lub światopoglądem, niepełnosprawnością, wiekiem lub orientacją seksualną oraz rekompensować te niedogodności.

Artykuł 6
Wymogi minimalne

1. Państwa członkowskie mogą przyjmować lub utrzymywać w mocy przepisy bardziej korzystne, z punktu widzenia ochrony zasady równego traktowania, od przepisów ustanowionych w niniejszej dyrektywie.

2. Wdrożenie niniejszej dyrektywy nie może być w żadnych okolicznościach przyczyną obniżenia poziomu ochrony przed dyskryminacją, już zapewnianego przez państwo członkowskie w zakresie regulowanym niniejszą dyrektywą.

ROZDZIAŁ II
ŚRODKI PRAWNE ORAZ EGZEKWOWANIE PRAWA

Artykuł 7
Obrona praw

1. Państwa członkowskie dopilnowują, aby procedury sądowe lub administracyjne, w tym, o ile uznają to za właściwe, procedury pojednawcze, których celem jest egzekwowanie wykonania obowiązków wynikających z niniejszej dyrektywy, były dostępne dla wszystkich osób, które uważają się za pokrzywdzone na skutek nieprzestrzegania w stosunku do nich zasady równego traktowania, nawet po zakończeniu kontaktów, w których przypuszczalnie miała miejsce dyskryminacja.

2. Państwa członkowskie dopilnowują, aby stowarzyszenia, organizacje lub inne osoby prawne, które mają uzasadniony interes w zapewnieniu przestrzegania przepisów niniejszej dyrektywy, mogły uczestniczyć, w imieniu skarżącego lub wspierając go, za jego zgodą, w każdym postępowaniu sądowym lub administracyjnym przewidzianym w celu egzekwowania wykonania obowiązków wynikających z niniejszej dyrektywy.

3. Ustępy 1 i 2 pozostają bez uszczerbku dla przepisów krajowych dotyczących przedawnienia roszczeń w odniesieniu do zasady równego traktowania.

Artykuł 8
Ciężar dowodu

1. Zgodnie ze swoimi krajowymi systemami sądowymi państwa członkowskie podejmują niezbędne środki dla zapewnienia obowiązku udowodnienia przez stronę pozwaną, że nie wystąpiło naruszenie zakazu dyskryminacji, w przypadku gdy osoby, które uważają się za pokrzywdzone na skutek nieprzestrzegania w stosunku do nich zasady równego traktowania, ustalą przed sądem lub innym właściwym organem fakty nasuwające przypuszczenie, że miała miejsce dyskryminacja bezpośrednia lub pośrednia.

2. Ustęp 1 nie stoi na przeszkodzie wprowadzeniu przez państwa członkowskie zasad dowodowych korzystniejszych dla strony skarżącej.

3. Ustęp 1 nie ma zastosowania do postępowań karnych.

4. Państwa członkowskie nie muszą stosować ust. 1 do postępowań, w których zbadanie okoliczności faktycznych sprawy jest zadaniem sądu lub właściwego organu.

5. Ustępy 1, 2, 3 i 4 stosuje się również do każdego postępowania sądowego wszczętego zgodnie z art. 7 ust. 2.

Artykuł 9
Represjonowanie

Państwa członkowskie wprowadzają do swoich krajowych systemów prawnych środki niezbędne do ochrony poszczególnych osób przed wszelkiego rodzaju negatywnym

traktowaniem lub negatywnymi skutkami w reakcji na skargę lub wszczęcie postępowania w celu wyegzekwowania przestrzegania zasady równego traktowania.

Artykuł 10
Rozpowszechnianie informacji

Państwa członkowskie dopilnowują, aby przepisy przyjęte zgodnie z niniejszą dyrektywą oraz odpowiednie przepisy już będące w mocy były udostępniane zainteresowanym osobom przy wykorzystaniu wszystkich stosownych środków na całym ich terytorium.

Artykuł 11
Dialog z zainteresowanymi stronami

W celu wspierania zasady równego traktowania państwa członkowskie zachęcają do prowadzenia dialogu z właściwymi zainteresowanymi stronami, w szczególności organizacjami pozarządowymi, które, zgodnie z krajowym ustawodawstwem i praktyką, mają uzasadniony interes w uczestniczeniu w walce z dyskryminacją z przyczyn objętych niniejszą dyrektywą.

Artykuł 12
Instytucje wspierające równość traktowania

1. Państwa członkowskie wyznaczają organ lub organy mające wspierać równe traktowanie wszystkich osób bez względu na ich religię lub światopogląd, niepełnosprawność, wiek lub orientację seksualną. Organy te mogą wchodzić w skład agencji odpowiedzialnych na poziomie krajowym za obronę praw człowieka lub przestrzeganie praw jednostek, łącznie z prawami przewidzianymi w aktach prawa wspólnotowego, w tym w dyrektywach 2000/43/WE i 2004/113/WE.

2. Państwa członkowskie dopilnowują, aby kompetencje tych organów obejmowały:

– bez uszczerbku dla praw ofiar i stowarzyszeń, organizacji lub innych osób prawnych, o których mowa w art. 7 ust. 2, świadczenie niezależnej pomocy ofiarom dyskryminacji przy wnoszeniu skarg dotyczących dyskryminacji,

– prowadzenie niezależnych badań nad dyskryminacją,

– publikowanie niezależnych sprawozdań i wydawanie zaleceń odnośnie problemów związanych z taką dyskryminacją.

ROZDZIAŁ III
PRZEPISY KOŃCOWE

Artykuł 13
Zgodność

Państwa członkowskie podejmują środki niezbędne do zapewnienia przestrzegania zasady równego traktowania, a w szczególności do:

a) uchylenia przepisów ustawowych, wykonawczych i administracyjnych sprzecznych z zasadą równego traktowania;

b) unieważnienia lub zmiany wszelkich postanowień umownych, regulaminów wewnętrznych przedsiębiorstw, przepisów dotyczących stowarzyszeń prowadzących działalność zarobkową lub nieprowadzących takiej działalności sprzecznych z zasadą równego traktowania.

Artykuł 14
Sankcje

Państwa członkowskie ustanawiają zasady stosowania sankcji obowiązujących wobec naruszeń przepisów krajowych przyjętych zgodnie z niniejszą dyrektywą i podejmują wszelkie niezbędne środki dla zapewnienia ich stosowania. Sankcje mogą mieć formę wypłaty odszkodowania, którego wysokość nie może być ograniczona przez ustalony wcześniej górny limit i które musi być skuteczne, proporcjonalne i odstraszające.

Artykuł 15
Wykonanie

1. Państwa członkowskie przyjmą, najpóźniej do dnia ... [dwa lata po przyjęciu] r., przepisy ustawowe, wykonawcze i administracyjne niezbędne do wykonania niniejszej dyrektywy.. Państwa członkowskie niezwłocznie zawiadomią o tym Komisję i przekażą Komisji tekst tych przepisów oraz tabelę korelacji pomiędzy tymi przepisami a niniejszą dyrektywą.

Przepisy przyjęte przez państwa członkowskie zawierają odniesienie do niniejszej dyrektywy lub odniesienie takie towarzyszy ich urzędowej publikacji. Metody dokonywania takiego odniesienia określane są przez państwa członkowskie.

2. W celu uwzględnienia szczególnych warunków, państwa członkowskie, w razie konieczności, mogą postanowić, że obowiązek zapewnienia skutecznego dostępu, o którym mowa w art. 4, musi zostać wykonany do … [najpóźniej] cztery [lata po przyjęciu] r.

Państwa członkowskie zamierzające skorzystać z tego dodatkowego okresu informują Komisję najpóźniej do dnia określonego w ust. 1., podając uzasadnienie.

Artykuł 16
Sprawozdanie

1. Najpóźniej do dnia ... r. i następnie raz na pięć lat państwa członkowskie i krajowe organy ds. równości przekażą Komisji wszelkie informacje niezbędne do sporządzenia przez Komisję sprawozdania dotyczącego stosowania niniejszej dyrektywy, przeznaczonego dla Parlamentu Europejskiego i Rady.

2. Sprawozdanie Komisji uwzględnia odpowiednio opinię partnerów społecznych oraz zainteresowanych organizacji pozarządowych, jak i Agencji UE ds. Praw Podstawowych. Zgodnie z zasadą uwzględniania problematyki płci sprawozdanie to zawiera, między innymi, ocenę wpływu podjętych środków na kobiety i mężczyzn. W świetle otrzymanych informacji sprawozdanie to zawiera, w razie konieczności, propozycje zmian i uaktualnienia niniejszej dyrektywy.

Artykuł 17
Wejście w życie

Niniejsza dyrektywa wchodzi w życie z dniem jej opublikowania w Dzienniku Urzędowym Unii Europejskiej.

Artykuł 18
Adresaci

Niniejsza dyrektywa skierowana jest do państw członkowskich.

Sporządzono w Brukseli dnia [...] r.

W imieniu Rady

Przewodniczący

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

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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.

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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.

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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

(Akty ustawodawcze)

ROZPORZĄDZENIA

ROZPORZĄDZENIE PARLAMENTU EUROPEJSKIEGO I RADY (UE) NR 181/2011

z dnia 16 lutego 2011 r.

dotyczące praw pasażerów w transporcie autobusowym i autokarowym oraz zmieniające rozporządzenie (WE) nr 2006/2004

(Tekst mający znaczenie dla EOG)

PARLAMENT EUROPEJSKI I RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat o funkcjonowaniu Unii Europejskiej, w szczególności jego art. 91 ust. 1,

uwzględniając wniosek Komisji Europejskiej,

uwzględniając opinię Europejskiego Komitetu Ekonomiczno-Społecznego ([1]),

po konsultacji z Komitetem Regionów,

stanowiąc zgodnie ze zwykłą procedurą ustawodawczą,

uwzględniając wspólny projekt zatwierdzony w dniu 24 stycznia 2011 r. przez komitet pojednawczy ([2]),

a także mając na uwadze, co następuje:

(1) Działanie Unii w dziedzinie transportu autobusowego i autokarowego powinno zmierzać, między innymi, do zapewnienia pasażerom wysokiego poziomu ochrony, porównywalnego z innymi rodzajami transportu i dostępnego wszędzie, gdzie podróżują. Ponadto należy w pełni uwzględniać ogólne wymogi ochrony konsumentów.

(2) Ponieważ pasażerowie autobusów lub autokarów są słabszą stroną umowy transportowej, wszystkim pasażerom należy zapewnić minimalny poziom ochrony.

(3) Działania Unii zmierzające do poprawy praw pasażerów w sektorze transportu autobusowego i autokarowego powinny uwzględniać specyfikę tego sektora, zdominowanego przez małe i średnie przedsiębiorstwa.

(4) Pasażerowie i, jako minimum, osoby, do których utrzymania pasażer był lub byłby prawnie zobowiązany, powinny zostać objęte odpowiednią ochroną w razie wypadków związanych ze skorzystaniem z autobusu lub autokaru, przy uwzględnieniu dyrektywy Parlamentu Europejskiego i Rady 2009/103/WE z dnia 16 września 2009 r. w sprawie ubezpieczenia od odpowiedzialności cywilnej za szkody powstałe w związku z ruchem pojazdów mechanicznych i egzekwowania obowiązku ubezpieczania od takiej odpowiedzialności ([3]).

(5) Przy wyborze prawa krajowego mającego zastosowanie do odszkodowania w związku ze śmiercią, w tym również za uzasadnione wydatki pogrzebowe, lub z odniesieniem obrażeń, jak również z utratą lub z uszkodzeniem bagażu w związku z wypadkami związanymi ze skorzystaniem z autobusu lub autokaru, należy uwzględnić rozporządzenie (WE) nr 864/2007 Parlamentu Europejskiego i Rady z dnia 11 lipca 2007 r. dotyczące prawa właściwego dla zobowiązań pozaumownych (Rzym II) ([4]) oraz rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 z dnia 17 czerwca 2008 r. w sprawie prawa właściwego dla zobowiązań umownych (Rzym I) ([5]).

(6) Oprócz odszkodowania – zgodnie z mającym zastosowanie prawem krajowym – w przypadku śmierci lub odniesienia obrażeń lub utraty lub uszkodzenia bagażu w związku z wypadkami związanymi ze skorzystaniem z autobusu lub autokaru, pasażerowie powinni być uprawnieni do uzyskania pomocy w odniesieniu do swoich natychmiastowych praktycznych potrzeb w wyniku wypadku. Pomoc ta powinna objąć w razie konieczności pierwszą pomoc, zakwaterowanie, żywność, ubiór i transport.

([1]) Dz.U. C 317 z 23.12.2009, s. 99.

([2]) Stanowisko Parlamentu Europejskiego z dnia 23 kwietnia 2009 r. (Dz.U. C 184 E z 8.7.2010, s. 312), stanowisko Rady przyjęte w pierwszym czytaniu z dnia 11 marca 2010 r. (Dz.U. C 122 E z 11.5.2010, s. 1), stanowisko Parlamentu Europejskiego z dnia 6 lipca 2010 r. (dotychczas nieopublikowane w Dzienniku Urzędowym), decyzja Rady z dnia 31 stycznia 2011 r. oraz rezolucja ustawodawcza Parlamentu Europejskiego z dnia 15 lutego 2011 r. (dotychczas nieopublikowana w Dzienniku Urzędowym).

([3]) Dz.U. L 263 z 7.10.2009, s. 11.

([4]) Dz.U. L 199 z 31.7.2007, s. 40.

([5]) Dz.U. L 177 z 4.7.2008, s. 6.

(7) Usługi świadczone pasażerom autobusów i autokarów powinny przynosić korzyści obywatelom w ogólności. W związku z tym osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej, spowodowanej niepełnosprawnością, wiekiem lub jakimkolwiek innym czynnikiem, powinny mieć możliwość korzystania z usług transportu autobusowego i autokarowego porównywalną z możliwością, jaką mają pozostali obywatele. Osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej mają takie same jak wszyscy inni obywatele prawa do swobodnego przemieszczania się, do wolności wyboru oraz do niedyskryminacji.

(8) W świetle art. 9 Konwencji ONZ o prawach osób niepełnosprawnych oraz w celu zapewnienia osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej możliwości podróżowania autobusem lub autokarem porównywalnych z możliwościami, jakie mają pozostali obywatele, należy ustalić zasady niedyskryminacji i pomocy podczas podróży. Osoby te powinny mieć zatem dostęp do przewozu i nie należy odmawiać im transportu ze względu na ich niepełnosprawność lub ograniczenie ruchowe, z wyjątkiem przypadków uzasadnionych względami bezpieczeństwa lub konstrukcją pojazdów, lub infrastrukturą. W ramach odpowiedniego ustawodawstwa dotyczącego ochrony pracowników osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej powinny mieć prawo do pomocy w terminalach i na pokładzie pojazdów. Z myślą o włączeniu społecznym osoby takie powinny otrzymywać pomoc bezpłatnie. Przewoźnicy powinni ustanowić warunki dostępu, najlepiej przy użyciu europejskiego systemu normalizacji.

(9) Decydując o budowie nowych terminali oraz w związku z poważnymi remontami, podmioty zarządzające terminalami powinny starać się uwzględniać potrzeby osób niepełnosprawnych oraz osób o ograniczonej sprawności ruchowej zgodnie z wymogami „projektowania dla wszystkich". W każdym razie podmioty zarządzające terminalami powinny wyznaczyć punkty, w których osoby takie mogą zgłosić przybycie i potrzebę pomocy.

(10) Podobnie, bez uszczerbku dla obecnych lub przyszłych przepisów dotyczących wymogów technicznych dla autobusów lub autokarów, przewoźnicy powinni, w miarę możliwości, uwzględnić te potrzeby przy podejmowaniu decyzji w sprawie sprzętu w nowych i nowo remontowanych pojazdach.

(11) Państwa członkowskie powinny starać się w razie potrzeby poprawić istniejącą infrastrukturę, aby umożliwić przewoźnikom zapewnienie dostępu osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej oraz zapewnienie właściwej pomocy.

(12) Aby odpowiedzieć na potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej, należy odpowiednio wyszkolić personel. Z myślą o ułatwieniu wzajemnego uznawania krajowych kwalifikacji kierowców można wprowadzić szkolenie uświadamiające na temat niepełnosprawności w ramach wstępnej kwalifikacji lub okresowego szkolenia, o których mowa w dyrektywie 2003/59/WE Parlamentu Europejskiego i Rady z dnia 15 lipca 2003 r. w sprawie wstępnej kwalifikacji i okresowego szkolenia kierowców niektórych pojazdów drogowych do przewozu rzeczy lub osób [1]. Aby zapewnić spójność między wprowadzeniem wymogów dotyczących szkolenia a terminami ustalonymi w tej dyrektywie, należy dopuścić możliwość wyłączenia podczas ograniczonego okresu.

(13) Przy organizowaniu szkolenia w zakresie niepełnosprawności należy konsultować się z organizacjami reprezentującymi osoby niepełnosprawne lub osoby o ograniczonej sprawności ruchowej lub włączać te organizacje w przygotowywanie programu takiego szkolenia.

(14) Prawa pasażerów autobusów i autokarów powinny obejmować otrzymanie informacji o usłudze przed podróżą i w jej trakcie. Wszystkie istotne informacje udzielane pasażerom autobusów i autokarów powinny być również na żądanie udzielane w formatach alternatywnych, przystępnych dla osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej, na przykład z wykorzystaniem dużego druku, prostego języka, alfabetu Braille'a, komunikacji elektronicznej, do której możliwy jest dostęp przy użyciu technologii adaptacyjnej, lub kaset audio.

(15) Niniejsze rozporządzenie nie powinno ograniczać prawa przewoźników do dochodzenia odszkodowania od dowolnej osoby, w tym stron trzecich, zgodnie z mającym zastosowanie prawem krajowym.

(16) Należy ograniczać niedogodności, których doświadczają pasażerowie z powodu odwołania lub znaczących opóźnień podróży. W tym celu pasażerom rozpoczynającym podróż w terminalach należy zapewnić odpowiednią opiekę i informacje w sposób dostępny dla wszystkich pasażerów. Pasażerowie powinni mieć także możliwość odwołania podróży i otrzymania zwrotu kosztu biletów lub kontynuowania podróży lub zmiany trasy podróży na zadowalających warunkach. Jeżeli przewoźnicy nie zapewnią pasażerom niezbędnej pomocy, pasażerowie powinni mieć prawo do otrzymania odszkodowania.

(17) Przewoźnicy powinni współpracować między sobą, przy udziale zainteresowanych stron, zrzeszeń zawodowych oraz stowarzyszeń konsumentów, pasażerów, osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej, na rzecz przyjęcia uzgodnień na poziomie krajowym lub europejskim. Uzgodnienia te powinny mieć na celu poprawę informacji, opieki i pomocy oferowanej pasażerom w przypadku przerwania podróży, w szczególności w przypadku dużych opóźnień lub odwołania podróży, ze szczególnym uwzględnieniem pasażerów o specjalnych potrzebach wynikających z niepełnosprawności, ograniczonej sprawności ruchowej, choroby, starszego wieku i ciąży, a także uwzględniając pasażerów towarzyszących i pasażerów podróżujących z małymi dziećmi. O ustaleniach tych należy poinformować krajowe organy odpowiedzialne za egzekwowanie przepisów.

[1] Dz.U. L 226 z 10.9.2003, s. 4.

(18) Niniejsze rozporządzenie nie powinno mieć wpływu na prawa pasażerów określone dyrektywą Rady 90/314/EWG z dnia 13 czerwca 1990 r. w sprawie zorganizowanych podróży, wakacji i wycieczek [1]. Niniejsze rozporządzenie nie powinno mieć zastosowania w przypadku odwołania wycieczki zorganizowanej z powodów innych niż odwołanie usługi transportu autobusowego lub autokarowego.

(19) Pasażerom powinna zostać zapewniona pełna informacja o prawach przysługujących im na mocy niniejszego rozporządzenia, tak aby mogli oni skutecznie korzystać z tych praw.

(20) Pasażerowie powinni mieć możliwość korzystania ze swoich praw poprzez odpowiednie procedury wnoszenia skarg wprowadzone przez przewoźników lub, w stosownych przypadkach, poprzez zgłaszanie skarg do organu(-ów) wyznaczonego(-ych) do tego celu przez właściwe państwo członkowskie.

(21) Państwa członkowskie powinny zapewnić przestrzeganie niniejszego rozporządzenia i wyznaczyć właściwy(-e) organ(-y) odpowiedzialny(-e) za nadzór i egzekwowanie przepisów. Nie powinno to mieć wpływu na prawa pasażerów do korzystania ze środków prawnych przed sądem na mocy prawa krajowego.

(22) Z uwzględnieniem procedur ustanowionych przez państwa członkowskie w odniesieniu do składania skarg, skarga dotycząca pomocy powinna być w miarę możliwości wnoszona do organu(-ów) wyznaczonego(-ych) do egzekwowania niniejszego rozporządzenia w państwie członkowskim, gdzie znajduje się miejsce, w którym pasażerowie wchodzą na pokład pojazdu lub w którym opuszczają pokład pojazdu.

(23) Państwa członkowskie powinny propagować korzystanie z transportu publicznego oraz wykorzystywanie zintegrowanej informacji i zintegrowanych biletów, aby zoptymalizować korzystanie z poszczególnych środków transportu i usług operatorów oraz ich interoperacyjność.

(24) Państwa członkowskie powinny ustanowić sankcje mające zastosowanie w przypadku naruszeń niniejszego rozporządzenia oraz zapewnić, aby sankcje te były stosowane. Sankcje te powinny być skuteczne, proporcjonalne i odstraszające.

(25) Ponieważ cel niniejszego rozporządzenia, a mianowicie zapewnienie pasażerom w transporcie autobusowym i autokarowym we wszystkich państwach członkowskich równoważnego poziomu ochrony i pomocy, nie może zostać osiągnięty w sposób wystarczający przez państwa członkowskie, natomiast ze względu na rozmiary i skutki działania możliwe jest lepsze jego osiągnięcie na poziomie Unii, Unia może przyjąć środki zgodne z zasadą pomocniczości określoną w art. 5 Traktatu o Unii Europejskiej. Zgodnie z zasadą proporcjonalności określoną w tym artykule niniejsze rozporządzenie nie wykracza poza to, co jest konieczne do osiągnięcia tego celu.

(26) Niniejsze rozporządzenie powinno pozostać bez uszczerbku dla dyrektywy 95/46/WE Parlamentu Europejskiego i Rady z dnia 24 października 1995 r. w sprawie ochrony osób fizycznych w zakresie przetwarzania danych osobowych i swobodnego przepływu tych danych [2].

(27) Egzekwowanie niniejszego rozporządzenia powinno opierać się na rozporządzeniu (WE) nr 2006/2004 Parlamentu Europejskiego i Rady z dnia 27 października 2004 r. w sprawie współpracy między organami krajowymi odpowiedzialnymi za egzekwowanie przepisów prawa w zakresie ochrony konsumentów („rozporządzenie w sprawie współpracy w dziedzinie ochrony konsumentów") [3]. Należy zatem odpowiednio zmienić to rozporządzenie.

(28) Niniejsze rozporządzenie nie narusza praw podstawowych i jest zgodne z zasadami uznanymi w szczególności w Karcie praw podstawowych Unii Europejskiej, o których mowa w art. 6 Traktatu o Unii Europejskiej, mając również na względzie dyrektywę Rady 2000/43/WE z dnia 29 czerwca 2000 r. wprowadzającą w życie zasadę równego traktowania osób bez względu na pochodzenie rasowe lub etniczne [4] oraz dyrektywę Rady 2004/113/WE z dnia 13 grudnia 2004 r. wprowadzającą w życie zasadę równego traktowania mężczyzn i kobiet w zakresie dostępu do towarów i usług oraz dostarczania towarów i usług [5],

PRZYJMUJĄ NINIEJSZE ROZPORZĄDZENIE:

ROZDZIAŁ I

PRZEPISY OGÓLNE

Artykuł 1

Przedmiot

Niniejsze rozporządzenie ustanawia przepisy w zakresie transportu autobusowego i autokarowego dotyczące:

a) niedyskryminacji pasażerów w zakresie warunków transportu oferowanych przez przewoźników;

b) praw pasażerów w przypadku wypadków związanych ze skorzystaniem z autobusu lub autokaru, którego skutkiem jest śmierć lub odniesienie obrażeń lub utrata lub uszkodzenie bagażu;

c) niedyskryminacji osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej oraz obowiązkowej pomocy dla nich;

d) praw pasażerów w przypadkach odwołania lub opóźnienia;

e) minimalnych informacji przekazywanych pasażerom;

f) rozpatrywania skarg;

g) ogólnych zasad egzekwowania przepisów.

[1] Dz.U. L 158 z 23.6.1990, s. 59.

[2] Dz.U. L 281 z 23.11.1995, s. 31.

[3] Dz.U. L 364 z 9.12.2004, s. 1.

[4] Dz.U. L 180 z 19.7.2000, s. 22.

[5] Dz.U. L 373 z 21.12.2004, s. 37.

Artykuł 2

Zakres stosowania

1. Niniejsze rozporządzenie ma zastosowanie do pasażerów podróżujących w ramach usług regularnych dla nieokreślonych kategorii pasażerów, w przypadku gdy miejsce, w którym pasażerowie wchodzą na pokład pojazdu lub w którym opuszczają pokład pojazdu, znajduje się na terytorium państwa członkowskiego oraz w przypadku gdy zaplanowana długość trasy, na jakiej świadczona jest usługa, wynosi co najmniej 250 km.

2. W odniesieniu do usług, o których mowa w ust. 1, ale gdy zaplanowana długość trasy, na jakiej świadczona jest usługa, jest krótsza niż 250 km, stosuje się art. 4 ust. 2, art. 9, art. 10 ust. 1, art. 16 ust. 1 lit. b), art. 16 ust. 2, art. 17 ust. 1 i 2 oraz art. 24–28.

3. Ponadto niniejsze rozporządzenie, z wyjątkiem art. 9–16, art. 17 ust. 3 oraz rozdziałów IV, V i VI, ma zastosowanie do pasażerów podróżujących w ramach usług okazjonalnych, w przypadku gdy początkowe miejsce, w którym pasażerowie wchodzą na pokład pojazdu, lub gdy docelowe miejsce, w którym opuszczają pokład pojazdu, znajduje się na terytorium państwa członkowskiego.

4. Z wyjątkiem art. 4 ust. 2, art. 9, art. 10 ust. 1, art. 16 ust. 1 lit. b), art. 16 ust. 2, art. 17 ust. 1 i 2 oraz art. 24–28, państwa członkowskie mogą w sposób przejrzysty i niedyskryminacyjny wyłączyć z zakresu stosowania niniejszego rozporządzenia krajowe usługi regularne. Wyłączenia takie mogą być przyznawane począwszy od daty rozpoczęcia stosowania niniejszego rozporządzenia na okres nie dłuższy niż cztery lata, który może zostać odnowiony raz.

5. Na okres maksymalnie czterech lat od daty rozpoczęcia stosowania niniejszego rozporządzenia państwa członkowskie mogą w sposób przejrzysty i niedyskryminacyjny wyłączyć z zakresu stosowania niniejszego rozporządzenia określone usługi regularne, ze względu na to, że znacząca część takich usług regularnych, w tym co najmniej jeden planowany przystanek, ma miejsce poza Unią. Takie wyłączenia mogą zostać odnowione raz.

6. Państwa członkowskie informują Komisję o wyłączeniach, które przyznano na podstawie ust. 4 i 5, dotyczących różnych typów usług. Komisja podejmuje odpowiednie działania, jeżeli uzna, że takie wyłączenie nie jest zgodne z przepisami niniejszego artykułu. Do dnia 2 marca 2018 r. Komisja przedstawi Parlamentowi Europejskiemu i Radzie sprawozdanie dotyczące wyłączeń przyznanych na podstawie ust. 4 i 5.

7. Żaden z elementów niniejszego rozporządzenia nie może być rozumiany jako sprzeczny z istniejącymi przepisami dotyczącymi wymogów technicznych dla autobusów lub autokarów lub infrastruktury lub urządzeń na przystankach i w terminalach, ani jako wprowadzający jakiekolwiek dodatkowe wymogi w tym zakresie.

8. Niniejsze rozporządzenie nie ma wpływu na prawa pasażerów określone dyrektywą 90/314/EWG i nie ma zastosowania w przypadku odwołania wycieczki zorganizowanej, o której mowa w tej dyrektywie, z powodów innych niż odwołanie usługi regularnej.

Artykuł 3

Definicje

Do celów niniejszego rozporządzenia zastosowanie mają następujące definicje:

a) „usługi regularne” oznaczają usługi polegające na przewozie osób autobusem lub autokarem w określonych odstępach czasu i na określonych trasach, przy czym pasażerowie są zabierani z określonych z góry przystanków i dowożeni na z góry określone przystanki;

b) „usługi okazjonalne” oznaczają usługi, które nie są objęte definicją usług regularnych oraz których główną cechą jest to, że obejmują przewóz autobusem lub autokarem grup pasażerów utworzonych z inicjatywy zleceniodawcy lub samego przewoźnika;

c) „umowa transportowa” oznacza umowę przewozu zawartą między przewoźnikiem a pasażerem, dotyczącą świadczenia co najmniej jednej usługi regularnej lub okazjonalnej;

d) „bilet” oznacza ważny dokument lub inny dowód zawarcia umowy transportowej;

e) „przewoźnik” oznacza osobę fizyczną lub prawną inną niż organizator wycieczek, biuro podróży lub sprzedawca biletów, oferującą ogółowi społeczeństwa transport w ramach usług regularnych lub okazjonalnych;

f) „wykonujący przewóz” oznacza osobę fizyczną lub prawną inną niż przewoźnik, która faktycznie wykonuje całość lub część przewozu;

g) „sprzedawca biletów” oznacza każdego pośrednika zawierającego umowy transportowe w imieniu przewoźnika;

h) „biuro podróży” oznacza każdego pośrednika działającego w imieniu pasażera w sprawach zawierania umów transportowych;

i) „organizator wycieczek” oznacza organizatora lub punkt sprzedaży detalicznej, innych niż przewoźnik, w rozumieniu art. 2 ust. 2 i 3 dyrektywy 90/314/EWG;

j) „osoba niepełnosprawna” lub „osoba o ograniczonej sprawności ruchowej” oznacza każdą osobę, której sprawność ruchowa podczas korzystania ze środków transportu jest ograniczona w wyniku jakiejkolwiek niepełnosprawności fizycznej (sensorycznej lub motorycznej, trwałej lub przejściowej), niepełnosprawności intelektualnej, upośledzenia lub jakiejkolwiek innej przyczyny niepełnosprawności bądź z powodu wieku i której sytuacja wymaga należytej uwagi i dostosowania usług udostępnianych wszystkim pasażerom do jej szczególnych potrzeb;

k) „warunki dostępu" oznaczają odnośne normy, wytyczne i informacje dotyczące dostępu do autobusów lub wyznaczonych terminali, wraz z istniejącymi w nich rozwiązaniami przeznaczonymi dla osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej;

l) „rezerwacja" oznacza rezerwację miejsca siedzącego na pokładzie autobusu lub autokaru w ramach usługi regularnej o określonym czasie rozpoczęcia podróży;

m) „terminal" oznacza terminal obsługiwany przez dany personel, w którym zgodnie z określoną trasą usługi regularnej planowany jest przystanek służący wejściu na pokład pojazdu lub jego opuszczeniu przez pasażerów, wyposażony w obiekty takie, jak stanowisko odprawy, poczekalnia lub kasa biletowa;

n) „przystanek autobusowy" oznacza każde miejsce inne niż terminal, w którym zgodnie z określoną trasą usługi regularnej planowany jest przystanek służący wejściu na pokład pojazdu lub jego opuszczeniu przez pasażerów;

o) „podmiot zarządzający terminalem" oznacza jednostkę organizacyjną w państwie członkowskim odpowiedzialną za zarządzanie wyznaczonym terminalem;

p) „odwołanie" oznacza niewykonanie usługi regularnej, która została uprzednio zaplanowana;

q) „opóźnienie" oznacza różnicę między zaplanowanym czasem rozpoczęcia usługi regularnej zgodnie z opublikowanym rozkładem a rzeczywistym czasem jej rozpoczęcia.

Artykuł 4

Bilety i niedyskryminacyjne warunki umowne

1. Przewoźnicy wydają pasażerowi bilet, chyba że inne dokumenty upoważniają do transportu. Bilet może być wydany w formie elektronicznej.

2. Bez uszczerbku dla taryf socjalnych, warunki umowne i taryfy stosowane przez przewoźników są oferowane ogółowi społeczeństwa bez jakiejkolwiek dyskryminacji, bezpośredniej lub pośredniej, ze względu na obywatelstwo klienta końcowego lub siedzibę przewoźnika lub sprzedawcy biletów w Unii.

Artykuł 5

Inne strony wykonujące

1. W przypadku gdy wykonywanie obowiązków wynikających z niniejszego rozporządzenia zostało powierzone wykonującemu przewóz, sprzedawcy biletów lub jakiejkolwiek innej osobie, przewoźnik, biuro podróży, organizator wycieczek lub podmiot zarządzający terminalem, którzy powierzyli wykonanie takich obowiązków, są mimo wszystko odpowiedzialni za działania i zaniechania tej strony wykonującej.

2. Ponadto strona, której przewoźnik, biuro podróży, organizator wycieczek lub podmiot zarządzający terminalem powierzyli wykonanie obowiązku, podlega przepisom niniejszego rozporządzenia w zakresie powierzonego obowiązku.

Artykuł 6

Niedopuszczalność uchyleń

1. Obowiązki względem pasażerów wynikające z niniejszego rozporządzenia nie podlegają ograniczeniu ani uchyleniu, w szczególności na mocy klauzuli derogacyjnej lub ograniczającej zawartej w umowie transportowej.

2. Przewoźnicy mogą oferować pasażerom warunki umowne korzystniejsze od warunków określonych w niniejszym rozporządzeniu.

ROZDZIAŁ II

ODSZKODOWANIE I POMOC W RAZIE WYPADKÓW

Artykuł 7

Śmierć lub obrażenia pasażerów i utrata lub uszkodzenie bagażu

1. Zgodnie z mającym zastosowanie prawem krajowym pasażerowie uprawnieni są do odszkodowania w związku ze śmiercią, w tym również za uzasadnione wydatki pogrzebowe, lub odniesieniem obrażeń, jak również utratą lub uszkodzeniem bagażu w związku z wypadkami związanymi ze skorzystaniem z autobusu lub autokaru. W przypadku śmierci pasażera prawo to ma, na zasadzie minimum, zastosowanie do osób, do których utrzymania pasażer był lub byłby prawnie zobowiązany.

2. Wysokość odszkodowania jest obliczana zgodnie z mającym zastosowanie prawem krajowym. Każdy maksymalny poziom odszkodowania przewidziany w prawie krajowym w przypadku śmierci lub odniesienia obrażeń lub utraty lub uszkodzenia bagażu w każdym poszczególnym wypadku wynosi nie mniej niż:

a) 220 000 EUR na pasażera;

b) 1 200 EUR na sztukę bagażu. W przypadku uszkodzenia wózków inwalidzkich, innego sprzętu służącego do poruszania się lub urządzeń pomocniczych wysokość odszkodowania jest zawsze równa kosztowi zastąpienia lub naprawy utraconego lub uszkodzonego sprzętu.

Artykuł 8

Natychmiastowe praktyczne potrzeby pasażerów

W razie wypadku związanego ze skorzystaniem z autobusu lub autokaru przewoźnik zapewnia rozsądną i proporcjonalną pomoc w odniesieniu do natychmiastowych praktycznych potrzeb pasażerów w następstwie wypadku. Pomoc ta obejmuje w razie konieczności zakwaterowanie, żywność, ubiór, transport i zapewnienie pierwszej pomocy. Żadna udzielona pomoc nie stanowi uznania odpowiedzialności.

W odniesieniu do każdego pasażera przewoźnik może ograniczyć całkowity koszt zakwaterowania do kwoty 80 EUR za noc, przez maksymalnie dwie noce.

ROZDZIAŁ III

PRAWA OSÓB NIEPEŁNOSPRAWNYCH I OSÓB O OGRANICZONEJ SPRAWNOŚCI RUCHOWEJ

Artykuł 9

Prawo do transportu

1. Przewoźnicy, biura podróży i organizatorzy wycieczek nie mogą odmówić przyjęcia rezerwacji, wydania lub udostępnienia w inny sposób biletu, ani przyjęcia danej osoby na pokład pojazdu, ze względu na niepełnosprawność lub ograniczenie ruchowe.

2. Osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej rezerwacje oraz bilety oferowane są bez dodatkowych opłat.

Artykuł 10

Odstępstwa i warunki specjalne

1. Niezależnie od art. 9 ust. 1, przewoźnicy, biura podróży i organizatorzy wycieczek mogą odmówić przyjęcia rezerwacji, wydania lub udostępnienia w inny sposób biletu, lub przyjęcia danej osoby na pokład, ze względu na niepełnosprawność lub ograniczenie ruchowe:

a) aby spełnić mające zastosowanie wymogi w zakresie bezpieczeństwa ustanowione na mocy prawa międzynarodowego, unijnego lub krajowego lub aby spełnić wymogi w zakresie zdrowia i bezpieczeństwa ustalone przez właściwe organy;

b) w przypadku gdy konstrukcja pojazdu lub infrastruktura, w tym przystanki autobusowe i terminale, fizycznie uniemożliwiają wejście na pokład pojazdu, jego opuszczenie lub przewóz osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej w sposób bezpieczny i operacyjnie wykonalny.

2. W przypadku odmowy przyjęcia rezerwacji, wydania lub udostępnienia w inny sposób biletu ze względów, o których mowa w ust. 1, przewoźnicy, biura podróży i organizatorzy wycieczek informują daną osobę o wszelkich akceptowalnych alternatywnych usługach realizowanych przez danego przewoźnika.

3. Jeśli osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej, mającej rezerwację lub bilet, która spełniła wymogi art. 14 ust. 1 lit. a), mimo wszystko odmówiono przyjęcia na pokład ze względu na jej niepełnosprawność lub ograniczenie ruchowe, osobie tej i wszelkim osobom towarzyszącym zgodnie z ust. 4 niniejszego artykułu oferuje się wybór pomiędzy:

a) prawem do zwrotu kwoty zapłaconej za bilet oraz, w stosownych przypadkach, nieodpłatną powrotną usługą transportową do punktu rozpoczęcia podróży, określonego w umowie transportowej, w najwcześniejszym możliwym terminie; oraz

b) z wyjątkiem przypadków, gdy nie jest to wykonalne – kontynuacją podróży lub zmianą trasy za pośrednictwem rozsądnej alternatywnej usługi transportowej do miejsca przeznaczenia określonego w umowie transportowej.

Brak powiadomienia zgodnie z art. 14 ust. 1 lit. a) nie ma wpływu na prawo do zwrotu kwoty zapłaconej za bilet.

4. Jeżeli przewoźnik, biuro podróży lub organizator wycieczek odmawia przyjęcia rezerwacji osoby, wydania lub dostarczenia w inny sposób tej osobie biletu lub przyjęcia jej na pokład ze względu na niepełnosprawność lub ograniczoną sprawność ruchową z przyczyn wymienionych w ust. 1, osoba ta może zażądać, aby towarzyszyła jej inna, wybrana przez nią osoba będąca w stanie udzielić pomocy danej osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej, tak aby nie miały już zastosowania kryteria określone w ust. 1.

Taka osoba towarzysząca jest przewożona nieodpłatnie i, jeżeli jest to wykonalne, ma miejsce siedzące obok osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej.

5. W przypadku gdy przewoźnicy, biura podróży lub organizatorzy wycieczek korzystają z możliwości przewidzianej w ust. 1, natychmiast informują osobę niepełnosprawną lub osobę o ograniczonej sprawności ruchowej o powodach oraz na żądanie informują ją na piśmie w ciągu pięciu dni roboczych od złożenia wniosku.

Artykuł 11

Dostępność i informacja

1. Przy współpracy z organizacjami przedstawicielskimi osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej, przewoźnicy i podmioty zarządzające terminalami, w stosownych przypadkach za pośrednictwem swoich organizacji, ustanawiają lub mają niedyskryminacyjne warunki dostępu osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej do transportu.

2. Warunki dostępu przewidziane w ust. 1, w tym tekst międzynarodowych, unijnych lub krajowych przepisów ustanawiających wymogi w zakresie bezpieczeństwa, na których oparte są te niedyskryminacyjne warunki dostępu, są publicznie udostępniane przez przewoźników i podmioty zarządzające terminalami fizycznie lub w Internecie, na żądanie w przystępnych formatach, w tych samych językach, w których informacje są zazwyczaj udostępniane wszystkim pasażerom. Przy udzielaniu tych informacji szczególną uwagę zwraca się na potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej.

3. Organizatorzy wycieczek udostępniają warunki dostępu przewidziane w ust. 1, mające zastosowanie do podróży w ramach zorganizowanych podróży, wakacji i wycieczek, które są przez nich organizowane, sprzedawane lub oferowane na sprzedaż.

4. Informacje w sprawie warunków dostępu, o których mowa w ust. 2 i 3, są fizycznie udostępniane na żądanie pasażera.

5. Przewoźnicy, biura podróży i organizatorzy wycieczek zapewniają osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej dostęp do podanych we właściwych i przystępnych formatach wszelkich istotnych informacji ogólnych na temat podróży i warunków przewozu, w tym, w stosownych przypadkach, na temat rezerwacji i informacji *on-line*. Informacje te są fizycznie rozprowadzane na żądanie pasażera.

Artykuł 12

Wyznaczanie terminali

Państwa członkowskie wyznaczają terminale autobusowe i autokarowe, w których udzielana jest pomoc dla osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej. Państwa członkowskie informują o tym Komisję. Komisja udostępnia w Internecie wykaz wyznaczonych terminali autobusowych i autokarowych.

Artykuł 13

Prawo do uzyskania pomocy w wyznaczonych terminalach i na pokładzie autobusów i autokarów

1. Z zastrzeżeniem warunków dostępu przewidzianych w art. 11 ust. 1, przewoźnicy i podmioty zarządzające terminalami, w ramach zakresu swoich kompetencji, udzielają w wyznaczonych przez państwa członkowskie terminalach nieodpłatnej pomocy osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej, co najmniej w zakresie określonym w załączniku I część a).

2. Z zastrzeżeniem warunków dostępu przewidzianych w art. 11 ust. 1, przewoźnicy udzielają na pokładzie autobusów i autokarów nieodpłatnej pomocy osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej, co najmniej w zakresie określonym w załączniku I część b).

Artykuł 14

Warunki udzielania pomocy

1. Przewoźnicy i podmioty zarządzające terminalami współpracują w celu udzielania pomocy osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej, pod warunkiem że:

a) przewoźnicy, podmioty zarządzające terminalami, biura podróży lub organizatorzy wycieczek zostali powiadomieni o potrzebie udzielenia takiej pomocy danej osobie najpóźniej 36 godzin przed koniecznością udzielenia pomocy; oraz

b) dana osoba sama stawi się w wyznaczonym miejscu:

(i) w czasie określonym z góry przez przewoźnika, nieprzekraczającym 60 minut przed opublikowanym czasem odjazdu, o ile przewoźnik i pasażer nie uzgodnią krótszego terminu; lub

(ii) jeśli nie zostanie określony czas, nie później niż 30 minut przed opublikowanym czasem odjazdu.

2. W uzupełnieniu ust. 1, osoby niepełnosprawne lub osoby o ograniczonej sprawności ruchowej powiadamiają przewoźnika, biuro podróży lub organizatora wycieczek w momencie dokonywania rezerwacji lub kupowania biletu w przedsprzedaży o szczególnych potrzebach w zakresie miejsc siedzących, pod warunkiem że potrzeby te są w tym czasie znane.

3. Przewoźnicy, podmioty zarządzające terminalami, biura podróży i organizatorzy wycieczek podejmują wszystkie środki niezbędne do ułatwienia przyjmowania powiadomień o potrzebie pomocy od osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej. Obowiązek ten ma zastosowanie we wszystkich wyznaczonych terminalach i ich punktach sprzedaży, włącznie ze sprzedażą telefoniczną i przez Internet.

4. Jeżeli nie zostanie dokonane powiadomienie zgodnie z ust. 1 lit. a) i ust. 2, przewoźnicy, podmioty zarządzające terminalami, biura podróży i organizatorzy wycieczek podejmują wszelkie uzasadnione wysiłki w celu zapewnienia, aby pomoc została udzielona w sposób umożliwiający osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej wejście na pokład odjeżdżającego pojazdu, przesiadkę do odpowiedniego pojazdu lub opuszczenie pokładu pojazdu przyjeżdżającego, na który zakupiła bilet.

5. Podmiot zarządzający terminalem wyznacza punkt wewnątrz lub na zewnątrz terminalu, w którym osoby niepełnosprawne lub osoby o ograniczonej sprawności ruchowej mogą zgłosić swoje przybycie i potrzebę uzyskania pomocy. Punkt ten jest wyraźnie oznakowany i oferuje w przystępnych formatach podstawowe informacje dotyczące terminalu i udzielanej pomocy.

Artykuł 15

Przekazywanie informacji stronom trzecim

W przypadku gdy biura podróży lub organizatorzy wycieczek otrzymają powiadomienie, o którym mowa w art. 14 ust. 1 lit. a), przekazują tę informację jak najszybciej, w czasie normalnych godzin pracy, przewoźnikowi lub podmiotowi zarządzającemu terminalem.

Artykuł 16

Szkolenie

1. Przewoźnicy oraz, w stosownych przypadkach, podmioty zarządzające terminalami ustanawiają procedury szkolenia w zakresie niepełnosprawności, w tym instruktażu, i zapewniają, aby:

a) ich personel, poza kierowcami, w tym pracownicy zatrudnieni przez jakąkolwiek inną stronę wykonującą, udzielający bezpośredniej pomocy osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej przeszli szkolenie lub instruktaż opisane w załączniku II część a) i b); oraz

b) ich personel, w tym kierowcy, którzy bezpośrednio zajmują się podróżnymi lub kwestiami związanymi z podróżnymi, przeszli szkolenie lub instruktaż opisane w załączniku II część a).

2. Państwo członkowskie może na maksymalny okres pięciu lat od dnia 1 marca 2013 r. przyznać wyłączenie ze stosowania ust. 1 lit. b) w odniesieniu do szkolenia kierowców.

Artykuł 17

Odszkodowanie za wózki inwalidzkie i inny sprzęt służący do poruszania się

1. Przewoźnicy i podmioty zarządzające terminalami odpowiadają za spowodowaną przez siebie utratę lub uszkodzenie wózków inwalidzkich, innego sprzętu służącego do poruszania się lub urządzeń pomocniczych. Utrata lub uszkodzenie podlegają odszkodowaniu ze strony przewoźnika lub podmiotu zarządzającego terminalem odpowiedzialnych za tę utratę lub uszkodzenie.

2. Odszkodowanie, o którym mowa w ust. 1, jest równe kosztowi zastąpienia lub naprawy utraconego lub uszkodzonego sprzętu lub urządzeń.

3. W razie potrzeby podejmuje się wszelkie działania mające na celu szybkie zapewnienie tymczasowego sprzętu lub urządzeń zastępczych. Wózki inwalidzkie, inny sprzęt służący do poruszania się lub urządzenia pomocnicze mają w miarę możliwości właściwości techniczne i funkcjonalne, które są podobne do właściwości utraconego lub uszkodzonego sprzętu lub urządzeń.

Artykuł 18

Wyłączenia

1. Bez uszczerbku dla art. 2 ust. 2 państwa członkowskie mogą wyłączyć krajowe usługi regularne z zakresu stosowania wszystkich lub niektórych przepisów niniejszego rozdziału, pod warunkiem że zapewniają, aby poziom ochrony osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej na mocy ich przepisów krajowych był co najmniej taki sam jak na mocy niniejszego rozporządzenia.

2. Państwa członkowskie informują Komisję o wyłączeniach przyznanych zgodnie z ust. 1. Komisja podejmuje odpowiednie działania, jeżeli uzna, że takie wyłączenie nie jest zgodne z przepisami niniejszego artykułu. Do dnia 2 marca 2018 r. Komisja przedstawia Parlamentowi Europejskiemu i Radzie sprawozdanie dotyczące wyłączeń przyznanych na podstawie ust. 1.

ROZDZIAŁ IV

PRAWA PASAŻERÓW W PRZYPADKU ODWOŁANIA LUB OPÓŹNIENIA

Artykuł 19

Kontynuacja podróży, zmiana trasy i zwrot kosztów

1. W przypadku gdy przewoźnik z uzasadnionych względów spodziewa się, że usługa regularna będzie odwołana lub odjazd z terminalu będzie opóźniony o ponad 120 minut lub w przypadku nadkompletu, pasażerowi niezwłocznie daje się wybór pomiędzy:

a) kontynuacją podróży lub zmianą trasy do miejsca docelowego, bez dodatkowych kosztów i na warunkach porównywalnych do warunków przewidzianych w umowie transportowej, w najwcześniejszym możliwym terminie;

b) zwrotem ceny biletu oraz, w stosownych przypadkach, nieodpłatną powrotną usługą autobusem lub autokarem do punktu rozpoczęcia podróży, określonego w umowie transportowej, w najwcześniejszym możliwym terminie.

2. Jeżeli przewoźnik nie zaproponuje pasażerowi wyboru, o którym mowa w ust. 1, pasażer ma prawo do odszkodowania w wysokości 50 % ceny biletu, oprócz zwrotu, o którym mowa w ust. 1 lit. b). Przewoźnik wypłaca tę kwotę w ciągu miesiąca od złożenia wniosku o odszkodowanie.

3. W przypadku awarii autobusu lub autokaru podczas podróży przewoźnik zapewnia możliwość kontynuowania podróży innym pojazdem z miejsca wystąpienia awarii lub transport z miejsca wystąpienia awarii do odpowiedniego miejsca oczekiwania lub terminalu, z którego możliwe będzie kontynuowanie podróży.

4. W przypadku gdy usługa regularna zostaje odwołana lub odjazd jest opóźniony o ponad 120 minut, pasażerowie mają prawo do kontynuacji podróży lub zmiany trasy, lub uzyskania od przewoźnika zwrotu ceny biletu, o którym mowa w ust. 1.

5. Płatność zwrotu kosztów przewidzianego w ust. 1 lit. b) i ust. 4 jest dokonywana w ciągu 14 dni od złożenia oferty lub otrzymania wniosku. Płatność pokrywa pełny koszt biletu według ceny zakupu, za niewykonaną(-e) część (części) podróży oraz za już wykonaną(-e) część (części) podróży, jeżeli podróż nie służy już w żaden sposób realizacji jakiegokolwiek celu związanego z pierwotnym planem podróży pasażera. W przypadku biletów kuponowych lub biletów sezonowych płatność ta równa jest proporcjonalnej części pełnego kosztu tych biletów. Zwrot kosztów ma formę pieniężną, chyba że pasażer akceptuje inną formę zwrotu kosztów.

Artykuł 20

Informacje

1. W przypadku odwołania lub opóźnienia rozpoczęcia usługi regularnej przewoźnik lub, w stosownych przypadkach, podmiot zarządzający terminalem, jak najszybciej, a w każdym razie nie później niż 30 minut po planowanym czasie rozpoczęcia podróży, informuje pasażerów rozpoczynających podróż z terminalu o sytuacji oraz o przypuszczalnym czasie rozpoczęcia podróży, gdy tylko taka informacja będzie dostępna.

2. Jeżeli z powodu odwołania lub opóźnienia pasażerowie nie zdążą na połączenie zgodne z rozkładem jazdy, przewoźnik lub, w stosownych przypadkach, podmiot zarządzający terminalem podejmuje uzasadnione starania w celu poinformowania tych pasażerów o połączeniach alternatywnych.

3. Przewoźnik lub, w stosownych przypadkach, podmiot zarządzający terminalem zapewniają, aby osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej otrzymały w przystępnych formatach informacje, o których mowa w ust. 1 i 2.

4. Jeżeli jest to wykonalne, informacje wymagane na mocy ust. 1 i 2 są przekazywane drogą elektroniczną wszystkim pasażerom, włącznie z tymi, którzy rozpoczynają podróż z przystanków autobusowych w terminach określonych w ust. 1, jeśli dany pasażer wystąpił o zastosowanie takiego rozwiązania i przekazał przewoźnikowi niezbędne dane kontaktowe.

Artykuł 21

Pomoc w przypadku odwołania lub opóźnienia odjazdu

W przypadku podróży o planowanym czasie dłuższym niż trzy godziny przewoźnik w razie odwołania lub opóźnienia odjazdu z terminalu powyżej 90 minut oferuje pasażerom nieodpłatnie:

a) przekąski, posiłki lub napoje odpowiednio do czasu oczekiwania lub opóźnienia, pod warunkiem że są one dostępne w autobusie lub w terminalu lub mogą zostać w rozsądnym zakresie dostarczone;

b) pokój hotelowy lub inne zakwaterowanie, jak również pomoc w zorganizowaniu transportu między terminalem a miejscem zakwaterowania, w przypadku gdy konieczny jest pobyt przez jedną lub więcej nocy. W odniesieniu do każdego pasażera przewoźnik może ograniczyć całkowity koszt zakwaterowania, z wyłączeniem przewozu w obu kierunkach między terminalem a miejscem zakwaterowania, do kwoty 80 EUR za noc, przez maksymalnie dwie noce.

Stosując niniejszy artykuł, przewoźnik zwraca szczególną uwagę na potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej oraz wszelkich osób im towarzyszących.

Artykuł 22

Dalsze roszczenia

Żaden z przepisów niniejszego rozdziału nie uniemożliwia pasażerom dochodzenia przed sądami krajowymi odszkodowania zgodnie z przepisami krajowymi z tytułu szkód wynikających z odwołania lub opóźnienia usług regularnych.

Artykuł 23

Wyłączenia

1. Artykuł 19 i 21 nie mają zastosowania do pasażerów posiadających bilety otwarte, jeżeli czas odjazdu nie jest określony, z wyjątkiem pasażerów posiadających bilety kuponowe lub bilety sezonowe.

2. Artykuł 21 lit. b) nie ma zastosowania w przypadkach, gdy przewoźnik udowodni, że odwołanie lub opóźnienie zostało spowodowane bardzo złymi warunkami pogodowymi lub poważnymi klęskami żywiołowymi stwarzającymi zagrożenia dla bezpiecznej realizacji usług transportu autobusowego lub autokarowego.

ROZDZIAŁ V

ZASADY OGÓLNE DOTYCZĄCE INFORMACJI I SKARG

Artykuł 24

Prawo do informacji dotyczących podróży

Przewoźnicy i podmioty zarządzające terminalami w ramach swoich odnośnych zakresów kompetencji dostarczają pasażerom odpowiednich informacji podczas całej podróży. Jeżeli jest to wykonalne, informacje te są przekazywane na żądanie w przystępnych formatach.

Artykuł 25

Informacje dotyczące praw pasażerów

1. Przewoźnicy i podmioty zarządzające terminalami w ramach swoich odnośnych zakresów kompetencji zapewniają, aby pasażerowie otrzymywali odpowiednie i zrozumiałe informacje dotyczące ich praw na mocy niniejszego rozporządzenia najpóźniej w momencie odjazdu. Informacje te są dostarczane w terminalach oraz, w stosownych przypadkach, w Internecie. Na żądanie osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej udziela się informacji, jeżeli jest to wykonalne, w przystępnych formatach. Informacje takie obejmują dane kontaktowe organu(-ów) odpowiedzialnego(-ych) za egzekwowanie przepisów wyznaczonego(-ych) przez państwo członkowskie zgodnie z art. 28 ust. 1.

2. W celu wypełnienia obowiązku informacyjnego, o którym mowa w ust. 1, przewoźnicy i podmioty zarządzające terminalami mogą korzystać ze streszczenia przepisów niniejszego rozporządzenia przygotowanego przez Komisję we wszystkich językach urzędowych instytucji Unii Europejskiej i im udostępnionego.

Artykuł 26

Skargi

Przewoźnicy opracowują lub stosują istniejący mechanizm rozpatrywania skarg odnoszący się do praw i obowiązków określonych w niniejszym rozporządzeniu.

Artykuł 27

Składanie skarg

Bez uszczerbku dla roszczeń o odszkodowanie zgodnie z art. 7, jeżeli pasażer objęty niniejszym rozporządzeniem chce wnieść skargę do przewoźnika, składa ją w ciągu trzech miesięcy od dnia, w którym usługa regularna została wykonana lub w którym usługa regularna powinna była zostać wykonana. W ciągu jednego miesiąca od dnia wpłynięcia skargi przewoźnik powiadamia pasażera, że jego skarga została uznana, oddalona lub jest w dalszym ciągu rozpatrywana. Termin, w jakim ma zostać udzielona ostateczna odpowiedź, nie przekracza trzech miesięcy od dnia wpłynięcia skargi.

ROZDZIAŁ VI

EGZEKWOWANIE I KRAJOWE ORGANY ODPOWIEDZIALNE ZA EGZEKWOWANIE PRZEPISÓW

Artykuł 28

Krajowe organy odpowiedzialne za egzekwowanie przepisów

1. Każde państwo członkowskie wyznacza nowy(-e) lub istniejący(-e) organ(-y) odpowiedzialny(-e) za egzekwowanie niniejszego rozporządzenia w zakresie usług regularnych z miejsc położonych na jego terytorium oraz regularnych usług z państwa trzeciego do takich miejsc. Każdy organ podejmuje środki konieczne do zapewnienia zgodności z niniejszym rozporządzeniem.

Każdy organ – pod względem swojej organizacji, decyzji finansowych, struktury prawnej i procesu decyzyjnego – jest niezależny od przewoźników, organizatorów wycieczek i podmiotów zarządzających terminalami.

2. Państwa członkowskie informują Komisję o organie(-ach) wyznaczonym(-ych) zgodnie z niniejszym artykułem.

3. Każdy pasażer może zgodnie z prawem krajowym wnieść do właściwego organu wyznaczonego na mocy ust. 1 lub do jakiegokolwiek innego właściwego organu wyznaczonego przez państwo członkowskie skargę w sprawie zarzucanego naruszenia niniejszego rozporządzenia.

Państwo członkowskie może postanowić, że na pierwszym etapie pasażer wnosi skargę do przewoźnika, w którym to przypadku krajowy organ odpowiedzialny za egzekwowanie przepisów lub inny odpowiedni organ wyznaczony przez państwo członkowskie działa jako instancja odwoławcza dla skarg, które nie zostały rozstrzygnięte z zastosowaniem art. 27.

Artykuł 29

Sprawozdanie z egzekwowania przepisów

W terminie do dnia 1 czerwca 2015 r., a następnie co dwa lata, organy odpowiedzialne za egzekwowanie przepisów wyznaczone na mocy art. 28 ust. 1 publikują sprawozdanie ze swoich działań prowadzonych w ciągu poprzedzających dwóch lat kalendarzowych, zawierające w szczególności opis działań podjętych w celu wprowadzenia w życie niniejszego rozporządzenia oraz dane statystyczne dotyczące skarg i zastosowanych kar.

Artykuł 30

Współpraca organów odpowiedzialnych za egzekwowanie przepisów

Krajowe organy odpowiedzialne za egzekwowanie przepisów, o których mowa w art. 28 ust. 1, wymieniają między sobą, w stosownych przypadkach, informacje dotyczące swojej pracy, zasad podejmowania decyzji oraz praktyk. Komisja wspomaga je w wykonywaniu tego zadania.

Artykuł 31

Sankcje

Państwa członkowskie ustanawiają przepisy dotyczące sankcji mających zastosowanie w przypadku naruszeń przepisów niniejszego rozporządzenia i podejmują wszystkie niezbędne środki w celu zapewnienia ich wdrożenia. Przewidziane sankcje muszą być skuteczne, proporcjonalne i odstraszające. Państwa członkowskie powiadamiają Komisję o tych przepisach i środkach do dnia 1 marca 2013 r. oraz niezwłocznie powiadamiają ją o wszelkich późniejszych zmianach, które ich dotyczą.

ROZDZIAŁ VII

PRZEPISY KOŃCOWE

Artykuł 32

Sprawozdanie

Do dnia 2 marca 2016 r. Komisja przedstawia Parlamentowi Europejskiemu i Radzie sprawozdanie dotyczące działania i skutków niniejszego rozporządzenia. W razie konieczności sprawozdaniu towarzyszą wnioski ustawodawcze dotyczące wykonania w stopniu bardziej szczegółowym przepisów niniejszego rozporządzenia lub jego zmiany.

Artykuł 33

Zmiany w rozporządzeniu (WE) nr 2006/2004

W załączniku do rozporządzenia (WE) nr 2006/2004 dodaje się punkt w brzmieniu:

„19. Rozporządzenie Parlamentu Europejskiego i Rady (UE) nr 181/2011 z dnia 16 lutego 2011 r. dotyczące praw pasażerów w transporcie autobusowym i autokarowym (*)

(*) Dz.U. L 55 z 28.2.2011, s. 1".

Artykuł 34

Wejście w życie

Niniejsze rozporządzenie wchodzi w życie dwudziestego dnia po jego opublikowaniu w *Dzienniku Urzędowym Unii Europejskiej.*

Niniejsze rozporządzenie stosuje się od dnia 1 marca 2013 r.

Niniejsze rozporządzenie wiąże w całości i jest bezpośrednio stosowane we wszystkich państwach członkowskich.

Sporządzono w Strasburgu dnia 16 lutego 2011 r.

W imieniu Parlamentu Europejskiego
J. BUZEK
Przewodniczący

W imieniu Rady
MARTONYI J.
Przewodniczący

ZAŁĄCZNIK I

POMOC UDZIELANA OSOBOM NIEPEŁNOSPRAWNYM I OSOBOM O OGRANICZONEJ SPRAWNOŚCI RUCHOWEJ

a) **Pomoc w wyznaczonych terminalach**

Pomoc i rozwiązania niezbędne, aby osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej mogły:

— poinformować o swoim przybyciu do terminalu i zwrócić się o pomoc w wyznaczonych punktach,

— przemieścić się z wyznaczonego punktu do stanowiska odprawy, poczekalni oraz miejsca wejścia na pokład pojazdu,

— wejść na pokład pojazdu, korzystając z wind, wózków inwalidzkich lub innej potrzebnej pomocy, odpowiednio do sytuacji,

— załadować swój bagaż,

— odebrać swój bagaż,

— opuścić pokład pojazdu,

— przewozić ze sobą w autobusie lub autokarze certyfikowanego psa przewodnika,

— udać się na swoje miejsce siedzące.

b) **Pomoc na pokładzie pojazdu**

Pomoc i rozwiązania niezbędne, aby osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej mogły:

— uzyskać istotne informacje o podróży w przystępnych formatach, pod warunkiem że zwróci się o nie pasażer,

— wejść na pokład pojazdu/opuścić pokład pojazdu podczas przerw w podróży, jeżeli na pokładzie pojazdu poza kierowcą jest inny personel.

ZAŁĄCZNIK II

SZKOLENIE W ZAKRESIE NIEPEŁNOSPRAWNOŚCI

a) **Szkolenie uświadamiające na temat niepełnosprawności**

Szkolenie personelu zajmującego się bezpośrednio podróżnymi obejmuje:

— odpowiednią wiedzę o pasażerach z upośledzeniami fizycznymi, sensorycznymi (słuchu i wzroku), ukrytymi lub w zakresie uczenia się oraz odpowiednie reagowanie na takie osoby, w tym umiejętność rozróżniania możliwości osób, których sprawność ruchowa, orientacja lub zdolność komunikacji mogą być ograniczone,

— bariery, w obliczu których stoją osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej, w tym bariery w zakresie postaw, bariery środowiskowe/fizyczne i organizacyjne,

— wiedzę na temat certyfikowanego psa przewodnika, w tym zadania i potrzeby psa przewodnika,

— reagowanie w nieoczekiwanych sytuacjach,

— umiejętności interpersonalne oraz metody komunikowania się z osobami głuchymi i niedosłyszącymi, osobami niedowidzącymi, osobami z upośledzeniem mowy i osobami z upośledzeniem w zakresie uczenia się,

— ostrożne obsługiwanie, w sposób pozwalający uniknąć uszkodzeń, wózków inwalidzkich oraz innego sprzętu służącego do poruszania się (dla całego personelu odpowiedzialnego za zajmowanie się bagażem, jeżeli taki jest).

b) **Szkolenie z zakresu pomocy osobom niepełnosprawnym**

Szkolenie personelu udzielającego bezpośredniej pomocy osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej obejmuje:

— umiejętności udzielania użytkownikom wózków inwalidzkich pomocy w przemieszczaniu się na wózek i z wózka,

— umiejętności udzielania pomocy osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej podróżującym z certyfikowanym psem przewodnikiem, w tym rola i potrzeby takich psów,

— techniki pomagania osobom z upośledzeniem wzroku oraz obchodzenia się z certyfikowanymi psami przewodnikami i ich przewozu,

— zapoznanie się z rodzajami sprzętu, który może być wykorzystywany przez osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej, a także umiejętność obchodzenia się z takim sprzętem,

— użycie sprzętu umożliwiającego wejście na pokład pojazdu i opuszczenie go oraz znajomość właściwych procedur pomocy przy wsiadaniu na pokład pojazdu i opuszczaniu go, zapewniających bezpieczeństwo i godność osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej,

— zrozumienie potrzeby niezawodnej i profesjonalnej pomocy; jak również świadomość, że niektóre osoby niepełnosprawne mogą doświadczać podczas podróży poczucia bezbronności ze względu na zależność od udzielenia pomocy,

— znajomość zasad pierwszej pomocy.

I

(Akty ustawodawcze)

ROZPORZĄDZENIA

ROZPORZĄDZENIE PARLAMENTU EUROPEJSKIEGO I RADY (UE) NR 1177/2010

z dnia 24 listopada 2010 r.

o prawach pasażerów podróżujących drogą morską i drogą wodną śródlądową oraz zmieniające rozporządzenie (WE) nr 2006/2004

(Tekst mający znaczenie dla EOG)

PARLAMENT EUROPEJSKI I RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat o funkcjonowaniu Unii Europejskiej, w szczególności jego art. 91 ust. 1 i art. 100 ust. 2,

uwzględniając wniosek Komisji Europejskiej,

uwzględniając opinię Europejskiego Komitetu Ekonomiczno-Społecznego [1],

po konsultacji z Komitetem Regionów,

stanowiąc zgodnie ze zwykłą procedurą ustawodawczą [2],

a także mając na uwadze, co następuje:

(1) Działanie Unii w dziedzinie przewozów drogą morską i śródlądowymi drogami wodnymi powinno mieć na celu m.in. zapewnienie wysokiego poziomu ochrony pasażerów, porównywalnego z poziomem ochrony zapewnianym w przypadku innych środków transportu. Ponadto należy w pełni uwzględnić ogólne wymogi ochrony konsumentów.

(2) Ponieważ pasażer podróżujący drogą morską lub drogą wodną śródlądową jest słabszą stroną umowy przewozu, wszystkim pasażerom należy zapewnić minimalny poziom ochrony. Przewoźnicy powinni mieć możliwość oferowania pasażerom korzystniejszych warunków umownych od określonych w niniejszym rozporządzeniu. Jednocześnie celem rozporządzenia nie jest ingerowanie w stosunki między przedsiębiorstwami w zakresie transportu towarów. W szczególności porozumienia między przewoźnikiem drogowym a przewoźnikiem nie powinny być rozumiane jako umowy transportowe do celów niniejszego rozporządzenia i w związku z tym nie powinny uprawniać przewoźnika drogowego lub zatrudnianych przez niego pracowników do otrzymania na mocy niniejszego rozporządzenia rekompensaty w przypadku opóźnień.

(3) Ochrona pasażerów powinna obejmować nie tylko usługi przewozu pasażerskiego między portami położonymi na terenie państw członkowskich, ale również usługi przewozu pasażerskiego między takimi portami a portami położonymi poza terytorium państw członkowskich, z uwzględnieniem ryzyka zakłócenia konkurencji na rynku przewozów pasażerskich. Dlatego termin „przewoźnik unijny" powinien do celów niniejszego rozporządzenia być interpretowany jak najszerzej, ale nie powinien kolidować z odpowiadającymi mu terminami w innych unijnych aktach prawnych, np. rozporządzeniu Rady (EWG) nr 4056/86 z dnia 22 grudnia 1986 r. ustanawiającym szczegółowe zasady stosowania art. 85 i 86 Traktatu do transportu morskiego [3] i rozporządzeniu Rady (EWG) nr 3577/92 z dnia 7 grudnia 1992 r. dotyczącym stosowania zasady swobody świadczenia usług w transporcie morskim w obrębie państw członkowskich (kabotaż morski) [4].

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[1] Dz.U. C 317 z 23.12.2009, s. 89.

[2] Stanowisko Parlamentu Europejskiego z dnia 23 kwietnia 2009 r. (Dz.U. C 184 E z 8.7.2010, s. 293), stanowisko Rady w pierwszym czytaniu z dnia 11 marca 2010 r. (Dz.U. C 122 E z 11.5.2010, s. 19), stanowisko Parlamentu Europejskiego z dnia 6 lipca 2010 r. (dotychczas niepublikowane w Dzienniku Urzędowym) oraz decyzja Rady z dnia 11 października 2010 r.

[3] Dz.U. L 378 z 31.12.1986, s. 4.

[4] Dz.U. L 364 z 12.12.1992, s. 7.

(4) Wewnętrzny rynek usług przewozów pasażerskich drogą morską i śródlądowymi drogami wodnymi powinien działać z korzyścią dla ogółu obywateli. W związku z tym osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej niezależnie od tego, czy spowodowanej niepełnosprawnością, wiekiem czy jakimikolwiek innymi czynnikami, powinny mieć możliwości korzystania z usług przewozu pasażerskiego i rejsów wycieczkowych porównywalne z możliwościami, jakimi dysponują inni obywatele. Osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej mają takie same prawa jak wszyscy inni obywatele w zakresie swobodnego przemieszczania się, wolności wyboru oraz niedyskryminacji.

(5) Państwa członkowskie powinny wspierać korzystanie z transportu publicznego i stosowanie zintegrowanych biletów, aby zoptymalizować współdziałanie poszczególnych środków transportu i usług operatorów oraz korzystanie z nich.

(6) W świetle art. 9 Konwencji Organizacji Narodów Zjednoczonych o prawach osób niepełnosprawnych oraz w celu zapewnienia osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej możliwości podróżowania drogą morską i śródlądowymi drogami wodnymi porównywalnych z możliwościami, jakimi dysponują inni obywatele, należy ustanowić przepisy dotyczące ich niedyskryminacji i pomocy im podczas podróży. Osoby te powinny mieć zatem dostęp do transportu i nie należy odmawiać im przewozu, z wyjątkiem określonych przez właściwe organy przypadków uzasadnionych względami bezpieczeństwa. Osoby te powinny mieć prawo do pomocy w portach i na pokładzie statków pasażerskich. W imię społecznej integracji tych osób powinny one otrzymywać taką pomoc bezpłatnie. Przewoźnicy powinni określić warunki dostępu, najlepiej przy użyciu europejskiego systemu normalizacji.

(7) Przy podejmowaniu decyzji dotyczących projektowania nowych portów i terminali oraz w ramach poważnych remontów organy odpowiedzialne za te obiekty powinny uwzględniać potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej, w szczególności w zakresie dostępu, zwracając szczególną uwagę na wymogi dotyczące dostosowania projektu do potrzeb wszystkich użytkowników. Przewoźnicy powinni uwzględniać potrzeby takich osób przy podejmowaniu decyzji dotyczących projektowania lub modernizowania statków pasażerskich zgodnie z dyrektywą 2006/87/WE Parlamentu Europejskiego i Rady z dnia 12 grudnia 2006 r. ustanawiającą wymagania techniczne dla statków żeglugi śródlądowej [1] oraz dyrektywą Parlamentu Europejskiego i Rady 2009/45/WE z dnia 6 maja 2009 r. w sprawie reguł i norm bezpieczeństwa statków pasażerskich [2].

(8) Pomoc udzielana w portach znajdujących się na terytorium państwa członkowskiego powinna m.in. umożliwiać osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej przemieszczenie się z wyznaczonego punktu przybycia do portu na statek pasażerski oraz ze statku pasażerskiego do wyznaczonego punktu odjazdu z portu, w tym wejście na pokład i zejście z pokładu statku.

(9) Przy organizowaniu pomocy dla osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej oraz przy szkoleniu swojego personelu przewoźnicy powinni współpracować z reprezentatywnymi organizacjami osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej. W działaniach tych powinni również uwzględniać odpowiednie postanowienia międzynarodowej konwencji i kodeksu o wymaganiach w zakresie wyszkolenia marynarzy, wydawania im świadectw oraz pełnienia wacht, a także zalecenia Międzynarodowej Organizacji Morskiej (IMO) w sprawie projektowania i eksploatacji statków pasażerskich, które odpowiadają potrzebom osób starszych i niepełnosprawnych.

(10) Przepisy dotyczące wchodzenia na pokład osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej powinny pozostawać bez uszczerbku dla ogólnych zasad mających zastosowanie do wchodzenia na pokład pasażerów, określonych w obowiązujących zasadach międzynarodowych, unijnych lub krajowych.

(11) Akty prawne Unii dotyczące praw pasażerów powinny uwzględniać potrzeby pasażerów, a w szczególności potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej, w zakresie korzystania z różnych środków transportu i sprawnego zmieniania środków transportu, zgodnie z obowiązującymi przepisami bezpieczeństwa mającymi zastosowanie przy eksploatacji statków.

(12) Pasażerowie powinni być odpowiednio informowani w razie odwołania lub opóźnienia jakiejkolwiek usługi przewozu pasażerskiego lub rejsu wycieczkowego. Informacje te powinny ułatwiać pasażerom poczynienie niezbędnych przygotowań oraz w razie potrzeby uzyskanie informacji na temat alternatywnych połączeń.

(13) Niedogodności doświadczane przez pasażerów w wyniku odwołania lub dużego opóźnienia podróży powinny być ograniczone. W tym celu pasażerom powinna przysługiwać odpowiednia opieka, a także prawo do odwołania podróży oraz do uzyskania zwrotu kosztu biletów lub do podróży zmienioną trasą na zadowalających warunkach. Odpowiednie zakwaterowanie dla pasażerów niekoniecznie polega na zakwaterowaniu w pokojach hotelowych, lecz może oznaczać wszelkie inne dostępne odpowiednie zakwaterowanie, szczególnie w zależności od okoliczności związanych z poszczególnymi sytuacjami, pojazdami pasażerów i cechami statku. Pod tym względem i w należycie uzasadnionych przypadkach wyjątkowych i naglących okoliczności przewoźnicy powinni mieć możliwość pełnego skorzystania z odpowiednich dostępnych obiektów we współpracy z władzami cywilnymi.

[1] Dz.U. L 389 z 30.12.2006, s. 1.
[2] Dz.U. L 163 z 25.6.2009, s. 1.

(14) W razie odwołania lub opóźnienia usługi przewozu pasażerskiego przewoźnicy powinni wypłacać pasażerom odszkodowanie stanowiące pewien odsetek ceny biletu, z wyjątkiem sytuacji, gdy odwołanie lub opóźnienie wiąże się z warunkami pogodowymi stwarzającymi zagrożenie dla bezpiecznej eksploatacji statku lub ze względu na nadzwyczajne okoliczności, których nie dałoby się uniknąć nawet przy podjęciu wszelkich racjonalnych środków.

(15) Zgodnie z powszechnie przyjętymi zasadami na przewoźnikach winien ciążyć obowiązek udowodnienia, że odwołanie lub opóźnienie spowodowane zostało takimi warunkami pogodowymi lub nadzwyczajnymi okolicznościami.

(16) Warunki pogodowe stwarzające zagrożenie dla bezpiecznej eksploatacji statku powinny obejmować między innymi silne wiatry, wzburzone morze, silne prądy, trudne warunki lodowe i skrajnie wysoki lub niski poziom wody, huragany, tornada i powodzie.

(17) Nadzwyczajne okoliczności powinny obejmować między innymi klęski żywiołowe, takie jak pożary i trzęsienia ziemi, ataki terrorystyczne, wojny i wojskowe lub cywilne konflikty zbrojne, powstania, wojskową lub bezprawną konfiskatę, spory pracownicze, wysadzanie na ląd wszelkich osób chorych, rannych lub zmarłych, operacje poszukiwawcze i ratownicze na morzu lub śródlądowych drogach wodnych, działania niezbędne, aby chronić środowisko, decyzje podjęte przez organy zarządzające ruchem lub władze portowe, lub decyzje podjęte przez właściwe organy w zakresie ładu i bezpieczeństwa publicznego, a także w odpowiedzi na pilne potrzeby transportowe.

(18) Przewoźnicy powinni współpracować między sobą z udziałem zainteresowanych stron, organizacji zawodowych i organizacji zrzeszających klientów, pasażerów, osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej, na rzecz przyjęcia, na szczeblu krajowym lub europejskim, rozwiązań mających na celu doskonalenie opieki i pomocy oferowanej pasażerom w przypadku przerwania podróży, w szczególności w razie dużych opóźnień lub odwołania podróży. O ustaleniach tych należy powiadamiać krajowe organy odpowiedzialne za egzekwowanie tych przepisów.

(19) Trybunał Sprawiedliwości Unii Europejskiej orzekł już, że problemy prowadzące do odwołania kursów lub ich opóźnień mogą podlegać pojęciu okoliczności nadzwyczajnych, wyłącznie o ile spowodowane są sytuacjami niezwiązanymi z normalnym prowadzeniem działalności przewoźnika, którego dotyczy sprawa, i które znajdują się poza jego rzeczywistą kontrolą. Należy zauważyć, że warunki pogodowe stwarzające zagrożenie dla bezpiecznej eksploatacji statku niewątpliwie znajdują się poza rzeczywistą kontrolą przewoźnika.

(20) Niniejsze rozporządzenie nie powinno mieć wpływu na prawa pasażerów ustanowione w dyrektywie Rady 90/314/EWG z dnia 13 czerwca 1990 r. w sprawie zorganizowanych podróży, wakacji i wycieczek [1]. Niniejsze rozporządzenie nie powinno mieć zastosowania w przypadkach gdy zorganizowana wycieczka zostaje odwołana z przyczyn innych niż odwołanie usługi przewozu pasażerskiego lub rejsu wycieczkowego.

(21) Pasażerowie powinni być wyczerpująco informowani, w ogólnodostępnych formach, o prawach przysługujących im zgodnie z niniejszym rozporządzeniem, tak aby mogli skutecznie z nich korzystać. Prawa pasażerów powinny obejmować uzyskanie informacji o usłudze przewozu pasażerskiego lub o rejsie wycieczkowym przed podróżą i w jej trakcie. Wszystkie istotne informacje udzielane pasażerom powinny być również udostępnione w formach przystępnych dla osób niepełnosprawnych oraz osób o ograniczonej sprawności ruchowej, umożliwiających pasażerom dostęp do tych samych informacji poprzez wykorzystanie na przykład tekstu, alfabetu Braille'a, form audio, wideo lub form elektronicznych.

(22) Pasażerowie powinni mieć możliwość korzystania ze swoich praw w oparciu o odpowiednie i przystępne procedury wnoszenia skarg wprowadzone przez przewoźników i operatorów terminali w ramach swoich odpowiednich zakresów kompetencji lub, zależnie od okoliczności, poprzez zgłaszanie skarg do organu lub organów wyznaczonych do tego celu przez zainteresowane państwo członkowskie. Przewoźnicy i operatorzy terminali powinni ustosunkować się do skarg zgłaszanych przez pasażerów w określonym czasie, ze świadomością, że brak reakcji na skargę mógłby zostać wykorzystany przeciwko nim.

(23) Z uwzględnieniem procedur określonych przez państwo członkowskie w odniesieniu do składania skarg, skarga dotycząca pomocy udzielanej w porcie lub na pokładzie statku powinna w miarę możliwości być wnoszona do organu lub organów wyznaczonych do egzekwowania niniejszego rozporządzenia przez państwo członkowskie, na którego terytorium znajduje się port, w którym pasażerowie wchodzą na pokład, a w przypadku usług przewozu pasażerskiego realizowanych z państwa trzeciego – port, w którym schodzą na ląd.

(24) Państwa członkowskie powinny zapewnić przestrzeganie niniejszego rozporządzenia oraz wyznaczyć właściwy organ lub organy odpowiedzialne za nadzór i egzekwowanie przepisów. Nadzór ten nie ma wpływu na prawa pasażerów do korzystania ze środków prawnych przed sądem zgodnie z prawem krajowym.

(25) Organ lub organy odpowiedzialne za wdrożenie niniejszego rozporządzenia powinny być niezależne od interesów handlowych. Każde państwo członkowskie powinno wyznaczyć co najmniej jeden organ, który powinien, w odpowiednim przypadku, mieć prawo i możliwość

[1] Dz.U. L 158 z 23.6.1990, s. 59.

rozpatrywania poszczególnych skarg oraz ułatwiania rozstrzygania sporów. Pasażerowie powinni mieć prawo do otrzymania w rozsądnym terminie uzasadnionej odpowiedzi z wyznaczonego organu. Ze względu na znaczenie, jakie mają wiarygodne statystyki dla wdrożenia niniejszego rozporządzenia, a w szczególności dla zapewnienia spójnego stosowania w całej Unii, sprawozdania przygotowywane przez te organy powinny w miarę możliwości zawierać statystyki dotyczące skarg i wyników postępowań.

(26) Państwa członkowskie powinny określić sankcje mające zastosowanie w przypadku naruszeń niniejszego rozporządzenia oraz zapewnić ich stosowanie. Sankcje te powinny być skuteczne, proporcjonalne i odstraszające.

(27) Ponieważ cele niniejszego rozporządzenia, a mianowicie zapewnienie wysokiego poziomu ochrony i pomocy pasażerom we wszystkich państwach członkowskich oraz zapewnienie funkcjonowania podmiotów gospodarczych zgodnie ze zharmonizowanymi warunkami na rynku wewnętrznym, nie mogą zostać osiągnięte w sposób wystarczający przez państwa członkowskie, natomiast ze względu na rozmiary lub skutki proponowanych działań możliwe jest lepsze ich osiągnięcie na poziomie Unii, Unia może podjąć działania zgodnie z zasadą pomocniczości określoną w art. 5 Traktatu o Unii Europejskiej. Zgodnie z zasadą proporcjonalności, określoną w tym samym artykule, niniejsze rozporządzenie nie wykracza poza to, co jest konieczne do osiągnięcia tych celów.

(28) Egzekwowanie niniejszego rozporządzenia powinno opierać się na rozporządzeniu (WE) nr 2006/2004 Parlamentu Europejskiego i Rady z dnia 27 października 2004 r. w sprawie współpracy między organami krajowymi odpowiedzialnymi za egzekwowanie przepisów prawa w zakresie ochrony konsumentów („rozporządzenie w sprawie współpracy w dziedzinie ochrony konsumentów") ([1]). Należy zatem odpowiednio zmienić to rozporządzenie.

(29) Należy ściśle przestrzegać przepisów dyrektywy 95/46/WE Parlamentu Europejskiego i Rady z dnia 24 października 1995 r. w sprawie ochrony osób fizycznych w zakresie przetwarzania danych osobowych i swobodnego przepływu tych danych ([2]) i egzekwować je, aby zapewnić poszanowanie prywatności osób fizycznych i prawnych oraz zagwarantować, że wymagane informacje i sprawozdania będą służyć wyłącznie wypełnianiu określonych w niniejszym rozporządzeniu obowiązków i nie zostaną użyte ze szkodą dla tych osób.

(30) Niniejsze rozporządzenie nie narusza praw podstawowych i jest zgodne z zasadami uznanymi w szczególności w Karcie praw podstawowych Unii Europejskiej, o której mowa w art. 6 Traktatu o Unii Europejskiej,

PRZYJMUJĄ NINIEJSZE ROZPORZĄDZENIE:

([1]) Dz.U. L 364 z 9.12.2004, s. 1.
([2]) Dz.U. L 281 z 23.11.1995, s. 31.

ROZDZIAŁ I

PRZEPISY OGÓLNE

Artykuł 1

Przedmiot

Niniejsze rozporządzenie ustanawia przepisy dotyczące przewozów drogą morską i drogą wodną śródlądową w odniesieniu do następujących kwestii:

a) niedyskryminacji pasażerów w zakresie warunków przewozu oferowanych przez przewoźników;

b) niedyskryminacji osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej oraz pomocy udzielanej tym osobom;

c) praw pasażerów w przypadkach odwołania lub opóźnienia usługi;

d) minimalnych informacji udostępnianych pasażerom;

e) rozpatrywania skarg;

f) ogólnych zasad dotyczących egzekwowania przepisów.

Artykuł 2

Zakres

1. Niniejsze rozporządzenie ma zastosowanie do pasażerów podróżujących:

a) z wykorzystaniem usług przewozu pasażerskiego, w przypadku gdy port, w którym pasażerowie wchodzą na pokład, znajduje się na terytorium państwa członkowskiego;

b) z wykorzystaniem usług przewozu pasażerskiego, w przypadku gdy port, w którym pasażerowie wchodzą na pokład, znajduje się poza terytorium państwa członkowskiego, a port, w którym schodzą na ląd, jest położony na terytorium państwa członkowskiego, pod warunkiem że usługa jest realizowana przez przewoźnika unijnego w rozumieniu art. 3 lit. e);

c) rejsem wycieczkowym, w przypadku gdy port, w którym pasażerowie wchodzą na pokład, znajduje się na terytorium państwa członkowskiego. Do tych pasażerów nie mają jednak zastosowania art. 16 ust. 2, art. 18, 19 oraz art. 20 ust. 1 i 4.

2. Niniejsze rozporządzenie nie ma zastosowania do pasażerów podróżujących:

a) statkami dopuszczonymi do przewozu nie więcej niż 12 pasażerów;

b) statkami, których załoga odpowiedzialna za eksploatację statku składa się z nie więcej niż 3 osób lub w przypadku gdy dystans, na którym wykonuje się całkowitą usługę przewozu pasażerskiego, jest mniejszy niż 500 metrów w jedną stronę;

c) rejsami spacerowymi i krajoznawczymi innymi niż rejsy wycieczkowe; lub

d) statkami nienapędzanymi środkami mechanicznymi oraz oryginalnymi historycznymi statkami pasażerskimi zaprojektowanymi przed rokiem 1965 lub pojedynczymi replikami takich statków, zbudowanymi głównie z oryginalnych materiałów, uprawnionych do przewozu najwyżej 36 pasażerów.

3. Przez okres dwóch lat od dnia 18 grudnia 2012 r. państwa członkowskie mogą zwolnić ze stosowania niniejszego rozporządzenia statki morskie poniżej 300 ton brutto eksploatowane w transporcie krajowym, pod warunkiem że prawa pasażerów wynikające z niniejszego rozporządzenia są odpowiednio zagwarantowane w prawie krajowym.

4. Państwa członkowskie mogą zwolnić ze stosowania niniejszego rozporządzenia usługi przewozu pasażerskiego w ramach obowiązku świadczenia usługi publicznej, umów o świadczenie usług publicznych lub usług zintegrowanych, pod warunkiem że prawa pasażerów przewidziane w niniejszym rozporządzeniu są porównywalnie zagwarantowane w prawie krajowym.

5. Bez uszczerbku dla dyrektywy 2006/87/WE i dyrektywy 2009/45/WE niniejsze rozporządzenie nie ustanawia wymogów technicznych nakładających na przewoźników, operatorów terminali ani inne podmioty, obowiązku zmiany lub wymiany statków, infrastruktury, portów lub terminali portowych.

Artykuł 3

Definicje

Na użytek niniejszego rozporządzenia stosuje się następujące definicje:

a) „osoba niepełnosprawna" lub „osoba o ograniczonej sprawności ruchowej" oznacza każdą osobę, której sprawność ruchowa podczas korzystania z przewozu jest ograniczona na skutek jakiejkolwiek niepełnosprawności fizycznej (sensorycznej lub ruchowej, trwałej lub przejściowej), niepełnosprawności umysłowej lub upośledzenia umysłowego lub niepełnosprawności wynikającej z dowolnych innych przyczyn lub z wieku i której sytuacja wymaga właściwej uwagi oraz przystosowania usług dostępnych dla wszystkich pasażerów do jej szczególnych potrzeb;

b) „terytorium państwa członkowskiego" oznacza terytorium, do którego zastosowanie ma Traktat o funkcjonowaniu Unii Europejskiej, zgodnie z jego art. 355 i na warunkach w nim przewidzianych;

c) „warunki dostępu" oznaczają odpowiednie normy, wytyczne i informacje dotyczące dostępu do terminali portowych i statków, wraz z istniejącymi w nich rozwiązaniami przeznaczonymi dla osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej;

d) „przewoźnik" oznacza osobę fizyczną lub prawną, inną niż organizator wyjazdów grupowych, biuro podróży lub sprzedawca biletów, oferującą ogólnie dostępne przewozy w postaci usług przewozu pasażerskiego lub rejsów wycieczkowych;

e) „przewoźnik unijny" oznacza przewoźnika z siedzibą na terytorium państwa członkowskiego lub oferującego transport w postaci usług przewozu pasażerskiego, który rozpoczyna lub kończy się na terytorium państwa członkowskiego;

f) „usługa przewozu pasażerskiego" oznacza komercyjną usługę przewozu pasażerskiego drogą morską lub drogą wodną śródlądową realizowaną według opublikowanego rozkładu rejsów;

g) „usługi zintegrowane" oznaczają połączone usługi przewozu realizowane w określonym obszarze geograficznym z wykorzystaniem jednego systemu informacyjnego, systemu biletowego i rozkładu jazdy;

h) „wykonujący przewóz" oznacza osobę inną niż przewoźnik, która faktycznie wykonuje całość lub część przewozu;

i) „śródlądowa droga wodna" oznacza dowolną naturalną lub sztuczną jednolitą część wód lub system połączonych jednolitych części wód, wykorzystywane do celów przewozu, jak np. jeziora, rzeki lub kanały, lub dowolne ich połączenie;

j) „port" oznacza miejsce lub obszar geograficzny posiadający udogodnienia i obiekty umożliwiające przyjmowanie statków, w którym pasażerowie regularnie wchodzą na pokład lub schodzą na ląd;

k) „terminal portowy" oznacza terminal obsługiwany przez pracowników przewoźnika lub operatora terminalu, w porcie wyposażonym w obiekty takie jak stanowiska odprawy, kasy biletowe lub poczekalnie, oraz dysponujący personelem, co umożliwia wchodzenie na pokład lub schodzenie na ląd pasażerów korzystających z usług przewozu pasażerskiego lub z rejsu wycieczkowego;

l) „statek" oznacza jednostkę pływającą użytkowaną do celów żeglugi po morskich lub śródlądowych drogach wodnych;

m) „umowa przewozu" oznacza umowę przewozu zawartą między przewoźnikiem a pasażerem, dotyczącą świadczenia co najmniej jednej usługi przewozu pasażerskiego lub rejsu wycieczkowego;

n) „bilet" oznacza ważny dokument lub inny dowód zawarcia umowy przewozu;

o) „sprzedawca biletów" oznacza każdego sprzedawcę detalicznego zawierającego umowy przewozu w imieniu przewoźnika;

p) „biuro podróży" oznacza każdego sprzedawcę detalicznego działającego w imieniu pasażera lub organizatora wycieczek w sprawach zawierania umów przewozu;

q) „operator turystyczny" oznacza organizatora lub punkt sprzedaży detalicznej, innych niż przewoźnik, w rozumieniu art. 2 pkt 2) i 3) dyrektywy 90/314/EWG;

r) „rezerwacja" oznacza rezerwację konkretnej usługi przewozu pasażerskiego lub rejsu wycieczkowego;

s) „operator terminalu" oznacza podmiot prywatny lub publiczny na terytorium państwa członkowskiego odpowiedzialny za administrowanie i zarządzanie terminalem portowym;

t) „rejs wycieczkowy" oznacza usługę przewozu świadczoną na morskiej lub śródlądowej drodze wodnej realizowaną wyłącznie dla przyjemności lub w celach rekreacyjnych, w uzupełnieniu której oferowane jest zakwaterowanie i inne elementy, obejmującą więcej niż dwa noclegi na statku;

u) „incydent żeglugowy" oznacza rozbicie statku, jego wywrócenie, zderzenie lub wejście na mieliznę, wybuch lub pożar na statku lub uszkodzenie statku.

Artykuł 4

Bilety i niedyskryminacyjne warunki umowne

1. Przewoźnicy wystawiają pasażerowi bilet, chyba że prawo krajowe przewiduje inne dokumenty uprawniające do przewozu. Bilet może być wystawiony w formie elektronicznej.

2. Bez uszczerbku dla taryf socjalnych warunki umowne i stawki stosowane przez przewoźników lub sprzedawców biletów są ogólnie dostępne bez jakiejkolwiek, bezpośredniej lub pośredniej, dyskryminacji ze względu na obywatelstwo klienta końcowego lub siedzibę przewoźnika lub sprzedawcy biletów w Unii.

Artykuł 5

Inne strony wykonujące

1. W przypadku gdy wykonywanie obowiązków wynikających z niniejszego rozporządzenia zostało powierzone wykonującemu przewóz, sprzedawcy biletów lub dowolnej innej osobie, przewoźnik, biuro podróży, organizator wyjazdów grupowych lub operator terminalu, którzy powierzyli wykonanie takich obowiązków, są niemniej jednak odpowiedzialni za działania i zaniechania tej strony wykonującej w ramach zleconych jej czynności.

2. W uzupełnieniu ust. 1 strona, której przewoźnik, biuro podróży, organizator wyjazdów grupowych lub operator terminalu powierzyli wykonanie obowiązku, podlega w zakresie powierzonych obowiązków przepisom niniejszego rozporządzenia, w tym dotyczącym odpowiedzialności i środków obrony.

Artykuł 6

Wyłączenie uchylenia się od odpowiedzialności

Prawa i obowiązki wynikające z niniejszego rozporządzenia nie mogą zostać wyłączone ani ograniczone, w szczególności poprzez odmienne postanowienia lub wyłączenia w umowie przewozu.

ROZDZIAŁ II

PRAWA OSÓB NIEPEŁNOSPRAWNYCH I OSÓB O OGRANICZONEJ SPRAWNOŚCI RUCHOWEJ

Artykuł 7

Prawo do przewozu

1. Przewoźnicy, biura podróży i organizatorzy wyjazdów grupowych nie mogą odmówić przyjęcia rezerwacji, wydania lub innego udostępnienia biletu ani przyjęcia danej osoby na pokład ze względu na niepełnosprawność lub ograniczoną sprawność ruchową jako taką.

2. Osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej rezerwacje oraz bilety oferowane są bez dodatkowych opłat i na takich samych warunkach jak pozostałym pasażerom.

Artykuł 8

Wyjątki i warunki specjalne

1. W drodze odstępstwa od art. 7 ust. 1 przewoźnicy, biura podróży i organizatorzy wyjazdów grupowych mogą odmówić przyjęcia rezerwacji, wydania lub innego udostępnienia biletu lub przyjęcia na pokład osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej:

a) ze względu na obowiązujące wymogi w zakresie bezpieczeństwa określone w prawie międzynarodowym, unijnym lub krajowym lub ze względu na wymogi dotyczące bezpieczeństwa określone przez właściwe organy;

b) w przypadkach gdy konstrukcja statku pasażerskiego lub infrastruktura portu i jego wyposażenie, w tym terminali portowych, uniemożliwia wejście na pokład lub zejście na ląd lub gdy przewóz rzeczonej osoby nie może być przeprowadzony w sposób bezpieczny lub nie jest wykonalny z punktu widzenia eksploatacyjnego.

2. W przypadku odmowy przyjęcia rezerwacji lub wydania lub udostępnienia biletu w inny sposób ze względów, o których mowa w ust. 1, przewoźnicy, biura podróży i organizatorzy wyjazdów grupowych dokładają wszelkich racjonalnie uzasadnionych starań, aby danej osobie zaproponować alternatywny transport z wykorzystaniem usługi przewozu pasażerskiego lub rejsu wycieczkowego realizowanych przez danego przewoźnika.

3. W przypadku gdy osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej, posiadającej rezerwację lub bilet, która spełnia wymogi, o których mowa w art. 11 ust. 2, odmówiono jednak przyjęcia na pokład na podstawie niniejszego rozporządzenia, osobie tej oraz każdej osobie towarzyszącej, o której mowa w ust. 4 niniejszego artykułu, oferuje się wybór pomiędzy zwrotem kosztów a zmianą trasy zgodnie z załącznikiem I. Prawo wyboru między podróżą powrotną a zmianą trasy jest uzależnione od spełnienia wszystkich wymogów w zakresie bezpieczeństwa.

4. W przypadku bezwzględnej konieczności i na warunkach określonych w ust. 1 przewoźnicy, biura podróży i organizatorzy wyjazdów grupowych mogą wymagać, aby osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej towarzyszyła inna osoba zdolna do udzielenia pomocy potrzebnej tej osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej. W przypadku usług przewozu pasażerskiego taka osoba towarzysząca jest przewożona bezpłatnie.

5. W przypadku gdy przewoźnicy, biura podróży i organizatorzy wyjazdów grupowych powołują się na przepisy ust. 1 lub 4, niezwłocznie informują osobę niepełnosprawną lub osobę o ograniczonej sprawności ruchowej o konkretnych powodach zastosowania tych przepisów. Na wniosek, osoba niepełnosprawna lub osoba o ograniczonej sprawności ruchowej jest powiadamiana o tych powodach na piśmie, nie później niż pięć dni roboczych po jego złożeniu. W przypadku odmowy na podstawie ust. 1 lit. a) należy odwołać się do odpowiednich wymogów z zakresu bezpieczeństwa.

Artykuł 9

Dostęp i informacja

1. We współpracy z reprezentatywnymi organizacjami osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej przewoźnicy i operatorzy terminali, w stosownych przypadkach za pośrednictwem swoich organizacji, określają lub stosują istniejące warunki niedyskryminacyjnego dostępu osób niepełnosprawnych oraz osób o ograniczonej sprawności ruchowej i osób im towarzyszących. O warunkach dostępu powiadamia się na wniosek krajowe organy odpowiedzialne za egzekwowanie przepisów.

2. Warunki dostępu, o których mowa w ust. 1, są podawane do publicznej wiadomości przez przewoźników, władze portowe i operatorów terminali fizycznie lub w Internecie, w przystępnych formach na wniosek, oraz w tych samych językach, w których informacje są zazwyczaj podawane wszystkim pasażerom. Szczególną uwagę zwraca się na potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej.

3. Organizatorzy wyjazdów grupowych podają do publicznej wiadomości warunki dostępu, o których mowa w ust. 1, mające zastosowanie do podróży, w tym zorganizowanych podróży, wakacji i wycieczek, które są przez nich organizowane, sprzedawane lub oferowane na sprzedaż.

4. Przewoźnicy, biura podróży i organizatorzy wyjazdów grupowych zapewniają osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej dostęp do podanych we właściwych i przystępnych formach wszelkich istotnych informacji na temat warunków przewozu, podróży i warunków dostępu, w tym na temat rezerwacji *on-line* i informacji. Osoby potrzebujące pomocy otrzymują za pomocą wszelkich dostępnych środków, w tym drogą elektroniczną lub krótką wiadomością tekstową (SMS-em), potwierdzenie, że zostanie ona udzielona.

Artykuł 10

Prawo do uzyskania pomocy w portach i na pokładzie statków

Z zastrzeżeniem warunków dostępu przewidzianych w art. 9 ust. 1 przewoźnicy i operatorzy terminali, w ramach swoich odpowiednich zakresów kompetencji, udzielają osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej bezpłatnej pomocy, szczegółowo określonej w załącznikach II i III, w portach – w tym podczas wchodzenia na statek i schodzenia na ląd – oraz na pokładzie statków. Pomoc jest dostosowana w miarę możliwości do indywidualnych potrzeb osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej.

Artykuł 11

Warunki udzielania pomocy

1. Przewoźnicy i operatorzy terminali w ramach swoich odpowiednich zakresów kompetencji udzielają pomocy osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej, jak przewidziano w art. 10, pod warunkiem że:

a) przewoźnik lub operator terminalu zostali powiadomieni, za pomocą wszelkich dostępnych środków, w tym drogą elektroniczną lub SMS-em, o potrzebie udzielenia takiej pomocy danej osobie co najmniej 48 godzin przed koniecznością udzielenia pomocy, o ile pasażer i przewoźnik lub operator terminalu nie uzgodnią krótszego terminu; oraz

b) osoba niepełnosprawna lub osoba o ograniczonej sprawności ruchowej pojawi się w porcie lub w wyznaczonym punkcie, o którym mowa w art. 12 ust. 3:

   (i) w czasie określonym na piśmie przez przewoźnika, przy czym nie może on przypadać wcześniej niż 60 minut przed opublikowanym czasem wchodzenia na pokład; lub

   (ii) jeżeli nie określono konkretnego czasu, nie później niż 60 minut przed opublikowanym czasem rozpoczęcia podróży, chyba że pasażer i przewoźnik lub operator terminalu ustalą krótszy termin.

2. W uzupełnieniu ust. 1 osoby niepełnosprawne lub osoby o ograniczonej sprawności ruchowej powiadamiają przewoźnika w momencie dokonywania rezerwacji lub kupowania biletu w przedsprzedaży o szczególnych potrzebach w zakresie zakwaterowania, miejsc siedzących lub wymaganych usług lub o potrzebie wniesienia na pokład sprzętu medycznego, pod warunkiem że potrzeby te są w tym czasie znane.

3. Powiadomienie, o którym mowa w ust. 1 lit. a) i w ust. 2, może zawsze zostać złożone w biurze podróży lub u organizatora wyjazdów grupowych, u których zakupiono bilet. Jeżeli bilet obejmuje kilka podróży, wystarczające jest jedno powiadomienie, pod warunkiem że przekazane zostaną odpowiednie informacje na temat terminów kolejnych podróży. Pasażer otrzymuje potwierdzenie, że o potrzebnej pomocy powiadomiono zgodnie z ust. 1 lit. a) i 2.

4. Jeżeli nie dokonano powiadomienia zgodnie z ust. 1 lit. a) oraz z ust. 2, przewoźnicy i operatorzy terminali podejmują jednak wszelkie racjonalnie uzasadnione starania w celu zapewnienia udzielenia pomocy, tak aby osoba niepełnosprawna lub osoba o ograniczonej sprawności ruchowej mogła wejść na pokład, zejść na ląd i odbyć podróż statkiem.

5. W przypadku gdy osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej towarzyszy uznany pies asystujący, pies ten jest kwaterowany razem z tą osobą, pod warunkiem że przewoźnik, biuro podróży lub organizator wyjazdów grupowych zostali powiadomieni zgodnie z mającymi zastosowanie przepisami krajowymi dotyczącymi przewozu uznanych psów asystujących na statkach pasażerskich, o ile przepisy takie istnieją.

Artykuł 12

Przyjmowanie powiadomień i wyznaczanie punktów spotkań

1. Przewoźnicy, operatorzy terminali, biura podróży i organizatorzy wyjazdów grupowych podejmują wszelkie środki niezbędne w celu żądania powiadomień i przyjmowania powiadomień składanych zgodnie z art. 11 ust. 1 lit. a) i art. 11 ust. 2. Obowiązek ten ma zastosowanie do wszystkich punktów sprzedaży, w tym sprzedaży telefonicznej i sprzedaży przez Internet.

2. W przypadku gdy biura podróży lub organizatorzy wyjazdów grupowych otrzymają powiadomienie, o którym mowa w ust. 1, niezwłocznie przekazują tę informację w czasie normalnych godzin pracy przewoźnikowi lub operatorowi terminalu.

3. Przewoźnicy i operatorzy terminali wyznaczają punkt wewnątrz lub na zewnątrz terminalu portowego, w którym osoby niepełnosprawne lub osoby o ograniczonej sprawności ruchowej mogą zgłosić swoje przybycie i potrzebę uzyskania pomocy. Punkt ten musi być wyraźnie oznakowany i muszą być w nim dostępne w przystępnej formie podstawowe informacje dotyczące terminalu portowego i udzielanej pomocy.

Artykuł 13

Normy jakości dotyczące pomocy

1. We współpracy z reprezentatywnymi organizacjami osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej operatorzy terminali i przewoźnicy eksploatujący terminale portowe lub realizujący usługi przewozu pasażerskiego, którzy w poprzednim roku kalendarzowym dokonali przewozu więcej niż 100 000 pasażerów, ustalają w ramach swoich odpowiednich zakresów kompetencji normy jakości pomocy określonej w załączniku II i III oraz, w stosownych przypadkach za pośrednictwem swoich organizacji, określają środki wymagane do spełnienia tych norm.

2. Przy ustalaniu norm jakości należy w pełni uwzględnić międzynarodowo uznane strategie i kodeksy postępowania dotyczące udogodnień w przewozie osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej, w szczególności zalecenie IMO w sprawie projektowania i eksploatacji statków pasażerskich odpowiadających potrzebom osób starszych i niepełnosprawnych.

3. Normy jakości, o których mowa w ust. 1, są przez operatorów terminali i przewoźników podawane do wiadomości publicznej fizycznie lub w Internecie w przystępnych formach i w tych samych językach, w których informacje są zazwyczaj podawane wszystkim pasażerom.

Artykuł 14

Szkolenie i instruktaż

Bez uszczerbku dla Międzynarodowej konwencji dotyczącej wymagań w zakresie wyszkolenia marynarzy, wydawania im świadectw oraz pełnienia wacht dla marynarzy ani przepisów przyjętych zgodnie z poprawioną Konwencją o żegludze na Renie oraz Konwencją o żegludze na Dunaju, przewoźnicy oraz – w stosownych przypadkach – operatorzy terminali określają procedury szkolenia w zakresie niepełnosprawności, w tym instruktażu, i zapewniają, aby:

a) ich pracownicy, w tym pracownicy zatrudnieni przez jakąkolwiek inną stronę wykonującą, udzielający bezpośredniej pomocy osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej przeszli szkolenie lub instruktaż opisane w załączniku IV część A i B;

b) ich pracownicy, którzy w inny sposób są odpowiedzialni za rezerwację i sprzedaż biletów lub wchodzenie na pokład i schodzenie na ląd, w tym pracownicy zatrudnieni przez jakąkolwiek inną stronę wykonującą, przeszli szkolenie lub instruktaż opisane w załączniku IV część A; oraz

c) kategorie pracowników, o których mowa w lit. a) i b), podtrzymywały swoje umiejętności, np. poprzez instruktaż lub szkolenia odświeżające wiedzę, odpowiednio do przypadku.

Artykuł 15

Odszkodowanie za sprzęt ułatwiający poruszanie się lub inny sprzęt specjalistyczny

1. Przewoźnicy i operatorzy terminali ponoszą odpowiedzialność za straty wynikające z utraty lub uszkodzenia sprzętu ułatwiającego poruszanie się lub innego sprzętu specjalistycznego używanego przez osobę niepełnosprawną lub osobę o ograniczonej sprawności ruchowej, jeżeli do zdarzenia, które spowodowało straty, doszło z winy lub z powodu zaniedbania przewoźnika lub operatora terminalu. W przypadku strat spowodowanych incydentem żeglugowym domniemywa się winę lub zaniedbanie przewoźnika.

2. Wysokość odszkodowania, o którym mowa w ust. 1, odpowiada wartości odtworzeniowej tego sprzętu lub, w odpowiednich przypadkach, kosztom jego naprawy.

3. Ustępy 1 i 2 nie mają zastosowania w przypadku gdy zastosowanie ma art. 4 rozporządzenia (WE) nr 392/2009 z dnia 23 kwietnia 2009 r. w sprawie odpowiedzialności przewoźników pasażerskich na morskich drogach wodnych z tytułu wypadków ([1]).

4. Ponadto dokłada się wszelkich starań, aby szybko dostarczyć tymczasowy sprzęt zastępczy stanowiący stosowną alternatywę.

([1]) Dz.U. L 131 z 28.5.2009, s. 24.

ROZDZIAŁ III

OBOWIĄZKI PRZEWOŹNIKÓW I OPERATORÓW TERMINALI W PRZYPADKU PRZERWANIA PODRÓŻY

Artykuł 16

Informacje w przypadku odwołania lub opóźnienia odjazdu

1. W przypadku odwołania lub opóźnienia rozpoczęcia usługi przewozu pasażerskiego lub rejsu wycieczkowego przewoźnik lub, w odpowiednich przypadkach, operator terminalu jak najszybciej, a w każdym razie nie później niż 30 minut po planowanym czasie rozpoczęcia podróży, informują pasażerów rozpoczynających podróż w terminalach portowych, lub w razie możliwości pasażerów rozpoczynających podróż w portach, o sytuacji oraz powiadamiają ich o przypuszczalnym czasie rozpoczęcia i zakończenia podróży, gdy tylko taka informacja będzie dostępna.

2. Jeżeli z powodu odwołania lub opóźnienia pasażerowie nie zdążą na połączenie w usłudze przewozu pasażerskiego, przewoźnik oraz, w odpowiednich przypadkach, operator terminalu podejmują racjonalnie uzasadnione starania w celu poinformowania tych pasażerów o połączeniach alternatywnych.

3. Przewoźnik lub, w odpowiednich przypadkach, operator terminalu zapewniają uzyskanie przez osoby niepełnosprawne lub osoby o ograniczonej sprawności ruchowej informacji, o których mowa w ust. 1 i 2, w przystępnej formie.

Artykuł 17

Pomoc w przypadku odwołania lub opóźnienia odjazdu

1. Jeżeli przewoźnik z uzasadnionych względów spodziewa się, że rozpoczęcie usługi przewozu pasażerskiego lub rejsu wycieczkowego zostanie odwołane lub opóźni się o ponad 90 minut w stosunku do planowanego czasu rozpoczęcia podróży, pasażerom rozpoczynającym podróż w terminalach portowych oferuje się bezpłatne przekąski, posiłki lub napoje, odpowiednio do czasu oczekiwania, pod warunkiem że są one dostępne lub mogą być dostarczone przy rozsądnym nakładzie środków.

2. W przypadku odwołania lub opóźnienia odjazdu powodującego konieczność co najmniej jednego noclegu lub pobytu dłuższego niż planowany przez pasażera, przewoźnik oferuje bezpłatnie pasażerom rozpoczynającym podróż w terminalach portowych, jeżeli jest to fizycznie wykonalne, oprócz przekąsek, posiłków lub napojów, o których mowa w ust. 1, odpowiednie zakwaterowanie na pokładzie lub na lądzie oraz przewóz w obu kierunkach między terminalem portowym a miejscem zakwaterowania. W odniesieniu do każdego pasażera przewoźnik może ograniczyć całkowity koszt zakwaterowania na lądzie, z wyłączeniem przewozu w obu kierunkach między terminalem portowym a miejscem zakwaterowania, do kwoty 80 EUR za noc, przez maksymalnie 3 noce.

3. Stosując przepisy ust. 1 i 2, przewoźnik zwraca szczególną uwagę na potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej oraz wszelkich osób im towarzyszących.

Artykuł 18

Zmiana trasy i zwrot kosztów w przypadku odwołania lub opóźnienia odjazdu

1. Jeżeli przewoźnik z uzasadnionych względów spodziewa się, że usługa przewozu pasażerskiego będzie odwołana lub odjazd z terminalu portowego będzie opóźniony o ponad 90 minut, pasażerowi niezwłocznie oferuje się następujący wybór:

a) podróż zmienioną trasą do miejsca docelowego, w warunkach porównywalnych do warunków przewidzianych w umowie przewozu, w najwcześniejszym możliwym terminie, bez dodatkowych opłat; lub

b) zwrot ceny biletu oraz, w odpowiednich przypadkach, bezpłatną powrotną usługę przewozu do punktu rozpoczęcia podróży, określonego w umowie przewozu, w najwcześniejszym możliwym terminie.

2. W przypadku gdy usługa przewozu pasażerskiego zostaje odwołana lub jeżeli odjazd jest opóźniony o ponad 90 minut, pasażerowie mają prawo do takiej podróży zmienioną trasą do miejsca docelowego lub uzyskania zwrotu ceny biletu od przewoźnika.

3. Zwrot, o którym mowa w ust. 1 lit. b) i ust. 2, jest dokonywany w ciągu siedmiu dni, gotówką, elektronicznym przelewem bankowym, przekazem bankowym lub czekiem bankowym w wysokości pełnego kosztu biletu według ceny zakupu, za niewykonaną część lub części podróży oraz za już wykonaną część lub części podróży, jeżeli podróż nie prowadzi już w żaden sposób do realizacji pierwotnego planu podróży. Za zgodą pasażera całkowity zwrot kosztów biletu może również nastąpić w postaci bonów lub innych usług o wartości odpowiadającej kwocie, za którą bilet ten został kupiony, pod warunkiem że zasady będą elastyczne, w szczególności w odniesieniu do okresu ważności i miejsca docelowego.

Artykuł 19

Odszkodowanie w przypadku opóźnionego zakończenia podróży

1. Nie tracąc prawa do przewozu, pasażerowie mogą domagać się od przewoźnika odszkodowania w przypadku opóźnionego przybycia do miejsca docelowego określonego w umowie przewozu. Minimalny poziom odszkodowania wynosi 25 % ceny biletu w przypadku opóźnienia wynoszącego co najmniej:

a) godzinę w przypadku rejsu rozkładowego trwającego do czterech godzin;

b) dwie godziny w przypadku rejsu rozkładowego trwającego dłużej niż cztery godziny, ale nieprzekraczającego ośmiu godzin;

c) trzy godziny w przypadku rejsu rozkładowego trwającego dłużej niż osiem godzin, ale nieprzekraczającego 24 godzin; lub

d) sześć godzin w przypadku rejsu rozkładowego trwającego dłużej niż 24 godziny.

Jeżeli opóźnienie ponad dwukrotnie przekracza czas określony w lit. a)–d), odszkodowanie wynosi 50 % ceny biletu.

2. Pasażerowie, którzy posiadają bilet wieloprzejazdowy lub bilet okresowy i którzy napotykają na powtarzające się opóźnienia zakończenia podróży w okresie jego ważności, mogą dochodzić odpowiedniego odszkodowania zgodnie z warunkami przyznawania odszkodowań określonymi przez przewoźnika. W warunkach tych określane są kryteria dotyczące stwierdzania opóźnienia zakończenia podróży i sposób obliczania odszkodowania.

3. Odszkodowanie oblicza się w stosunku do ceny, jaką pasażer faktycznie zapłacił za opóźnioną usługę przewozu pasażerskiego.

4. Gdy przewóz dotyczy podróży w obie strony, odszkodowanie za opóźnienie zakończenia podróży tam lub z powrotem obliczane jest na podstawie połowy ceny zapłaconej za tę usługę przewozu pasażerskiego.

5. Wypłata odszkodowania następuje w ciągu miesiąca od złożenia wniosku o odszkodowanie. Odszkodowanie może mieć postać bonów lub innych usług, o ile ich warunki są elastyczne, w szczególności w odniesieniu do okresu ważności i miejsca docelowego. Na wniosek pasażera odszkodowanie jest wypłacane w formie pieniężnej.

6. Odszkodowanie za koszt biletu nie jest pomniejszane o finansowe koszty transakcji, takie jak opłaty, koszty telekomunikacyjne lub koszty przesyłki. Przewoźnicy mogą określić kwotę minimalną, poniżej której odszkodowanie nie będzie wypłacane. Wysokość tej kwoty nie może przekraczać 6 EUR.

Artykuł 20

Zwolnienia

1. Artykuły 17, 18 i 19 nie mają zastosowania do pasażerów posiadających bilety otwarte, jeżeli czas odjazdu nie jest wyszczególniony, z wyjątkiem pasażerów posiadających bilet wieloprzejazdowy lub bilet okresowy.

2. Artykuły 17 i 19 nie mają zastosowania, jeżeli pasażer został poinformowany o odwołaniu lub opóźnieniu przed zakupem biletu lub jeżeli odwołanie lub opóźnienie wynikły z winy pasażera.

3. Artykuł 17 ust. 2 nie ma zastosowania w przypadku gdy przewoźnik udowodni, że odwołanie lub opóźnienie są spowodowane warunkami pogodowymi, które zagrażają bezpiecznej eksploatacji statku.

4. Artykuł 19 nie ma zastosowania w przypadkach, gdy przewoźnik udowodni, że odwołanie lub opóźnienie zostało spowodowane warunkami pogodowymi zagrażającymi bezpiecznej eksploatacji statku lub nadzwyczajnymi okolicznościami utrudniającymi wykonanie usługi przewozu pasażerskiego, których nie można było uniknąć nawet przy podjęciu wszelkich racjonalnych środków.

Artykuł 21

Dalsze roszczenia

Niniejsze rozporządzenie nie uniemożliwia pasażerom dochodzenia przed sądami krajowymi zgodnie z prawem krajowym odszkodowania za straty wynikające z odwołania lub opóźnienia usług przewozu, w tym na podstawie dyrektywy 90/314/EWG.

ROZDZIAŁ IV

PRZEPISY OGÓLNE DOTYCZĄCE INFORMACJI I SKARG

Artykuł 22

Prawo do informacji dotyczących podróży

Przewoźnicy i operatorzy terminali w ramach swoich odpowiednich zakresów działalności dostarczają pasażerom odpowiednich informacji podczas całej podróży w przystępnych wszystkim formach w tych samych językach, w których informacje są zazwyczaj podawane wszystkim pasażerom. Szczególną uwagę zwraca się na potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej.

Artykuł 23

Informacje o prawach pasażerów

1. Przewoźnicy, operatorzy terminali i w odpowiednich przypadkach władze portowe w ramach swoich odpowiednich zakresów kompetencji zapewniają podawanie do publicznej wiadomości zarówno na statkach, w portach, o ile to możliwe, i w terminalach portowych informacji dotyczących praw przysługujących pasażerom na mocy niniejszego rozporządzenia. Informacje te są podawane w miarę możliwości w przystępnych formach w tych samych językach, w których informacje są zazwyczaj podawane wszystkim pasażerom. Przy podawaniu tych informacji szczególną uwagę zwraca się na potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej.

2. W celu spełnienia obowiązku informacyjnego, o którym mowa w ust. 1, przewoźnicy i operatorzy terminali oraz w odpowiednich przypadkach władze portowe mogą korzystać ze streszczenia przepisów niniejszego rozporządzenia przygotowanego przez Komisję we wszystkich językach urzędowych instytucji Unii Europejskiej, które jest im udostępniane.

3. Przewoźnicy, operatorzy terminali i w odpowiednich przypadkach władze portowe informują pasażerów we właściwy sposób na statkach, w portach, o ile to możliwe i w terminalach portowych o danych kontaktowych organu odpowiedzialnego za egzekwowanie przepisów wyznaczonego przez zainteresowane państwo członkowskie na mocy art. 25 ust. 1.

Artykuł 24

Skargi

1. Przewoźnicy i operatorzy terminali tworzą lub stosują istniejący przystępny mechanizm rozpatrywania skarg dotyczących praw i obowiązków objętych niniejszym rozporządzeniem.

2. W przypadku gdy pasażer objęty niniejszym rozporządzeniem chce wnieść skargę do przewoźnika lub operatora terminalu, składa ją w ciągu dwóch miesięcy od dnia, w którym wykonana została usługa lub w którym powinna była ona zostać wykonana. W ciągu miesiąca od dnia wpłynięcia skargi przewoźnik lub operator terminalu powiadamia pasażera, że jego skarga została uznana, oddalona lub jest w dalszym ciągu rozpatrywana. Termin, w jakim ma zostać udzielona ostateczna odpowiedź, nie może być dłuższy niż dwa miesiące od dnia otrzymania skargi.

ROZDZIAŁ V

EGZEKWOWANIE PRZEPISÓW I KRAJOWE ORGANY ODPOWIEDZIALNE ZA EGZEKWOWANIE PRZEPISÓW

Artykuł 25

Organy krajowe odpowiedzialne za egzekwowanie przepisów

1. Każde państwo członkowskie wyznacza nowy lub istniejący organ lub organy odpowiedzialne za egzekwowanie niniejszego rozporządzenia w zakresie usług przewozu pasażerskiego i rejsów wycieczkowych z portów położonych na jego terytorium oraz usług przewozu pasażerskiego z państwa trzeciego do takich portów. Każdy organ podejmuje środki konieczne do zapewnienia przestrzegania niniejszego rozporządzenia.

Każdy organ – pod względem swojej organizacji, decyzji finansowych, struktury prawnej i procesu decyzyjnego – jest niezależny od interesów handlowych.

2. Państwa członkowskie informują Komisję o organie lub organach wyznaczonych zgodnie z niniejszym artykułem.

3. Każdy pasażer może zgodnie z prawem krajowym wnieść skargę do właściwego organu wyznaczonego na mocy ust. 1 lub do jakiegokolwiek innego właściwego organu wyznaczonego przez państwo członkowskie w sprawie domniemanego naruszenia niniejszego rozporządzenia. Właściwy organ dostarcza pasażerom uzasadnioną odpowiedź na skargę w rozsądnym terminie.

Państwo członkowskie może postanowić, że:

a) na pierwszym etapie pasażer wnosi skargę na podstawie niniejszego rozporządzenia do przewoźnika lub operatora terminalu; lub

b) krajowy organ odpowiedzialny za egzekwowanie przepisów lub inny odpowiedni organ wyznaczony przez państwo członkowskie działa jako instancja odwoławcza w odniesieniu do skarg dotyczących sporów, które nie zostały rozwiązane na podstawie art. 24.

4. Państwa członkowskie, które postanowiły objąć niektóre usługi odstępstwem zgodnie z art. 2 ust. 4, zapewniają istnienie porównywalnego mechanizmu egzekwowania praw pasażerów.

Artykuł 26

Sprawozdanie dotyczące egzekwowania rozporządzenia

Do dnia 1 czerwca 2015 r., a następnie co dwa lata, organy odpowiedzialne za egzekwowanie przepisów wyznaczone na mocy art. 25 podają do publicznej wiadomości sprawozdanie ze swoich działań w ciągu poprzedzających dwóch lat kalendarzowych, zawierające w szczególności opis działań podjętych w celu wprowadzenia w życie przepisów niniejszego rozporządzenia, szczegółowe informacje na temat zastosowanych kar oraz dane statystyczne dotyczące skarg i zastosowanych kar.

Artykuł 27

Współpraca między organami odpowiedzialnymi za egzekwowanie przepisów

Krajowe organy odpowiedzialne za egzekwowanie przepisów, o których mowa w art. 25 ust. 1, wymieniają między sobą informacje dotyczące swojej pracy, zasad podejmowania decyzji oraz praktyk w zakresie koniecznym do spójnego stosowania niniejszego rozporządzenia. Komisja wspomaga je w wykonywaniu tego zadania.

Artykuł 28

Sankcje

Państwa członkowskie przyjmują przepisy dotyczące sankcji mających zastosowanie w przypadku naruszeń przepisów niniejszego rozporządzenia i podejmują wszelkie niezbędne środki, aby zapewnić ich stosowanie. Przewidziane sankcje muszą być skuteczne, proporcjonalne i odstraszające. Państwa członkowskie powiadamiają Komisję o tych przepisach i środkach w terminie do dnia 18 grudnia 2012 r. i powiadamiają ją niezwłocznie o wszystkich późniejszych zmianach, które ich dotyczą.

ROZDZIAŁ VI

POSTANOWIENIA KOŃCOWE

Artykuł 29

Sprawozdanie

W terminie do dnia 19 grudnia 2015 r. Komisja przedstawia Parlamentowi Europejskiemu i Radzie sprawozdanie dotyczące funkcjonowania i skutków niniejszego rozporządzenia. Sprawozdaniu w razie konieczności towarzyszą wnioski legislacyjne dotyczące dalszego szczegółowego wykonania przepisów niniejszego rozporządzenia lub zmieniające niniejsze rozporządzenie.

Artykuł 30

Zmiany w rozporządzeniu (WE) nr 2006/2004

W załączniku do rozporządzenia (WE) nr 2006/2004 dodaje się punkt w brzmieniu:

„18. Rozporządzenie Parlamentu Europejskiego i Rady (UE) nr 1177/2010 z dnia 24 listopada 2010 r. o prawach pasażerów podróżujących drogą morską i drogą wodną śródlądową (*).

(*) Dz.U. L 334, 17.12.2010, s. 1.”

Artykuł 31

Wejście w życie

Niniejsze rozporządzenie wchodzi w życie dwudziestego dnia po jego opublikowaniu w *Dzienniku Urzędowym Unii Europejskiej*.

Niniejsze rozporządzenie stosuje się od dnia 18 grudnia 2012 r.

Niniejsze rozporządzenie wiąże w całości i jest bezpośrednio stosowane we wszystkich państwach członkowskich.

Sporządzono w Strasburgu dnia 24 listopada 2010 r.

W imieniu Parlamentu Europejskiego
Przewodniczący
J. BUZEK

W imieniu Rady
Przewodniczący
O. CHASTEL

ZAŁĄCZNIK I

PRAWO DO ZWROTU KOSZTÓW LUB ZMIANY TRASY PRZYSŁUGUJĄCE OSOBOM NIEPEŁNOSPRAWNYM I OSOBOM O OGRANICZONEJ SPRAWNOŚCI RUCHOWEJ, O KTÓRYCH MOWA W ART. 8

1. W przypadku odesłania do niniejszego załącznika osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej proponuje się do wyboru:

   a) — zwrot, w ciągu siedmiu dni, gotówką, elektronicznym przelewem bankowym, przekazem bankowym lub czekiem bankowym całości kosztu biletu według ceny zakupu, za niewykonaną część lub części podróży oraz za już wykonaną część lub części podróży, jeżeli podróż nie prowadzi już w żaden sposób do realizacji pierwotnego planu podróży, a także, w stosownych przypadkach,

   — podróż powrotną do miejsca rozpoczęcia podróży, w najbliższym możliwym terminie; lub

   b) podróż zmienioną trasą do miejsca docelowego określonego w umowie przewozu, bez dodatkowych kosztów i w porównywalnych warunkach, w najwcześniejszym możliwym terminie; lub

   c) podróż zmienioną trasą do miejsca docelowego określonego w umowie przewozu, w porównywalnych warunkach, w późniejszym terminie dogodnym dla pasażera, w zależności od dostępności biletów.

2. Ustępy 1 lit. a) ma również zastosowanie do pasażerów, których podróż stanowi część pakietu, z wyjątkiem prawa do zwrotu kosztów, gdy to prawo wynika z dyrektywy 90/314/EWG.

3. Jeżeli – w przypadku gdy miasto lub region są obsługiwane przez kilka portów – przewoźnik oferuje pasażerowi podróż do alternatywnego portu, innego niż wskazany w rezerwacji, przewoźnik ponosi koszt przewozu pasażera z tego alternatywnego portu do portu wskazanego w rezerwacji lub do innego pobliskiego miejsca docelowego uzgodnionego z pasażerem.

ZAŁĄCZNIK II

POMOC W PORTACH, O KTÓREJ MOWA W ART. 10 I 13, W TYM PODCZAS WCHODZENIA NA POKŁAD I SCHODZENIA NA LĄD

1. Pomoc i rozwiązania niezbędne, by osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej mogły:

   — poinformować o swoim przybyciu do terminalu portowego lub – o ile to możliwe – do portu i zwrócić się o pomoc,

   — przemieścić się od wejścia do stanowiska odprawy (jeżeli takie istnieje) lub na statek,

   — dokonać odprawy i nadać bagaż, gdy to konieczne,

   — przejść ze stanowiska odprawy (jeżeli takie istnieje) na statek przez punkty kontroli paszportowej i bezpieczeństwa,

   — wejść na pokład statku, korzystając z wind, wózków inwalidzkich lub innej potrzebnej pomocy, odpowiednio do sytuacji,

   — przemieścić się od wejścia na pokład do części, w której znajdują się ich miejsca,

   — przechować i odebrać bagaż na statku,

   — przemieścić się ze swojego miejsca do wejścia na pokład,

   — zejść z pokładu statku, korzystając z udostępnionych wind, wózków inwalidzkich lub innej potrzebnej pomocy, odpowiednio do sytuacji,

   — odebrać bagaż, gdy to konieczne, i przejść przez punkty kontroli paszportowej i celnej,

   — dostać się z hali bagażowej lub punktu zejścia z pokładu do wskazanego wyjścia,

   — w razie potrzeby przemieszczać się do toalet (jeżeli takie istnieją).

2. W przypadku gdy osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej pomaga osoba towarzysząca, należy zezwolić tej osobie na udzielanie, na życzenie, koniecznej pomocy w porcie oraz podczas wejścia na pokład i zejścia z pokładu.

3. Zajęcie się wszelkim niezbędnym sprzętem ułatwiającym poruszanie się, w tym wózkami inwalidzkimi z napędem elektrycznym.

4. Tymczasowe udostępnienie będącego stosowną alternatywą sprzętu ułatwiającego poruszanie się zastępującego sprzęt uszkodzony lub zagubiony.

5. W stosownych przypadkach, naziemna obsługa uznanych psów asystujących.

6. Podawanie w przystępnych formach informacji potrzebnych przy wchodzeniu na pokład i schodzeniu na ląd.

ZAŁĄCZNIK III

POMOC NA POKŁADZIE STATKÓW, O KTÓREJ MOWA W ART. 10 I 13

1. Przewóz uznanych psów asystujących na statku, z zastrzeżeniem przepisów krajowych.

2. Przewóz sprzętu medycznego oraz sprzętu umożliwiającego poruszanie się niezbędnego osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej, w tym wózków elektrycznych.

3. Podawanie w przystępnych formach istotnych informacji o trasie.

4. Podjęcie wszelkich niezbędnych starań w celu udostępnienia, na prośbę, miejsc siedzących stosownie do potrzeb osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej z zastrzeżeniem wymogów bezpieczeństwa i zależnie od dostępności.

5. W razie potrzeby pomoc w przemieszczaniu się do toalet (jeżeli takie istnieją).

6. W przypadku gdy osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej pomaga osoba towarzysząca, przewoźnik podejmuje wszelkie racjonalne starania, aby zapewnić takiej osobie miejsce lub kabinę obok danej osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej.

ZAŁĄCZNIK IV

SZKOLENIE W ZAKRESIE NIEPEŁNOSPRAWNOŚCI, O KTÓRYM MOWA W ART. 14, W TYM INSTRUKTAŻ

A. Szkolenie w zakresie wiedzy na temat niepełnosprawności, w tym instruktaż

Szkolenie w zakresie wiedzy na temat niepełnosprawności, w tym instruktaż, obejmuje:

— wiedzę i umiejętności potrzebne do właściwego reagowania na pasażerów z niepełnosprawnością fizyczną, niepełnosprawnością w zakresie narządów zmysłów (słuchu i wzroku), z niepełnosprawnością ukrytą lub z trudnościami w uczeniu się, w tym umiejętność właściwej oceny zróżnicowanych możliwości osób, których sprawność ruchowa, orientacja przestrzenna lub zdolności komunikacyjne mogą być ograniczone,

— bariery, w obliczu których stoją osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej, w tym bariery w zakresie postaw psychicznych, bariery środowiskowe/fizyczne i organizacyjne,

— uznane psy asystujące, w tym zadania i potrzeby psa asystującego,

— reagowanie w nieoczekiwanych sytuacjach,

— umiejętności interpersonalne i metody komunikacji z osobami z uszkodzeniem słuchu, z uszkodzeniem wzroku lub z uszkodzeniem mowy i z osobami z trudnościami w uczeniu się,

— ogólna wiedza na temat wytycznych IMO związanych z zaleceniem w sprawie projektowania i eksploatacji statków pasażerskich odpowiadających potrzebom osób starszych i niepełnosprawnych.

B. Szkolenie w zakresie pomocy osobom niepełnosprawnym, w tym instruktaż

Szkolenie w zakresie pomocy osobom niepełnosprawnym, w tym instruktaż, obejmuje:

— umiejętność udzielania użytkownikom wózków inwalidzkich pomocy w przemieszczaniu się na wózek i z wózka,

— umiejętności udzielania pomocy osobom niepełnosprawnym oraz osobom o ograniczonej sprawności ruchowej podróżującym z uznanym psem asystującym, z uwzględnieniem roli i potrzeb takich zwierząt,

— techniki eskortowania pasażerów z uszkodzeniem wzroku oraz postępowania z uznanymi psami asystującymi i przewożenia ich,

— znajomość rodzajów sprzętu, który może być wykorzystywany przez osoby niepełnosprawne oraz osoby o ograniczonej sprawności ruchowej, a także umiejętność ostrożnego obchodzenia się z takim sprzętem,

— użycie sprzętu umożliwiającego wsiadanie i wysiadanie oraz znajomość właściwych procedur wsiadania i wysiadania, chroniących bezpieczeństwo i godność osób niepełnosprawnych oraz osób o ograniczonej sprawności ruchowej,

— zrozumienie potrzeby niezawodnej i profesjonalnej pomocy. Również świadomość, że niektóre osoby niepełnosprawne mogą doświadczać podczas podróży uczucia zagrożenia ze względu na zależność od udzielenia pomocy,

— znajomość zasad pierwszej pomocy.

ROZPORZĄDZENIE (WE) NR 1371/2007 PARLAMENTU EUROPEJSKIEGO I RADY

z dnia 23 października 2007 r.

dotyczące praw i obowiązków pasażerów w ruchu kolejowym

PARLAMENT EUROPEJSKI I RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat ustanawiający Wspólnotę Europejską, w szczególności jego art. 71 ust. 1,

uwzględniając wniosek Komisji,

uwzględniając opinię Europejskiego Komitetu Ekonomiczno-Społecznego [1],

uwzględniając opinię Komitetu Regionów [2],

stanowiąc zgodnie z procedurą przewidzianą w art. 251 Traktatu w świetle wspólnego tekstu zatwierdzonego przez komitet pojednawczy w dniu 31 lipca 2007 r. [3],

a także mając na uwadze, co następuje:

(1) W ramach wspólnej polityki transportowej istotne jest zapewnienie ochrony praw pasażerów w ruchu kolejowym oraz podniesienie jakości i efektywności kolejowych usług pasażerskich, aby zwiększyć udział transportu kolejowego w stosunku do innych środków transportu.

(2) Komunikat Komisji: „Strategia polityki ochrony konsumentów na lata 2002–2006" [4] stawia za cel osiągnięcie wysokiego poziomu ochrony konsumentów w dziedzinie przewozów, zgodnie z art. 153 ust. 2 Traktatu.

(3) Ponieważ pasażer w ruchu kolejowym jest słabszą stroną umowy transportu, prawa pasażera powinny podlegać ochronie.

(4) Prawa użytkowników w ruchu kolejowym obejmują otrzymywanie informacji dotyczących połączenia zarówno przed podróżą i w jej trakcie. O ile to tylko możliwe, przedsiębiorstwa kolejowe i sprzedawcy biletów powinni przekazywać te informacje z odpowiednim wyprzedzeniem i jak najszybciej.

(5) Bardziej szczegółowe wymagania dotyczące przekazywania informacji o podróży zostaną określone w specyfikacjach technicznych w zakresie interoperacyjności (TSI), o których mowa w dyrektywie 2001/16/WE Parlamentu Europejskiego i Rady z dnia 19 marca 2001 r. w sprawie interoperacyjności systemu kolei konwencjonalnych [5].

(6) Wzmocnienie praw pasażerów w ruchu kolejowym powinno opierać się na istniejącym systemie prawa międzynarodowego w tej dziedzinie zawartym w załączniku A — Przepisy ujednolicone o umowie międzynarodowego przewozu osób i bagażu kolejami (CIV) do Konwencji o międzynarodowym przewozie kolejami (COTIF) z dnia 9 maja 1980 r., ze zmianami zawartymi w Protokole wprowadzającym zmiany do Konwencji o międzynarodowym przewozie kolejami z dnia 3 czerwca 1999 r. (Protokół z 1999 r.). Pożądane jest jednak rozszerzenie zakresu stosowania niniejszego rozporządzenia, tak aby zapewnić ochronę nie tylko pasażerom w międzynarodowym ruchu kolejowym, ale także pasażerom w krajowym ruchu kolejowym.

(7) Przedsiębiorstwa kolejowe powinny współpracować w celu ułatwienia transferu pasażerów w ruchu kolejowym pomiędzy jednym operatorem a innym poprzez zapewnienie, kiedy tylko jest to możliwe, biletów bezpośrednich.

(8) Dostarczanie informacji i wystawianie biletów pasażerom w ruchu kolejowym powinno być ułatwione poprzez dostosowanie systemów komputerowych do wspólnych wymogów.

(9) Dalsze wdrażanie systemów informacji o podróży oraz rezerwacji powinno odbywać się zgodnie z TSI.

(10) Z kolejowych usług pasażerskich powinni móc korzystać wszyscy obywatele. Dlatego osoby niepełnosprawne oraz osoby o ograniczonej sprawności ruchowej spowodowanej niepełnosprawnością, wiekiem lub jakimkolwiek innym czynnikiem powinny mieć możliwość podróżowania koleją porównywalną z możliwością innych obywateli. Osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej mają takie samo jak wszyscy inni obywatele prawo do swobodnego przemieszczania się, swobodnego wyboru i niedyskryminacji. Należy między innymi zwrócić szczególną uwagę na przekazywanie osobom niepełnosprawnym oraz osobom o ograniczonej sprawności ruchowej informacji na temat dostępności przewozów kolejowych, warunków dostępu do taboru kolejowego i wyposażenia w pociągach. W celu możliwie najlepszego przekazywania informacji o opóźnieniach pasażerom dotkniętym niepełnosprawnością sensoryczną należy korzystać w razie potrzeby z systemów informacji wizualnej i głosowej. Osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej powinny mieć możliwość zakupu biletu w pociągu bez dodatkowych opłat.

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[1] Dz.U. C 221 z 8.9.2005, str. 8.

[2] Dz.U. C 71 z 22.3.2005, str. 26.

[3] Opinia Parlamentu Europejskiego z dnia 28 września 2005 r. (Dz.U. C 227 E z 21.9.2006, str. 490), wspólne stanowisko Rady z dnia 24 lipca 2006 r. (Dz.U. C 289 E z 28.11.2006, str. 1), stanowisko Parlamentu Europejskiego z dnia 18 stycznia 2007 r. (dotychczas nieopublikowane w Dzienniku Urzędowym), rezolucja legislacyjna Parlamentu Europejskiego z dnia 25 września 2007 r. oraz decyzja Rady z dnia 26 września 2007 r.

[4] Dz.U. C 137 z 8.6.2002, str. 2.

[5] Dz.U. L 110 z 20.4.2001, str. 1. Dyrektywa ostatnio zmieniona dyrektywą Komisji 2007/32/WE (Dz.U. L 141 z 2.6.2007, str. 63).

(11) Postępując zgodnie z TSI dla osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej, przedsiębiorstwa kolejowe i zarządcy stacji powinni uwzględniać potrzeby osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej, w celu zapewnienia, zgodnie ze wspólnotowymi zasadami zamówień publicznych, dostępność wszystkich budynków i całego taboru poprzez stopniową eliminację barier fizycznych i przeszkód funkcjonalnych przy zakupie nowego wyposażenia, przeprowadzaniu prac budowlanych lub istotnych prac remontowych.

(12) Przedsiębiorstwa kolejowe powinny być zobowiązane do ubezpieczenia się lub zawarcia równoważnych umów od odpowiedzialności wobec pasażerów za wypadki w ruchu kolejowym. Minimalna kwota ubezpieczenia w odniesieniu do przedsiębiorstw kolejowych powinna być w przedmiotem przyszłego przeglądu.

(13) Wzmocnione prawa do odszkodowania i pomocy w przypadku opóźnienia, utraty połączenia lub odwołania połączenia powinny wpłynąć stymulująco na rynek pasażerskich przewozów kolejowych, z korzyścią dla pasażerów.

(14) Pożądane jest, aby niniejsze rozporządzenie stworzyło system odszkodowań dla pasażerów w przypadku opóźnień, powiązany z odpowiedzialnością przedsiębiorstwa kolejowego, na takiej samej zasadzie jak system międzynarodowy przewidziany w konwencji COTIF, a zwłaszcza w załączniku CIV do niej, odnoszącym się do praw pasażerów.

(15) Jeżeli państwo członkowskie przyznaje przedsiębiorstwom kolejowym zwolnienie ze stosowania przepisów niniejszego rozporządzenia, powinno ono zachęcać przedsiębiorstwa kolejowe, w porozumieniu z organizacjami reprezentującymi pasażerów, do ustanowienia systemu rekompensat i pomocy w przypadku poważnego zakłócenia kolejowych usług pasażerskich.

(16) Pożądane jest również przyznanie ofiarom wypadków i osobom będącym na ich utrzymaniu pomocy finansowej na zaspokojenie ich krótkoterminowych potrzeb w okresie następującym bezpośrednio po wypadku.

(17) W interesie pasażerów w ruchu kolejowym jest podejmowanie, w porozumieniu z władzami publicznymi, odpowiednich działań w celu zapewnienia bezpieczeństwa osobistego na stacjach oraz w pociągach.

(18) Pasażerowie w ruchu kolejowym powinni mieć możliwość złożenia skargi do każdego przedsiębiorstwa kolejowego świadczącego daną usługę w zakresie praw i obowiązków ustanowionych niniejszym rozporządzeniem oraz powinni mieć prawo do otrzymania odpowiedzi w rozsądnym terminie.

(19) Przedsiębiorstwa kolejowe powinny określać standardy jakości obsługi w pasażerskich przewozach kolejowych, zarządzać nimi i je monitorować.

(20) Treść niniejszego rozporządzenia powinna być poddawana przeglądowi w celu dostosowania wysokości kwot do poziomu inflacji oraz dostosowania go do wymagań dotyczących informacji i jakości usług w świetle rozwoju rynku, jak też wpływu rozporządzenia na jakość usług.

(21) Niniejsze rozporządzenie powinno pozostawać bez uszczerbku dla dyrektywy 95/46/WE Parlamentu Europejskiego i Rady z dnia 24 października 1995 r. w sprawie ochrony osób fizycznych w zakresie przetwarzania danych osobowych i swobodnego przepływu tych danych ([1]).

(22) Państwa członkowskie powinny ustanowić sankcje mające zastosowanie w przypadku naruszania niniejszego rozporządzenia i zapewnić ich stosowanie. Sankcje, które mogą obejmować wypłatę odszkodowania danej osobie, powinny być skuteczne, proporcjonalne i odstraszające.

(23) Ponieważ cele niniejszego rozporządzenia, to jest rozwój kolei we Wspólnocie oraz wprowadzenie praw pasażerów nie mogą być osiągnięte w sposób wystarczający przez państwa członkowskie, natomiast możliwe jest lepsze ich osiągnięcie na szczeblu wspólnotowym, Wspólnota może podjąć działania zgodnie z zasadą pomocniczości określoną w art. 5 Traktatu. Zgodnie z zasadą proporcjonalności, określoną w tym samym artykule, niniejsze rozporządzenie nie wykracza poza to, co jest konieczne do osiągnięcia tych celów.

(24) Celem niniejszego rozporządzenia jest poprawa poziomu kolejowych usług pasażerskich we Wspólnocie. Dlatego też państwa członkowskie powinny tymczasowo mieć możliwość udzielania zwolnień dotyczących połączeń w regionach, gdzie znacząca część połączenia wykonywana jest poza Wspólnotą.

(25) Przedsiębiorstwa kolejowe w niektórych państwach członkowskich mogą mieć trudności przy stosowaniu ogółu przepisów niniejszego rozporządzenia w chwili ich wejścia w życie. Dlatego państwa członkowskie powinny mieć możliwość udzielania czasowych zwolnień ze stosowania przepisów niniejszego rozporządzenia, dotyczących krajowych kolejowych usług pasażerskich w wewnętrznym dalekobieżnym ruchu kolejowym. Jednakże czasowe zwolnienie nie ma zastosowania do przepisów niniejszego rozporządzenia gwarantujących osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej dostęp do podróżowania koleją i prawo osób zamierzających nabyć bilety na podróż koleją do uczynienia tego bez niepotrzebnych trudności, jak również do przepisów dotyczących odpowiedzialności przedsiębiorstw kolejowych za pasażerów i ich bagaż, do wymogu, aby przedsiębiorstwa te były odpowiednio ubezpieczone, i do wymogu, aby przyjęły one odpowiednie środki w celu zapewnienia pasażerom osobistego bezpieczeństwa na stacjach kolejowych i w pociągach, a także zarządzania ryzykiem.

([1]) Dz.U. L 281 z 23.11.1995, str. 31. Dyrektywa zmieniona rozporządzeniem (WE) nr 1882/2003 (Dz.U. L 284 z 31.10.2003, str. 1).

(26) Miejskie, podmiejskie i regionalne kolejowe usługi pasażerskie mają inny charakter niż usługi dalekobieżne. Dlatego państwa członkowskie powinny mieć możliwość udzielania czasowych zwolnień ze stosowania przepisów niniejszego rozporządzenia dla miejskich, podmiejskich i regionalnych kolejowych usług pasażerskich, z wyjątkiem niektórych przepisów, które powinny mieć zastosowanie do wszelkich kolejowych usług pasażerskich w całej Wspólnocie.

(27) Środki niezbędne do wprowadzenia w życie niniejszego rozporządzenia powinny zostać przyjęte zgodnie z decyzją Rady 1999/468/WE z dnia 28 czerwca 1999 r. ustanawiającą warunki wykonywania uprawnień wykonawczych przyznanych Komisji [1].

(28) Komisja powinna w szczególności posiadać uprawnienia dotyczące przyjmowania środków wykonawczych. Ponieważ środki te maja zasięg ogólny, przyjmowane są w celu zmiany elementów innych niż istotne niniejszego rozporządzenia lub uzupełnienia go przez dodanie nowych innych niż istotne elementów, muszą one zostać przyjęte zgodnie z procedurą regulacyjną połączoną z kontrolą, o której mowa w art. 5a decyzji 1999/468/WE,

PRZYJMUJĄ NINIEJSZE ROZPORZĄDZENIE:

ROZDZIAŁ I

PRZEPISY OGÓLNE

Artykuł 1

Przedmiot

Niniejsze rozporządzenie ustanawia przepisy w odniesieniu do następujących kwestii:

a) informacji dostarczanych przez przedsiębiorstwa kolejowe, zawierania umów transportowych, wystawiania biletów i wdrażania komputerowego systemu informacji i rezerwacji w transporcie kolejowym;

b) odpowiedzialności przedsiębiorstw kolejowych i ich obowiązku ubezpieczenia od odpowiedzialności wobec pasażerów oraz za ich bagaż;

c) obowiązków przedsiębiorstw kolejowych wobec pasażerów w przypadku opóźnień;

d) ochrony i pomocy zapewnianej osobom niepełnosprawnym oraz osobom o ograniczonej sprawności ruchowej podróżującym koleją;

e) określenia i monitorowania norm jakości obsługi w odniesieniu do połączeń, kontroli zagrożeń bezpieczeństwa osobistego pasażerów oraz rozpatrywania skarg; oraz

f) ogólnych zasad dotyczących egzekwowania przepisów.

[1] Dz.U. L 184 z 17.7.1999, str. 23. Decyzja zmieniona decyzją 2006/512/WE (Dz.U. L 200 z 22.7.2006, str. 11).

Artykuł 2

Zakres stosowania

1. Z zastrzeżeniem ust. 2, 3 i 4, niniejsze rozporządzenie stosuje się na terenie całej Wspólnoty w odniesieniu do wszelkich podróży i usług kolejowych wykonywanych przez jedno lub kilka przedsiębiorstw kolejowych posiadających licencję wydaną zgodnie z dyrektywą Rady 95/18/WE z dnia 19 czerwca 1995 r. w sprawie wydawania licencji przedsiębiorstwom kolejowym [2].

2. Niniejszego rozporządzenia nie stosuje się w odniesieniu do przedsiębiorstw kolejowych i usługodawców, którzy nie posiadają licencji zgodnie z dyrektywą 95/18/WE.

3. W chwili wejścia w życie niniejszego rozporządzenia art. 9, art. 11, art. 12, art. 19, art. 20 ust. 1 i art. 26 stosuje się do wszelkich kolejowych usług pasażerskich na terenie całej Wspólnoty.

4. Z zastrzeżeniem przepisów wymienionych w ust. 3 niniejszego artykułu, państwo członkowskie może w przejrzysty i niedyskryminujący sposób przyznać zwolnienie ze stosowania przepisów niniejszego rozporządzenia na okres nieprzekraczający 5 lat, który może zostać dwukrotnie przedłużony, za każdym razem na okres nieprzekraczający 5 lat, w odniesieniu do krajowych kolejowych połączeń pasażerskich.

5. Z zastrzeżeniem przepisów wymienionych w ust. 3 niniejszego artykułu, państwo członkowskie może zwolnić ze stosowania przepisów niniejszego rozporządzenia miejskie, podmiejskie i regionalne kolejowe usługi pasażerskie. W celu rozróżnienia pomiędzy miejskimi, podmiejskimi i regionalnymi kolejowymi usługami pasażerskimi państwa członkowskie stosują definicje zawarte w dyrektywie Rady 91/440/EWG z dnia 29 lipca 1991 r. w sprawie rozwoju kolei wspólnotowych [3]. Przy stosowaniu tych definicji państwa członkowskie uwzględniają następujące kryteria: odległość, częstotliwość usług, liczba planowanych przystanków, stosowany tabor kolejowy, system sprzedaży biletów, różnice w liczbie pasażerów w godzinach szczytu i poza godzinami szczytu, kody pociągów i rozkłady jazdy.

6. Na okres maksymalnie 5 lat państwo członkowskie może w przejrzysty i niedyskryminujący sposób przyznać czasowe zwolnienie, które może zostać przedłużone, ze stosowania przepisów niniejszego rozporządzenia dotyczących określonych usług lub tras, ze względu na to, że istotna część kolejowej usługi pasażerskiej, w tym co najmniej jeden planowany przystanek na stacji, ma miejsce poza Wspólnotą.

7. Państwa członkowskie powiadamiają Komisję o zwolnieniach udzielonych zgodnie z ust. 4, 5 i 6. Komisja podejmuje odpowiednie działania, jeżeli uzna, że takie zwolnienie nie jest zgodne z przepisami niniejszego artykułu. Najpóźniej do dnia 3 grudnia 2014 r. Komisja przedstawia Parlamentowi Europejskiemu i Radzie sprawozdanie dotyczące zwolnień przyznanych na podstawie ust. 4, 5 i 6 niniejszego artykułu.

[2] Dz.U. L 143 z 27.6.1995, str. 70. Dyrektywa ostatnio zmieniona dyrektywą 2004/49/WE Parlamentu Europejskiego i Rady (Dz.U. L 164 z 30.4.2004, str. 44).

[3] Dz.U. L 237 z 24.8.1991, str. 25. Dyrektywa ostatnio zmieniona dyrektywą 2006/103/WE (Dz.U. L 363 z 20.12.2006, str. 344).

Artykuł 3

Definicje

Do celów niniejszego rozporządzenia stosuje się następujące definicje:

1) „przedsiębiorstwo kolejowe” oznacza przedsiębiorstwo kolejowe określone w art. 2 dyrektywy 2001/14/WE [1] oraz każde inne przedsiębiorstwo publiczne lub prywatne, którego działalność polega na transporcie koleją towarów lub pasażerów, z zastrzeżeniem, że przedsiębiorstwo to musi zapewniać pojazdy trakcyjne; definicja ta obejmuje również przedsiębiorstwa zajmujące się tylko zapewnianiem pojazdów trakcyjnych;

2) „przewoźnik” oznacza przedsiębiorstwo kolejowe, z którym pasażer zawarł umowę przewozu lub też kilka przedsiębiorstw kolejowych, które mogą ponosić odpowiedzialność na podstawie tej umowy;

3) „przewoźnik podwykonawca” oznacza przedsiębiorstwo kolejowe, które nie zawarło umowy transportu z pasażerem, ale któremu przedsiębiorstwo kolejowe będące stroną umowy powierzyło wykonanie całości lub części przewozu koleją;

4) „zarządca infrastruktury” oznacza każdą instytucję lub przedsiębiorstwo odpowiedzialne w szczególności za stworzenie i utrzymanie infrastruktury kolejowej lub jej części, zgodnie z definicją „instytucji zarządzającej infrastrukturą” zawartą w art. 3 dyrektywy 91/440/EWG, co może również obejmować zarządzanie systemami sterowania i bezpieczeństwa infrastruktury; funkcje zarządcy infrastruktury na sieci albo jej części mogą być powierzane różnym podmiotom lub przedsiębiorstwom;

5) „zarządca stacji” oznacza jednostkę organizacyjną w państwie członkowskim, której powierzono zarządzanie stacją kolejową i która może być zarządcą infrastruktury;

6) „operator turystyczny” oznacza innego niż przedsiębiorstwo kolejowe organizatora lub punkt sprzedaży detalicznej, w rozumieniu art. 2 pkt 2 i 3 dyrektywy Rady 90/314/EWG [2];

7) „sprzedawca biletów” oznacza każdego detalicznego sprzedawcę kolejowych usług transportowych, zawierającego w imieniu przedsiębiorstwa kolejowego lub na własny rachunek umowy transportowe i sprzedającego bilety;

8) „umowa transportu” oznacza odpłatną lub nieodpłatną umowę przewozu pomiędzy przedsiębiorstwem kolejowym lub sprzedawcą biletów a pasażerem na wykonanie jednej lub więcej usług transportowych;

9) „rezerwacja” oznacza potwierdzenie na papierze lub w formie elektronicznej uprawniające do przewozu z zastrzeżeniem wcześniej potwierdzonych uzgodnień przewozowych w odniesieniu do danej osoby;

10) „bilet bezpośredni” oznacza bilet lub bilety będące dowodem zawarcia umowy transportu dotyczącej wykonania następujących po sobie połączeń kolejowych obsługiwanych przez jedno lub kilka przedsiębiorstw kolejowych;

11) „krajowa kolejowa usługa pasażerska” oznacza kolejową usługę pasażerską, podczas której pasażer nie przekracza granicy państwa członkowskiego;

12) „opóźnienie” oznacza różnicę między zaplanowanym czasem przyjazdu pasażera zgodnie z opublikowanym rozkładem jazdy a rzeczywistym lub spodziewanym czasem jego przyjazdu;

13) „abonament” lub „bilet okresowy” oznacza bilet na nieograniczoną liczbę przejazdów, umożliwiający uprawnionemu posiadaczowi przejazdy koleją na określonej trasie lub w określonej sieci w określonym czasie;

14) „komputerowy system informacji i rezerwacji w transporcie kolejowym (KSIRTK)” oznacza skomputeryzowany system zawierający informacje o połączeniach kolejowych oferowanych przez przedsiębiorstwa kolejowe; informacje zgromadzone w KSIRTK w odniesieniu do pasażerskich usług kolejowych obejmują informacje dotyczące:

   a) rozkładów jazdy połączeń pasażerskich;

   b) dostępności miejsc w połączeniach pasażerskich;

   c) opłat i warunków specjalnych;

   d) dostępności pociągów dla osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej;

   e) urządzeń do dokonywania rezerwacji lub wystawiania biletów lub biletów bezpośrednich w zakresie, w jakim część lub wszystkie te urządzenia są udostępniane użytkownikom;

15) „osoba niepełnosprawna” lub „osoba o ograniczonej sprawności ruchowej” oznacza każdą osobę, której możliwość poruszania się jest ograniczona podczas korzystania z transportu na skutek jakiejkolwiek niesprawności fizycznej (zmysłowej lub ruchowej, trwałej lub przejściowej), upośledzenia lub niesprawności umysłowej, lub każdej innej przyczyny niepełnosprawności, lub na skutek wieku, i której sytuacja wymaga specjalnej uwagi oraz dostosowania usług dostępnych dla wszystkich pasażerów do szczególnych potrzeb takiej osoby;

16) „ogólne warunki przewozu” oznaczają warunki przewoźnika w postaci ogólnych warunków umów lub taryf prawnie obowiązujących w każdym państwie członkowskim, które z chwilą zawarcia umowy o przewóz stają się jej integralną częścią;

17) „pojazd” oznacza pojazd silnikowy lub przyczepę przewożoną przy okazji przewozu pasażerów.

[1] Dyrektywa 2001/14/WE Parlamentu Europejskiego i Rady z dnia 26 lutego 2001 r. w sprawie alokacji zdolności przepustowej infrastruktury kolejowej i pobierania opłat za użytkowanie infrastruktury kolejowej (Dz.U. L 75 z 15.3.2001, str. 29). Dyrektywa ostatnio zmieniona dyrektywą 2004/49/WE.

[2] Dyrektywa Rady 90/314/EWG z dnia 13 czerwca 1990 r. w sprawie zorganizowanych podróży, wakacji i wycieczek (Dz.U. L 158 z 23.6.1990, str. 59).

ROZDZIAŁ II

UMOWA TRANSPORTU, INFORMACJE ORAZ BILETY

Artykuł 4

Umowa transportu

Z zastrzeżeniem przepisów niniejszego rozdziału, zawieranie i sposób realizacji umowy transportu oraz dostarczanie informacji i wystawianie biletów podlegają przepisom tytułu II oraz tytułu III załącznika I.

Artykuł 5

Rowery

Przedsiębiorstwa kolejowe umożliwiają pasażerom przewóz rowerów w pociągu, jeżeli są one łatwe do przemieszczania, nie zakłócają świadczenia danej usługi kolejowej i jeżeli umożliwia to tabor, w odpowiednich przypadkach za opłatą.

Artykuł 6

Wykluczenie wyłączeń i ograniczeń

1. Zobowiązania wobec pasażerów wynikające z niniejszego rozporządzenia nie podlegają ograniczeniu lub wyłączeniu, zwłaszcza na mocy klauzuli derogacyjnej lub ograniczającej zawartej w umowie transportowej.

2. Przedsiębiorstwa kolejowe mogą oferować pasażerom warunki umowne, które są korzystniejsze od określonych w niniejszym rozporządzeniu.

Artykuł 7

Obowiązek informowania o zaprzestaniu obsługi połączeń

Przedsiębiorstwa kolejowe lub, w razie potrzeby, właściwe organy odpowiadające za umowy o świadczenie publicznej usługi kolejowej podają do wiadomości publicznej, przy wykorzystaniu odpowiednich środków, decyzje o zaprzestaniu obsługi połączeń, przed ich wejściem w życie.

Artykuł 8

Informacje dotyczące podróży

1. Bez uszczerbku dla art. 10 przedsiębiorstwa kolejowe oraz sprzedawcy biletów w imieniu jednego lub kilku przedsiębiorstw kolejowych udzielają pasażerowi na jego żądanie przynajmniej informacji wymienionych w załączniku II część I, w odniesieniu do podróży objętych umowami transportowymi oferowanymi przez dane przedsiębiorstwo kolejowe. Sprzedawcy biletów, którzy oferują umowy transportowe we własnym imieniu, oraz operatorzy turystyczni dostarczają tych informacji, jeżeli są one dostępne.

2. Przedsiębiorstwa kolejowe dostarczają pasażerowi w trakcie podróży przynajmniej informacji wymienionych w załączniku II część II.

3. Informacje, o których mowa w ust.1 i 2, dostarczane są w najbardziej odpowiedniej formie. Szczególną uwagę poświęca się w tym zakresie potrzebom osób z upośledzeniem słuchu lub wzroku.

Artykuł 9

Dostępność biletów, biletów bezpośrednich i rezerwacji

1. Przedsiębiorstwa kolejowe oraz sprzedawcy biletów oferują, tam gdzie jest to możliwe, bilety oraz bilety bezpośrednie i rezerwacje.

2. Bez uszczerbku dla ust. 4 przedsiębiorstwa kolejowe dystrybuują wśród pasażerów bilety za pośrednictwem przynajmniej jednego z następujących sposobów sprzedaży:

a) w kasach biletowych lub w automatach biletowych;

b) za pośrednictwem telefonu, Internetu lub jakichkolwiek innych, powszechnie dostępnych technologii informacyjnych;

c) w pociągach.

3. Bez uszczerbku dla ust. 4 i 5 przedsiębiorstwa kolejowe w ramach umów o świadczenie usług publicznych rozprowadzają bilety w przynajmniej jeden z następujących sposobów:

a) w kasach biletowych lub w automatach biletowych;

b) w pociągach.

4. Przedsiębiorstwa kolejowe zapewniają możliwość nabycia w pociągu biletów na dane połączenie, chyba że możliwość taka jest ograniczona albo wyłączona ze względów bezpieczeństwa lub zwalczania nadużyć, z powodu obowiązku wcześniejszej rezerwacji lub z uzasadnionych względów handlowych.

5. Jeżeli na stacji początkowej nie ma kasy ani automatu biletowego, pasażerowie muszą zostać poinformowani na stacji o:

a) możliwości i sposobie dokonania zakupu biletu telefonicznie, za pośrednictwem Internetu lub w pociągu;

b) najbliższej stacji kolejowej lub miejscu, w którym znajdują się kasy lub automaty biletowe.

Artykuł 10

Informacje dotyczące podróży oraz systemy rezerwacji

1. W celu dostarczania informacji oraz wystawiania biletów, o których mowa w niniejszym rozporządzeniu, przedsiębiorstwa kolejowe i sprzedawcy biletów korzystają z systemu KSIRTK, który ma zostać utworzony przy zastosowaniu procedur, o których mowa w niniejszym artykule.

2. Do celów niniejszego rozporządzenia stosuje się techniczne specyfikacje interoperacyjności (TSI), o których mowa w dyrektywie 2001/16/WE.

3. Komisja, na wniosek Europejskiej Agencji Kolejowej (ERA), przyjmuje w terminie do dnia 3 grudnia 2010 r. podsystem TSI dotyczący aplikacji telematycznych dla usług pasażerskich. TSI umożliwiają dostarczanie informacji wymienionych w załączniku II oraz wystawianie biletów zgodnie z niniejszym rozporządzeniem.

4. Przedsiębiorstwa kolejowe dostosowują swoje KSIRTK do wymagań określonych w TSI, zgodnie z planem rozmieszczenia, określonym w tym TSI.

5. Z zastrzeżeniem przepisów dyrektywy 95/46/WE, żadne przedsiębiorstwo kolejowe ani sprzedawca biletów nie ujawnia innym przedsiębiorstwom kolejowym lub sprzedawcom biletów informacji dotyczących osób odnoszących się do poszczególnych rezerwacji.

ROZDZIAŁ III

ODPOWIEDZIALNOŚĆ PRZEDSIĘBIORSTW KOLEJOWYCH ZA PASAŻERÓW ORAZ ICH BAGAŻ

Artykuł 11

Odpowiedzialność wobec pasażerów i za bagaż

Z zastrzeżeniem przepisów niniejszego rozdziału i bez uszczerbku dla mających zastosowanie przepisów krajowych przyznających pasażerom prawo do odszkodowania, odpowiedzialność przedsiębiorstwa kolejowego wobec pasażerów oraz za ich bagaż regulowana jest przepisami rozdziałów I, III i IV tytułu IV oraz tytułu VI i tytułu VII załącznika I.

Artykuł 12

Ubezpieczenie

1. Obowiązek określony w art. 9 dyrektywy 95/18/WE w zakresie dotyczącym odpowiedzialności wobec pasażerów należy rozumieć jako wymóg posiadania odpowiedniego ubezpieczenia przez przedsiębiorstwo kolejowe lub przedstawienia przez nie równoważnego zabezpieczenia w zakresie jego odpowiedzialności wynikającej z niniejszego rozporządzenia.

2. Komisja w terminie do dnia 3 grudnia 2010 r. przedstawia Parlamentowi Europejskiemu i Radzie sprawozdanie na temat ustalenia minimalnej kwoty ubezpieczenia przedsiębiorstw kolejowych. W razie potrzeby sprawozdanie to jest uzupełniane odpowiednimi wnioskami lub zaleceniami w tej sprawie.

Artykuł 13

Zaliczki

1. W przypadku śmierci lub zranienia pasażera przedsiębiorstwo kolejowe, zgodnie z art. 26 ust. 5 załącznika I, niezwłocznie, a w każdym razie nie później niż piętnaście dni od ustalenia tożsamości osoby fizycznej uprawnionej do odszkodowania, wypłaca zaliczkę w wysokości niezbędnej do zaspokojenia bieżących potrzeb finansowych, proporcjonalnie do odniesionej szkody.

2. Bez uszczerbku dla przepisów ust. 1 zaliczka w razie śmierci nie może być niższa niż 21000 EUR na pasażera.

3. Zaliczka nie stanowi uznania odpowiedzialności i może być potrącona z kolejnych kwot wypłacanych na podstawie niniejszego rozporządzenia, ale nie podlega zwrotowi — z wyjątkiem przypadków, gdy szkoda powstała na skutek zaniedbania ze strony pasażera lub z jego winy albo gdy osoba, która otrzymała zaliczkę, nie była uprawniona do odszkodowania.

Artykuł 14

Kwestionowanie odpowiedzialności

Nawet jeżeli przedsiębiorstwo kolejowe kwestionuje swoją odpowiedzialność za uszkodzenia ciała doznane przez przewożonego przez siebie pasażera, podejmie ono wszelkie racjonalne środki w celu udzielenia pomocy pasażerowi, który dochodzi odszkodowania od osób trzecich.

ROZDZIAŁ IV

OPÓŹNIENIA, UTRATA POŁĄCZEŃ ORAZ ODWOŁANIA POCIĄGÓW

Artykuł 15

Odpowiedzialność za opóźnienie, utratę połączeń i odwołanie pociągu

Z zastrzeżeniem przepisów niniejszego rozdziału, odpowiedzialność przedsiębiorstwa kolejowego za opóźnienia, utratę połączeń oraz odwołania pociągów regulowana jest postanowieniami tytułu IV rozdział II załącznika I.

Artykuł 16

Zwrot kosztów biletu oraz zmiana trasy

W przypadku gdy istnieją uzasadnione powody, aby przypuszczać, że opóźnienie przyjazdu do miejsca przeznaczenia przekroczy 60 minut w stosunku do umowy transportu, pasażer otrzymuje natychmiast wybór pomiędzy:

a) zwrotem pełnego kosztu biletu na warunkach, na jakich został opłacony, za część lub części niezrealizowanej podróży oraz za część lub części już zrealizowane, jeżeli taka podróż jest już bezcelowa w kontekście pierwotnego planu podróży, wraz z zapewnieniem w odpowiednich przypadkach połączenia powrotnego do miejsca wyjazdu w najbliższym dostępnym terminie. Zwrot jest dokonywany na takich samych warunkach jak wypłata odszkodowania, o którym mowa w art. 17; albo

b) kontynuacją lub zmianą trasy podróży, przy porównywalnych warunkach przewozu, do miejsca docelowego w najbliższym dostępnym terminie; albo

c) kontynuacją lub zmianą trasy podróży, przy porównywalnych warunkach przewozu, do miejsca docelowego w późniejszym terminie dogodnym dla pasażera.

Artykuł 17

Odszkodowanie

1. Nie tracąc prawa do przewozu, pasażer może zażądać od przedsiębiorstwa kolejowego odszkodowania za opóźnienie w przypadku opóźnienia pomiędzy podanym na bilecie miejscem wyjazdu i miejscem docelowym, za które nie otrzymał on zwrotu kosztów biletu zgodnie z art. 16. Minimalna kwota odszkodowania wynosi:

a) 25 % ceny biletu w przypadku opóźnienia wynoszącego od 60 do 119 minut;

b) 50 % ceny biletu w przypadku opóźnienia wynoszącego 120 minut lub więcej.

Pasażerowie, którzy posiadają abonament lub kolejowy bilet okresowy i którzy napotykają na powtarzające się opóźnienia lub odwołania połączeń w okresie jego ważności, mogą dochodzić odpowiedniego odszkodowania zgodnie z warunkami przyznawania odszkodowań określonymi przez przedsiębiorstwa kolejowe. Warunki te określają kryteria dotyczące opóźnienia i sposób obliczania odszkodowania.

Odszkodowanie za opóźnienie oblicza się w stosunku do ceny, jaką pasażer faktycznie zapłacił za opóźnioną usługę.

Gdy umowa transportu dotyczy podróży w obie strony, odszkodowanie za opóźnienie w podróży docelowej lub powrotnej obliczane jest na podstawie połowy ceny zapłaconej za bilet. W analogiczny sposób cena biletu na opóźnione połączenie odbywane na podstawie każdej innej formy umowy transportu, która pozwala na podróż na kilku kolejnych odcinkach trasy, obliczana jest proporcjonalnie do pełnej ceny biletu.

Przy obliczaniu czasu opóźnienia nie uwzględnia się opóźnień, co do których przedsiębiorstwo kolejowe może udowodnić, że zdarzyły się poza terytorium, na którym stosuje się Traktat ustanawiający Wspólnotę Europejską..

2. Wypłata odszkodowania następuje w ciągu miesiąca od złożenia wniosku o odszkodowanie. Odszkodowanie może zostać wypłacone w postaci kuponów lub innych usług, jeżeli ich warunki są elastyczne (szczególnie w odniesieniu do okresu ważności oraz miejsca docelowego). Odszkodowanie jest wypłacane w formie pieniężnej na wniosek pasażera.

3. Kwota zwrotu ceny biletu nie jest pomniejszana o finansowe koszty transakcji, takie jak opłaty, koszty telekomunikacyjne lub znaczki. Przedsiębiorstwa kolejowe mogą wprowadzić próg minimalny, poniżej którego odszkodowanie nie będzie wypłacane. Wysokość progu nie przekracza 4 EUR.

4. Pasażerowi nie przysługuje prawo do odszkodowania, jeżeli został poinformowany o opóźnieniu przed zakupem biletu lub jeżeli opóźnienie w wyniku kontynuacji podróży innym połączeniem lub poprzez zmianę trasy jest krótsze niż 60 minut.

Artykuł 18

Pomoc

1. W przypadku opóźnienia przyjazdu lub odjazdu pasażerowie są informowani o sytuacji i o spodziewanym czasie odjazdu oraz przyjazdu przez przedsiębiorstwo kolejowe lub przez zarządcę stacji niezwłocznie po pojawieniu się takiej informacji.

2. W przypadku opóźnienia, o którym mowa w ust. 1, o ponad 60 minut pasażerom oferuje się także nieodpłatnie:

a) posiłki i napoje odpowiednio do czasu oczekiwania, jeżeli są one dostępne w pociągu lub na stacji lub mogą zostać w rozsądnym zakresie dostarczone;

b) o ile jest to fizycznie możliwe, zakwaterowanie w hotelu lub innym miejscu oraz transport pomiędzy stacją kolejową a miejscem zakwaterowania w przypadkach konieczności pobytu przez jedną lub kilka nocy albo jeżeli niezbędny jest pobyt dodatkowy;

c) o ile jest to fizycznie możliwe, transport z pociągu do stacji kolejowej, do miejsca odjazdu zastępczego środka transportu lub do miejsca przeznaczenia, jeżeli pociąg został unieruchomiony na trasie.

3. Jeżeli połączenie kolejowe nie może być dalej wykonywane, przedsiębiorstwo kolejowe organizuje jak najszybciej zastępczy transport pasażerów.

4. Na żądanie pasażera przedsiębiorstwa kolejowe zaświadczają na bilecie, zależnie od sytuacji, że połączenie kolejowe uległo opóźnieniu, że opóźnienie doprowadziło do utraty połączenia albo że połączenie zostało odwołane.

5. Stosując ust. 1, 2 i 3, prowadzące obsługę przedsiębiorstwo kolejowe zwraca szczególną uwagę na potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej i osób im towarzyszących.

ROZDZIAŁ V

OSOBY NIEPEŁNOSPRAWNE I OSOBY O OGRANICZONEJ SPRAWNOŚCI RUCHOWEJ

Artykuł 19

Prawo do przewozu

1. Przedsiębiorstwa kolejowe i zarządcy stacji, przy aktywnym udziale przedstawicieli organizacji osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej, określają niedyskryminujące zasady dotyczące korzystania z przewozu przez osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej.

2. Osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej rezerwacje oraz bilety oferowane są bez dodatkowych opłat. Przedsiębiorstwo kolejowe, sprzedawca biletów lub operator turystyczny nie mogą odmówić osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej dokonania rezerwacji lub wystawienia biletu ani żądać, aby osobie tej towarzyszyła inna osoba, chyba że jest to absolutnie konieczne w celu zapewnienia zgodności z zasadami dostępu, o których mowa w ust. 1.

Artykuł 20

Informacja dla osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej

1. Na żądanie, przedsiębiorstwo kolejowe, sprzedawca biletów lub operator turystyczny udzielają osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej informacji o dostępności przewozów kolejowych oraz o warunkach dostępu do taboru kolejowego i pomieszczeń w pociągach, zgodnie z zasadami dostępu, o których mowa w art. 19 ust. 1, oraz informują osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej o udogodnieniach w pociągu.

2. Jeżeli przedsiębiorstwo kolejowe, sprzedawca biletów lub operator turystyczny korzysta ze zwolnienia, o którym mowa w art. 19 ust. 2, na żądanie informuje on na piśmie w terminie pięciu dni roboczych zainteresowane osoby niepełnosprawne lub osoby o ograniczonej sprawności ruchowej o przyczynach odmowy dokonania rezerwacji lub wystawienia biletu, lub żądania, aby towarzyszyła jej inna osoba.

Artykuł 21

Dostępność

1. Przedsiębiorstwo kolejowe i zarządca stacji zapewniają, zgodnie z TSI dla osób o ograniczonej sprawności ruchowej, dostępność stacji, peronów, taboru kolejowego i innych pomieszczeń dla osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej.

2. W braku personelu towarzyszącego w pociągu lub personelu na stacji przedsiębiorstwo kolejowe lub zarządca stacji podejmuje wszelkie racjonalne starania w celu zapewnienia osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej dostępu do podróży pociągiem.

Artykuł 22

Pomoc na stacjach kolejowych

1. Osobom niepełnosprawnym lub osobom o ograniczonej sprawności ruchowej, które odjeżdżają ze stacji kolejowej, na której obecny jest personel, przejeżdżają przez nią lub przyjeżdżają na nią, zarządca stacji zapewnia nieodpłatnie pomoc w taki sposób, aby osoby te były w stanie wsiąść do odjeżdżającego pociągu, przesiąść się do pociągu skomunikowanego lub wysiąść z pociągu przyjeżdżającego, na przejazd, na który zakupiły bilet, bez uszczerbku dla zasad dostępu ustanowionych na mocy art. 19 ust. 1.

2. Państwa członkowskie mogą przewidzieć odstępstwo od ust. 1 w przypadku osób podróżujących połączeniami na podstawie umowy o świadczenie usług publicznych zawartej zgodnie z obowiązującym prawem wspólnotowym, pod warunkiem że właściwe organy zapewnią alternatywne środki lub ustalenia gwarantujące równoważny lub wyższy poziom dostępu do usług transportowych.

3. Na stacjach, na których nie ma personelu, przedsiębiorstwo kolejowe lub zarządca stacji zapewnia wywieszanie łatwo dostępnej informacji zgodnie z zasadami dostępu, o których mowa w art. 19 ust. 1, dotyczącej najbliższej stacji, na której obecny jest personel oraz bezpośrednio dostępnej pomocy dla osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej.

Artykuł 23

Pomoc w pociągu

Bez uszczerbku dla zasad dostępu, o których mowa w art. 19 ust. 1, przedsiębiorstwo kolejowe zapewnia osobie niepełnosprawnej oraz osobie o ograniczonej sprawności ruchowej nieodpłatną pomoc w pociągu oraz podczas wsiadania i wysiadania.

Do celów niniejszego artykułu pomoc w pociągu oznacza wszelkie racjonalne starania w celu zaoferowania pomocy osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej, aby umożliwić jej dostęp do takich samych usług w pociągu jak pozostałym pasażerom, w przypadku gdy poziom niepełnosprawności ruchowej utrudnia powyższej osobie samodzielne i bezpieczne korzystanie z takich usług.

Artykuł 24

Warunki udzielania pomocy

Przedsiębiorstwa kolejowe, zarządcy stacji, sprzedawcy biletów i operatorzy turystyczni współpracują ze sobą w celu udzielania pomocy osobom niepełnosprawnym lub osobom o ograniczonej sprawności ruchowej zgodnie z art. 22 i 23 oraz zgodnie z poniższymi literami:

a) pomoc zapewniana jest pod warunkiem, że przedsiębiorstwo kolejowe, zarządcę stacji, sprzedawcę biletów lub operatora turystycznego powiadomiono o potrzebie udzielenia pomocy danej osobie przynajmniej na 48 godzin, zanim taka pomoc będzie potrzebna. Jeżeli bilet pozwala na odbycie kilku podróży, wystarczy jedno powiadomienie, pod warunkiem że przekazana zostanie wystarczająca informacja na temat terminu kolejnych przewozów;

b) przedsiębiorstwa kolejowe, zarządcy stacji, sprzedawcy biletów oraz operatorzy turystyczni podejmują wszystkie działania konieczne dla przyjęcia powiadomień;

c) jeżeli nie dokonano powiadomienia zgodnie z lit. a), przedsiębiorstwo kolejowe i zarządca stacji podejmują wszelkie stosowne wysiłki dla zapewnienia pomocy w taki sposób, by osoba niepełnosprawna oraz osoba o ograniczonej sprawności ruchowej mogła odbyć podróż;

d) bez uszczerbku dla uprawnień innych podmiotów w odniesieniu do obszarów poza terenem stacji zarządca stacji lub inna upoważniona osoba wyznacza punkty w granicach stacji kolejowej i poza nią, w których osoby niepełnosprawne lub osoby o ograniczonej sprawności ruchowej mogą zgłaszać swoje przybycie na stację oraz w razie potrzeby poprosić o pomoc;

e) pomoc udzielana jest pod warunkiem, że dana osoba niepełnosprawna lub osoba o ograniczonej sprawności ruchowej pojawi się w wyznaczonym punkcie w terminie określonym przez przedsiębiorstwo kolejowe lub zarządcę stacji świadczących taką pomoc. Wyznaczony termin nie może przekraczać 60 minut przed ogłoszoną godziną odjazdu lub terminem, w jakim pasażerowie są wzywani do odprawy. Jeżeli nie został określony konkretny termin pojawienia się osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej, osoba ta musi stawić się w wyznaczonym punkcie nie później niż 30 minut przed ogłoszoną godziną odjazdu lub terminem, w jakim pasażerowie są wzywani do odprawy.

Artykuł 25

Odszkodowanie za sprzęt osób o ograniczonej sprawności ruchowej lub inny specjalistyczny sprzęt

Jeżeli przedsiębiorstwo kolejowe odpowiedzialne jest za całkowitą lub częściową utratę albo uszkodzenie sprzętu osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej służącego im do poruszania się lub innego specjalistycznego sprzętu używanego przez takie osoby, ograniczenia finansowe nie mają zastosowania.

ROZDZIAŁ VI

BEZPIECZEŃSTWO, SKARGI ORAZ JAKOŚĆ USŁUG

Artykuł 26

Osobiste bezpieczeństwo pasażerów

W porozumieniu z organami publicznymi przedsiębiorstwa kolejowe, zarządca infrastruktury i zarządcy stacji podejmują, każdy w ramach swojego zakresu odpowiedzialności, odpowiednie środki w celu zapewnienia osobistego bezpieczeństwa pasażerów na stacjach kolejowych i w pociągach oraz w celu kontroli ryzyka i dostosowują je do poziomu bezpieczeństwa określonego przez władze publiczne. Podmioty te współpracują ze sobą oraz wymieniają informacje dotyczące najlepszych praktyk w zakresie zapobiegania działaniom, które prawdopodobnie pogorszą poziom bezpieczeństwa.

Artykuł 27

Skargi

1. Przedsiębiorstwa kolejowe, we współpracy ze sprzedawcami biletów, ustanawiają mechanizm rozpatrywania skarg w zakresie praw i obowiązków objętych niniejszym rozporządzeniem. Podają one do ogólnej wiadomości pasażerów informacje kontaktowe oraz powiadamiają o swoim języku lub językach roboczych.

2. Pasażerowie mogą złożyć skargę do któregokolwiek przedsiębiorstwa kolejowego świadczącego daną usługę lub do odpowiedniego sprzedawcy biletów. W ciągu 20 dni adresat skargi udziela odpowiedzi, wraz z uzasadnieniem, lub też w usprawiedliwionych przypadkach informuje pasażera o terminie, krótszym niż trzy miesiące od daty złożenia skargi, w jakim możne on spodziewać się na nią odpowiedzi.

3. Przedsiębiorstwo kolejowe publikuje w sprawozdaniu rocznym, o którym mowa w art. 28, informację o liczbie i rodzaju otrzymanych i rozpatrzonych skarg, a także o czasie udzielenia odpowiedzi i ewentualnych podjętych działaniach mających na celu poprawę sytuacji.

Artykuł 28

Normy jakości obsługi

1. Przedsiębiorstwa kolejowe określają normy jakości obsługi w połączeniach i wdrażają system zarządzania jakością, aby utrzymać wysoki poziom tych usług. Normy jakości obsługi obejmą co najmniej pozycje wymienione w załączniku III.

2. Przedsiębiorstwa kolejowe monitorują swoje wyniki w zakresie realizacji norm jakości obsługi. Przedsiębiorstwa kolejowe publikują każdego roku sprawozdanie na temat realizacji swoich norm jakości razem ze sprawozdaniem rocznym. Sprawozdanie na temat realizacji norm jakości obsługi publikowane jest na stronach internetowych przedsiębiorstw kolejowych. Ponadto sprawozdania te udostępnia się na stronie internetowej Europejskiej Agencji Kolejowej.

ROZDZIAŁ VII

INFORMACJA I EGZEKWOWANIE PRZEPISÓW

Artykuł 29

Informowanie pasażerów o przysługujących im prawach

1. Przedsiębiorstwa kolejowe, zarządcy stacji i operatorzy turystyczni przy sprzedaży biletów na podróż pociągiem informują pasażerów o ich prawach i obowiązkach wynikających z niniejszego rozporządzenia. W celu wypełnienia tego obowiązku informacyjnego przedsiębiorstwa kolejowe, zarządcy stacji i operatorzy turystyczni mogą skorzystać ze streszczenia przepisów niniejszego rozporządzenia przygotowanego przez Komisję we wszystkich językach urzędowych i udostępnionego przedsiębiorstwom kolejowym, zarządcom stacji i operatorom turystycznym.

2. Przedsiębiorstwa kolejowe i zarządcy stacji udostępniają pasażerom — na stacjach i w pociągu — dane umożliwiające kontakt z organem wyznaczonym przez państwa członkowskie zgodnie z art. 30.

Artykuł 30

Egzekwowanie przepisów

1. Każde państwo członkowskie wyznacza organ lub organy odpowiedzialne za egzekwowanie przepisów niniejszego rozporządzenia. Każdy z tych organów podejmuje kroki niezbędne do zapewnienia przestrzegania praw pasażerów.

Każdy z tych organów jest niezależny organizacyjne w zakresie decyzji dotyczących finansowania i w zakresie struktury prawnej i procesu decyzyjnego od zarządcy infrastruktury, organu pobierającego opłaty, organu przydzielającego zdolność przepustową lub przedsiębiorstwa kolejowego.

Państwa członkowskie informują Komisję o organie lub organach wyznaczonych zgodnie z niniejszym ustępem oraz o ich zakresach odpowiedzialności.

2. Każdy pasażer może składać skargi w sprawie naruszenia niniejszego rozporządzenia do odpowiedniego organu wyznaczonego zgodnie z ust. 1 albo do innego właściwego organu wyznaczonego przez państwo członkowskie.

Artykuł 31

Współpraca między organami odpowiedzialnymi za egzekwowanie przepisów

Organy, o których mowa w art. 30, odpowiedzialne za egzekwowanie przepisów, wymieniają między sobą informacje dotyczące swojej pracy, zasad podejmowania decyzji oraz praktyki w tym zakresie w celu koordynowania swoich zasad podejmowania decyzji na terytorium Wspólnoty. Komisja udziela im pomocy w wykonywaniu tego zadania.

ROZDZIAŁ VIII

POSTANOWIENIA KOŃCOWE

Artykuł 32

Sankcje

Państwa członkowskie przyjmują przepisy dotyczące sankcji mających zastosowanie w przypadkach naruszenia przepisów niniejszego rozporządzenia oraz podejmują wszelkie niezbędne działania, aby zapewnić ich stosowanie. Przewidziane sankcje muszą być skuteczne, proporcjonalne i odstraszające. Państwa członkowskie zawiadamiają Komisję o tych przepisach i działaniach do dnia 3 czerwca 2010 r. i niezwłocznie zgłaszają wszelkie późniejsze ich zmiany.

Artykuł 33

Załączniki

Środki mające na celu zmianę innych niż istotne elementów niniejszego rozporządzenia poprzez zmianę załączników do niego, z wyjątkiem załącznika I, są przyjmowane zgodnie z procedurą regulacyjną połączoną z kontrolą, o której mowa w art. 35 ust. 2.

Artykuł 34

Przepisy zmieniające

1. Środki mające na celu zmianę innych niż istotne elementów niniejszego rozporządzenia poprzez jego uzupełnienie, konieczne dla wdrożenia art. 2, 10 i 12, przyjmuje się zgodnie z procedurą regulacyjną połączoną z kontrolą, o której mowa w art. 35 ust. 2.

2. Środki mające na celu zmianę innych niż istotne elementów niniejszego rozporządzenia poprzez zmianę kwot, o których mowa w niniejszym rozporządzeniu, innych niż określone w załączniku I, są przyjmowane w zależności od inflacji zgodnie z procedurą regulacyjną połączoną z kontrolą, o której mowa w art. 35 ust. 2.

Artykuł 35

Procedura komitetu

1. Komisja wspomagana jest przez komitet powołany na mocy art. 11a dyrektywy 91/440/EWG.

2. W przypadku odesłania do niniejszego ustępu stosuje się art. 5a ust. 1–4 i art. 7 decyzji 1999/468/WE, z uwzględnieniem przepisów art. 8 tej decyzji.

Artykuł 36

Sprawozdanie

Komisja składa Parlamentowi Europejskiemu i Radzie sprawozdanie dotyczące wdrożenia i skutków niniejszego rozporządzenia do dnia 3 grudnia 2012 r., szczególnie w odniesieniu do poziomów jakości obsługi.

Sprawozdanie jest opracowywane na podstawie informacji dostarczanych zgodnie z niniejszym rozporządzeniem oraz z art. 10b dyrektywy 91/440/EWG. W razie potrzeby sprawozdaniu będą towarzyszyć odpowiednie wnioski.

Artykuł 37

Wejście w życie

Niniejsze rozporządzenie wchodzi w życie 24 miesiące po jego opublikowaniu w *Dzienniku Urzędowym Unii Europejskiej*.

Niniejsze rozporządzenie wiąże w całości i jest bezpośrednio stosowane we wszystkich państwach członkowskich.

Sporządzono w Strasburgu dnia 23 października 2007 r.

W imieniu Parlamentu Europejskiego
H.-G. PÖTTERING
Przewodniczący

W imieniu Rady
M. LOBO ANTUNES
Przewodniczący

ZAŁĄCZNIK I

Wyciąg z umowy międzynarodowego przewozu osób kolejami (CIV)

Załącznik A

Do Konwencji o międzynarodowym przewozie kolejami (COTIF) z dnia 9 maja 1980 r. zmienionej protokołem wprowadzającym zmiany do Konwencji o międzynarodowym przewozie kolejami z dnia 3 czerwca 1999 r.

TYTUŁ II

ZAWARCIE I WYKONANIE UMOWY PRZEWOZU

Artykuł 6

Umowa przewozu

1. Przez zawarcie umowy przewozu przewoźnik zobowiązuje się do przewiezienia podróżnego oraz, odpowiednio, jego bagażu i pojazdów do miejsca przeznaczenia i do wydania bagażu i pojazdów w miejscu przeznaczenia.

2. Umowę przewozu potwierdza się jednym lub kilkoma biletami na przewóz wydawanymi podróżnemu. Jednak brak biletu, nieprawidłowości lub utrata biletu nie powodują nieważności umowy przewozu, która nie naruszając postanowień art. 9, podlega postanowieniom przepisów ujednoliconych.

3. Z zastrzeżeniem dowodu przeciwnego, bilet jest miarodajnym dowodem zawarcia oraz treści umowy przewozu.

Artykuł 7

Bilet

1. Ogólne warunki przewozu określają formę i treść biletu oraz języki i czcionki, które należy zastosować przy ich druku i wypełnianiu biletu.

2. Bilet powinien zawierać przynajmniej następujące dane:

a) oznaczenie przewoźnika lub przewoźników,

b) oświadczenie, że pomimo zawarcia w umowie odmiennego postanowienia przewóz podlega niniejszym przepisom ujednoliconym; zapis taki może przybrać postać skrótu CIV;

c) wszelkie inne wskazówki niezbędne dla udowodnienia zawarcia oraz treści umowy umożliwiające podróżnemu dochodzenie swoich praw wynikających z umowy.

3. Podróżny jest zobowiązany przy otrzymaniu biletu upewnić się, czy został on wystawiony według jego wskazówek.

4. Bilet może być odstąpiony, gdy nie jest imienny i podróż nie została jeszcze rozpoczęta.

5. Bilet może być sporządzony w formie elektronicznego zapisu danych, które mogą być przekształcane w formę pisemną. Sposób zbierania i opracowywania powinien zapewniać ich praktyczną równowartość, zwłaszcza w zakresie mocy dowodowej danych zawartych w bilecie.

Artykuł 8

Opłata i zwrot należności za przejazd

1. Opłatę za przejazd uiszcza się przed rozpoczęciem podróży, chyba że między podróżnym a przewoźnikiem została zawarta odmienna umowa.

2. Ogólne warunki przewozu określają zasady zwrotu opłaty za przejazd.

Artykuł 9

Prawo przewozu. Wyłączenie z przewozu

1. Podróżny musi być zaopatrzony z chwilą rozpoczęcia podróży w ważny bilet na przejazd i okazać go podczas kontroli biletów. Ogólne warunki przewozu mogą stanowić, że:

a) podróżny, który nie może okazać ważnego biletu, jest obowiązany oprócz opłaty za przejazd uiścić dopłatę;

b) podróżnego, który odmawia natychmiastowego uiszczenia opłaty za przejazd lub dopłaty, można usunąć z pociągu; oraz

c) określać, czy i na jakich zasadach dokonuje się zwrotu opłaty.

2. Ogólne warunki przewozu mogą przewidywać wyłączenie z przewozu lub możliwość usunięcia w czasie podróży:

a) osób stanowiących zagrożenie dla bezpieczeństwa i prawidłowego funkcjonowania ruchu lub dla bezpieczeństwa pozostałych podróżnych;

b) osób, które w sposób niedopuszczalny są uciążliwe dla innych podróżnych;

osoby te nie mają prawa żądać zwrotu opłaty za bilet ani opłaty uiszczonej za przewóz ich bagażu.

Artykuł 10

Przestrzeganie przepisów władz administracyjnych

Podróżny jest zobowiązany zastosować się do przepisów wydawanych przez władze celne lub inne władze administracyjne.

Artykuł 11

Odwołanie i opóźnienie pociągu. Utrata połączenia.

Przewoźnik zobowiązany jest w danym wypadku poświadczyć na bilecie odwołanie pociągu lub utratę połączenia.

TYTUŁ III

PRZEWÓZ BAGAŻU RĘCZNEGO, ZWIERZĄT, PRZESYŁEK BAGAŻOWYCH I POJAZDÓW SAMOCHODOWYCH

Rozdział I

Wspólne postanowienia

Artykuł 12

Przedmioty i zwierzęta dopuszczone do przewozu

1. Podróżny może zabrać ze sobą łatwo przenośne przedmioty (bagaż ręczny) oraz żywe zwierzęta, zgodnie z postanowieniami ogólnych warunków przewozu. Ponadto podróżny może zabrać ze sobą przedmioty przestrzenne zgodnie ze szczególnymi postanowieniami Ogólnych warunków przewozu. Wyłączone są od przewozu jako bagaż ręczny przedmioty i zwierzęta, które mogą być dla podróżnych uciążliwe lub spowodować szkodę.

2. Podróżny może nadać, jako przesyłkę bagażową, przedmioty oraz zwierzęta zgodnie z postanowieniami ogólnych warunków przewozu.

3. Szczególne postanowienia ogólnych warunków przewozu mogą dopuszczać przewóz pojazdów przy okazji przewozu podróżnych.

4. Przewóz przedmiotów i materiałów niebezpiecznych, jako bagażu ręcznego, przesyłek bagażowych albo w lub na pojazdach samochodowych, które zgodnie z postanowieniami niniejszego tytułu przewożone są koleją, musi być zgodny z postanowieniami Regulaminu międzynarodowego przewozu kolejami towarów niebezpiecznych (RID).

Artykuł 13

Sprawdzenie

1. Jeżeli ustawy lub przepisy państwa, na którego terytorium zdarzy się taki przypadek, tego nie zabraniają, w razie uzasadnionego domniemania naruszenia warunków przewozu przewoźnik ma prawo sprawdzić, czy przedmioty lub zwierzęta (bagaż ręczny, bagaż nadany, pojazdy wraz z ich załadunkiem) odpowiadają warunkom przewozu. Podróżnego wzywa się do uczestniczenia przy sprawdzeniu. Jeśli podróżny nie zjawi się lub nie jest osiągalny, sprawdzenie powinno być dokonane w obecności dwóch niezależnych świadków.

2. W razie stwierdzenia naruszenia warunków przewozu przewoźnik może zażądać od podróżnego zapłacenia kosztów sprawdzenia.

Artykuł 14

Przestrzeganie przepisów władz administracyjnych

Podróżny jest zobowiązany zastosować się do przepisów wydawanych przez władze celne i inne władze administracyjne w czasie przewozu zarówno w odniesieniu do jego osoby, jak i przewożonych przez niego przedmiotów i zwierząt (bagaż ręczny, przesyłki bagażowe, pojazdy wraz z ich załadunkiem). Podróżny powinien być obecny przy rewizji bagażu ręcznego i nadanego, chyba że ustawy i przepisy danego państwa dopuszczają wyjątki w tym zakresie.

Rozdział II

Bagaż ręczny i zwierzęta

Artykuł 15

Nadzór

Nadzór nad bagażem ręcznym i zwierzętami zabranymi ze sobą należy do podróżnego.

Rozdział III

Przesyłki bagażowe

Artykuł 16

Nadanie przesyłki bagażowej

1. Zobowiązania umowne dotyczące przewozu przesyłek bagażowych powinny być potwierdzone na kwicie bagażowym, który wydaje się podróżnemu.

2. Brak, nieprawidłowości lub utrata kwitu bagażowego nie powodują nieważności umowy przewozu bagażu, która nie naruszając postanowień art. 22, podlega postanowieniom niniejszych przepisów ujednoliconych.

3. Z zastrzeżeniem dowodu przeciwnego, kwit bagażowy jest miarodajnym dowodem nadania przesyłki bagażowej oraz warunków jej przewozu.

4. Do chwili złożenia dowodu przeciwnego zakłada się, że w czasie przyjęcia do przewozu przesyłka bagażowa była zewnętrznie w dobrym stanie i że liczba i masa sztuk odpowiadały danym wpisanym na kwicie bagażowym.

Artykuł 17

Kwit bagażowy

1. Ogólne warunki przewozu określają formę i treść kwitu bagażowego oraz języki i czcionki, które należy stosować przy ich druku i wypełnianiu. Artykuł 7 ust. 5 stosuje się odpowiednio.

2. Kwit bagażowy powinien zawierać przynajmniej następujące dane:

a) oznaczenie przewoźnika lub przewoźników;

b) oświadczenie, że pomimo zawarcia w umowie odmiennego postanowienia przewóz podlega niniejszym przepisom ujednoliconym; zapis taki może przybrać postać skrótu CIV;

c) wszelkie inne wskazówki niezbędne dla udowodnienia zawarcia oraz treści umowy umożliwiające podróżnemu dochodzenie swoich praw wynikających z umowy.

3. Przy otrzymaniu kwitu bagażowego podróżny obowiązany jest upewnić się, czy został on wystawiony zgodnie z jego wskazówkami.

Artykuł 18

Nadanie i przewóz

1. Z zastrzeżeniem wyjątku przewidzianego w ogólnych warunkach przewozu, bagaż można nadać do przewozu tylko za okazaniem biletu na przejazd ważnego co najmniej do stacji przeznaczenia bagażu. Formalności wymagane przy nadaniu bagażu, nieokreślone w niniejszym artykule, regulują przepisy obowiązujące w miejscu nadania.

2. Jeżeli ogólne warunki przewozu przewidują przyjmowanie bagażu do przewozu bez okazania biletu, postanowienia przepisów ujednoliconych dotyczące praw i obowiązków podróżnego odnośnie do jego bagażu stosuje się odpowiednio do nadawcy bagażu.

3. Przewoźnik może dokonać przewozu bagażu innym pociągiem lub innym środkiem transportu i inną drogą niż te, z których korzysta podróżny.

Artykuł 19

Uiszczenie opłaty za przewóz bagażu

Opłatę za przewóz bagażu uiszcza się przed rozpoczęciem podróży, chyba że między podróżnym a przewoźnikiem została zawarta odmienna umowa.

Artykuł 20

Oznakowanie bagażu

Podróżny zobowiązany jest podać na każdej sztuce bagażu w dobrze widocznym miejscu i w sposób trwały:

a) swoje nazwisko i adres;

b) miejsce przeznaczenia.

Artykuł 21

Prawo do dysponowania bagażem

1. Jeśli okoliczności na to pozwalają i nie sprzeciwiają się temu przepisy celne lub innych władz administracyjnych, bagaż może być, na żądanie podróżnego, wydany w miejscu jego nadania za zwrotem kwitu bagażowego i, jeśli ogólne warunki przewozu to przewidują, za okazaniem biletu.

2. Ogólne warunki przewozu mogą zawierać inne postanowienia dotyczące prawa do dysponowania bagażem, w tym zmiany miejsca jego przeznaczenia oraz ewentualnych obciążeń finansowych, jakie wówczas ponosi podróżny.

Artykuł 22

Wydanie

1. Bagaż wydaje się za zwrotem kwitu bagażowego i po zapłaceniu ewentualnych należności obciążających przesyłkę.

Przewoźnik ma prawo, lecz nie jest obowiązany sprawdzić, czy posiadacz kwitu bagażowego jest uprawniony do odbioru bagażu.

2. Za równoznaczne z wydaniem bagażu posiadaczowi kwitu bagażowego uważa się dokonane zgodnie z przepisami obowiązującymi w miejscu wydania:

a) przekazanie bagażu organom celnym lub podatkowym do ich pomieszczeń ekspedycyjnych lub składów, jeżeli pomieszczenia te nie są pod nadzorem przewoźnika;

b) przekazanie żywych zwierząt osobom trzecim na przechowanie.

3. Posiadacz kwitu bagażowego może żądać wydania bagażu w miejscu przeznaczenia w uzgodnionym czasie, a w stosownym wypadku po upływie czasu potrzebnego do załatwienia formalności wymaganych przez władze celne lub inne władze administracyjne.

4. W razie nieoddania kwitu bagażowego przewoźnik jest zobowiązany wydać bagaż tylko tej osobie, która udowodni, że ma do niego prawo; jeśli dowód ten zostanie uznany za niewystarczający, przewoźnik może żądać zabezpieczenia.

5. Bagaż wydaje się w miejscu przeznaczenia, do którego został nadany.

6. Posiadacz kwitu bagażowego, któremu nie wydano bagażu na warunkach określonych w ust. 3, może żądać stwierdzenia na kwicie bagażowym dnia i godziny, w których żądał wydania tego bagażu.

7. Na żądanie osoby uprawnionej przewoźnik jest obowiązany sprawdzić bagaż, w celu stwierdzenia istniejącej zdaniem tej osoby szkody; jeśli przewoźnik nie uczynił zadość temu żądaniu, posiadacz kwitu bagażowego ma prawo odmówić przyjęcia bagażu.

8. W sprawach nieuregulowanych powyżej wydanie bagażu odbywa się zgodnie z przepisami obowiązującymi w miejscu wydania.

Rozdział IV

Pojazdy samochodowe

Artykuł 23

Warunki przewozu

Postanowienia szczególne dotyczące przewozu pojazdów, zawarte w ogólnych warunkach przewozu, określają w szczególności: warunki przyjęcia do przewozu, nadania, załadunku i przewozu, warunki wyładunku i wydania oraz obowiązki pasażerów.

Artykuł 24

Kwit na przewóz

1. Przy przewozie pojazdów samochodowych kwit na przewóz powinien być wydany i przekazany podróżnemu. Kwit może stanowić część biletu na przejazd.

2. Postanowienia szczególne dla przewozu pojazdów samochodowych zawarte w ogólnych warunkach przewozu ustalają formę i treść kwitu na przewóz pojazdów oraz języki i czcionki, które należy stosować przy jego druku i wypełnianiu. Artykuł 7 ust. 5 stosuje się odpowiednio.

3. Kwit na przewóz pojazdów powinien zawierać przynajmniej następujące dane:

a) oznaczenie przewoźnika lub przewoźników;

b) oświadczenie, że pomimo zawarcia w umowie odmiennego postanowienia przewóz podlega niniejszym przepisom ujednoliconym; zapis taki może przybrać postać skrótu CIV;

c) wszelkie inne wskazówki niezbędne dla udowodnienia zawarcia oraz treści umowy, umożliwiające podróżnemu dochodzenie swoich praw wynikających z umowy.

4. Przy otrzymaniu kwitu na przewóz pojazdu podróżny obowiązany jest upewnić się, czy został on wystawiony zgodnie z jego wskazówkami.

Artykuł 25

Obowiązujące prawo

Z zastrzeżeniem postanowień niniejszego rozdziału, postanowienia rozdziału III dotyczące przewozu bagażu mają zastosowanie do przewozu pojazdów samochodowych.

TYTUŁ IV

ODPOWIEDZIALNOŚĆ PRZEWOŹNIKA

Rozdział I

Odpowiedzialność za śmierć i zranienie podróżnych

Artykuł 26

Podstawa odpowiedzialności

1. Przewoźnik odpowiada za szkody powstałe w wyniku śmierci, zranienia lub wszelkiego innego naruszenia fizycznego lub umysłowego stanu zdrowia podróżnego, spowodowane w wyniku wypadku związanego z ruchem kolejowym, powstałego podczas przebywania podróżnego w wagonie albo przy wsiadaniu lub wysiadaniu z wagonu, niezależnie od infrastruktury kolejowej, z której podróżny korzystał.

2. Przewoźnik jest zwolniony z odpowiedzialności:

a) jeżeli wypadek został spowodowany przez okoliczności zewnętrzne w stosunku do ruchu kolei, których przewoźnik mimo zastosowania niezbędnej w powstałej sytuacji staranności nie mógł uniknąć ani których skutkom nie mógł zapobiec;

b) jeżeli wypadek nastąpił z winy podróżnego;

c) jeżeli wypadek został spowodowany zachowaniem się osoby trzeciej oraz jeśli przewoźnik mimo zastosowania nakazanej sytuacją staranności nie mógł uniknąć takiego zachowania się i którego skutkom nie mógł zapobiec; za stronę trzecią nie uważa się innego przedsiębiorstwa eksploatującego tę samą linię kolejową; prawo regresu pozostaje nienaruszone.

3. Jeżeli wypadek został spowodowany zachowaniem się osoby trzeciej i jeżeli odpowiedzialność przewoźnika nie jest całkowicie wyłączona, zgodnie z ust. 2 lit. c), ponosi on pełną odpowiedzialność, uwzględniając ograniczenia Przepisów ujednoliconych, lecz bez uszczerbku dla roszczeń zwrotnych, które może on mieć w stosunku do tej osoby trzeciej.

4. Niniejsze Przepisy ujednolicone nie naruszają odpowiedzialności, jaka może ciążyć na przewoźniku w przypadkach nieprzewidzianych w ust. 1.

5. Jeśli przewóz podlegający jednej umowie przewozu wykonywany jest kolejno przez więcej niż jednego przewoźnika, to w przypadku śmierci lub uszkodzeń ciała podróżnych odpowiedzialność ponosi przewoźnik, który na mocy umowy przewozu zobowiązany był wykonać usługę przewozu, podczas której miał miejsce wypadek. Jeśli usługa ta nie została wykonana przez tego przewoźnika, lecz przez przewoźnika podwykonawcę, odpowiedzialność zgodną z niniejszymi przepisami ujednoliconymi ponoszą solidarnie obaj przewoźnicy.

Artykuł 27

Odszkodowanie w przypadku śmierci

1. W przypadku śmierci podróżnego odszkodowanie obejmuje:

a) wszelkie niezbędne koszty, spowodowane śmiercią podróżnego, a w szczególności koszty przewozu zwłok i wydatki związane z pogrzebem;

b) jeżeli śmierć nie nastąpiła natychmiast, odszkodowanie określone w art. 28.

2. Jeżeli, z powodu śmierci podróżnego, osoby, wobec których miał on lub mógłby mieć ustawowy obowiązek alimentacyjny, są pozbawione jego wsparcia, osoby takie również otrzymują odszkodowanie za tę stratę. Roszczenia o odszkodowania osób pozostających na utrzymaniu podróżnego, wobec których nie miał on ustawowego obowiązku alimentacyjnego, podlegają prawu krajowemu.

Artykuł 28

Odszkodowanie w przypadku uszkodzeń ciała

W przypadku uszkodzeń ciała lub wszelkiego innego naruszenia fizycznego lub umysłowego stanu zdrowia podróżnego odszkodowanie obejmuje:

a) wszelkie niezbędne koszty, a w szczególności koszty leczenia i transportu;

b) zadośćuczynienie stratom finansowym powstałym na skutek całkowitej lub częściowej utraty zdolności do pracy lub na skutek zwiększonych potrzeb spowodowanych wypadkiem.

Artykuł 29

Naprawienie innych szkód wynikających z obrażeń ciała

Prawo krajowe określa, czy i w jakiej mierze przewoźnik jest zobowiązany do wypłaty odszkodowania za szkody wynikające z obrażeń ciała, inne niż przewidziane w art. 27 i 28.

Artykuł 30

Forma i wysokość odszkodowania za śmierć i zranienie

1. Odszkodowanie przewidziane w art. 27 ust. 2 i w art. 28 lit. b) powinno być uiszczone w formie pieniężnej. Jednakże w razie gdy prawo krajowe dopuszcza przyznanie renty, odszkodowanie uiszcza się w tej formie, jeśli poszkodowany podróżny lub osoby uprawnione wymienione w art. 27 ust. 2 żądają wypłaty renty.

2. Wysokość odszkodowania przyznanego zgodnie z ust. 1 określa prawo krajowe. Jednakże przy zastosowaniu niniejszych przepisów ujednoliconych ustala się dla każdego podróżnego górną granicę w wysokości 175 000 jednostek obrachunkowych jako kwotę jednorazową lub jako rentę roczną odpowiadającą tej sumie, jeżeli prawo krajowe przewiduje granicę maksymalną o niższej wysokości.

Artykuł 31

Inne środki komunikacji

1. Z zastrzeżeniem postanowień ust. 2, postanowienia dotyczące odpowiedzialności za śmierć i zranienie podróżnych nie mają zastosowania do szkód, które powstały podczas przewozu, który zgodnie z umową przewozu nie był przewozem kolejowym.

2. Jeżeli jednak wagony kolejowe przewozi się promem, postanowienia o odpowiedzialności w razie śmierci i zranienia podróżnego stosuje się do szkód wymienionych art. 26 ust. 1 i art. 33 ust. 1, spowodowanych wskutek wypadku związanego z ruchem kolejowymi, który zdarzył się w czasie przebywania podróżnego w wymienionych wagonach albo przy wsiadaniu do nich lub wysiadaniu z nich.

3. Jeżeli, wskutek wyjątkowych okoliczności, ruch kolejowy jest czasowo przerwany i podróżni są przewożeni innymi środkami transportu, przewoźnik ponosi odpowiedzialność zgodnie z niniejszymi przepisami ujednoliconymi.

Rozdział II

Odpowiedzialność w razie niedotrzymania rozkładu jazdy

Artykuł 32

Odpowiedzialność w razie odwołania pociągu, jego opóźnienia lub utraty połączenia

1. Przewoźnik odpowiada za szkody, jakie poniósł podróżny, jeżeli wskutek odwołania pociągu, jego opóźnienia lub utraty przez podróżnego połączenia podróż nie może być kontynuowana tego samego dnia lub wskutek zaistniałych okoliczności od podróżnego nie można zgodnie ze zdrowym rozsądkiem wymagać kontynuowania podróży tego samego dnia. Szkody obejmują racjonalnie uzasadnione koszty spowodowane powiadomieniem osób oczekujących na podróżnego w miejscu przeznaczenia.

2. Przewoźnik jest zwolniony od odpowiedzialności, jeżeli odwołanie pociągu, jego opóźnienie lub utrata połączenia są spowodowane jedną z następujących przyczyn:

a) okoliczności zewnętrzne w stosunku do ruchu kolei, których przewoźnik mimo zastosowania niezbędnej w powstałej sytuacji staranności nie mógł uniknąć ani których skutkom nie mógł zapobiec;

b) wina podróżnego; lub

c) zachowanie się osoby trzeciej oraz jeśli przewoźnik mimo zastosowania nakazanej sytuacją staranności nie mógł uniknąć takiego zachowania się i którego skutkom nie mógł zapobiec; za stronę trzecią nie uważa się innego przedsiębiorstwa eksploatującego tę samą linię kolejową; prawo regresu pozostaje nienaruszone.

3. Prawo krajowe określa, czy i w jakiej mierze przewoźnik jest zobowiązany do wypłacenia odszkodowań za szkody inne niż przewidziane w ust. 1. Niniejsze postanowienie nie narusza postanowień art. 44.

Rozdział III

Odpowiedzialność za szkody powstałe podczas przewozu bagażu ręcznego, zwierząt, przesyłek bagażowych i pojazdów samochodowych

DZIAŁ 1

Bagaż ręczny i zwierzęta

Artykuł 33

Odpowiedzialność

1. W razie śmierci lub zranienia podróżnego przewoźnik odpowiada ponadto za szkodę wynikłą na skutek uszkodzenia bądź całkowitej lub częściowej utraty rzeczy, które podróżny będący ofiarą wypadku miał przy sobie lub wiózł ze sobą jako bagaż ręczny; dotyczy to również zwierząt, które podróżny miał ze sobą. Artykuł 26 stosuje się odpowiednio.

2. W pozostałych wypadkach przewoźnik odpowiada za szkodę wynikłą na skutek uszkodzenia bądź całkowitej lub częściowej utraty rzeczy, bagażu ręcznego lub zwierząt, których nadzór, zgodnie z art.15 spoczywa na podróżnym, jedynie gdy szkoda wynikła z jego winy. Z wyjątkiem art. 51, innych artykułów tytułu IV oraz tytułu VI nie stosuje się.

Artykuł 34

Ograniczenie odszkodowania w razie uszkodzenia lub utraty rzeczy

Jeżeli przewoźnik odpowiada na podstawie art. 33 ust. 1, to górna granica odszkodowania wynosi 1 400 jednostek obrachunkowych dla każdego podróżnego.

Artykuł 35

Zwolnienie od odpowiedzialności

Przewoźnik nie odpowiada wobec podróżnego za szkody powstałe wskutek niezastosowania się podróżnego do przepisów celnych i przepisów innych władz administracyjnych.

DZIAŁ 2

Przesyłki bagażowe

Artykuł 36

Podstawa odpowiedzialności

1. Przewoźnik odpowiada za szkodę powstałą wskutek całkowitego lub częściowego zaginięcia lub uszkodzenia bagażu w czasie od przyjęcia do przewozu aż do wydania, jak również za szkodę spowodowaną opóźnionym wydaniem.

2. Przewoźnik jest zwolniony od tej odpowiedzialności, jeżeli zaginięcie, uszkodzenie lub opóźnienie w wydaniu nastąpiło z winy podróżnego, z powodu jego zlecenia niewywołanego winą przewoźnika, z powodu wady własnej bagażu albo wskutek okoliczności, których przewoźnik nie mógł uniknąć i których skutkom nie mógł zapobiec.

3. Przewoźnik jest zwolniony od tej odpowiedzialności, jeżeli zaginięcie lub uszkodzenie nastąpiło wskutek szczególnego niebezpieczeństwa wynikającego z jednej lub kilku niżej wymienionych okoliczności:

a) braku lub usterki opakowania;

b) specjalnych właściwości bagażu;

c) nadania jako przesyłki bagażowej przedmiotów wyłączonych od przewozu.

Artykuł 37

Ciężar dowodu

1. Dowód, że opóźnienie w wydaniu, zaginięcie lub uszkodzenie spowodowane zostało przez jedną z okoliczności przewidzianych w art. 36 ust. 2 ciąży na przewoźniku.

2. Jeżeli przewoźnik wykaże, że bez względu na okoliczności danego przypadku zaginięcie lub uszkodzenie mogło wyniknąć z jednego lub kilku szczególnych niebezpieczeństw przewidzianych w art. 36 ust. 3, istnieje domniemanie, że szkoda z nich wynikła. Osoba uprawniona zachowuje jednak prawo udowodnienia, że szkoda nie została spowodowana, całkowicie lub częściowo, przez jedno z tych niebezpieczeństw.

Artykuł 38

Kolejni przewoźnicy

Jeżeli przewóz będący przedmiotem jednej umowy przewozu i wykonywany jest przez kilku kolejnych przewoźników, każdy z przewoźników przez samo przyjęcie przesyłki bagażowej wraz z kwitem bagażowym lub pojazdu samochodowego z kwitem przewozowym uczestniczy, jeżeli chodzi o przewiezienie przesyłki bagażowej lub pojazdu samochodowego, w umowie przewozu stosownie do warunków określonych w kwicie bagażowym lub w kwicie przewozowym i przyjmuje wynikające z niej obowiązki. W tym wypadku każdy przewoźnik odpowiada za wykonanie przewozu na całej drodze aż do wydania.

Artykuł 39

Przewoźnicy podwykonawcy

1. Jeżeli przewoźnik zlecił przewoźnikowi podwykonawcy w całości lub w części wykonanie przewozu, to niezależnie, czy miał do tego upoważnienie na podstawie umowy przewozu czy nie, odpowiada za wykonanie całego przewozu.

2. Wszelkie postanowienia niniejszych przepisów ujednoliconych dotyczące odpowiedzialności przewoźnika mają zastosowanie do odpowiedzialności przewoźnika podwykonawcy w zakresie wykonanego przez niego przewozu. Jeżeli wytoczono powództwo przeciwko pracownikom i jakimkolwiek innym zatrudnionym, którymi przewoźnik podwykonawca posłużył się przy wykonywaniu przewozu, mają zastosowanie postanowienia art. 48 i 52.

3. Jakiekolwiek szczególne porozumienie, na mocy którego przewoźnik przyjmuje zobowiązania niewynikające z niniejszych przepisów ujednoliconych albo zrzeka się praw przysługujących przez niniejsze przepisy ujednolicone, ma zastosowanie do przewoźnika podwykonawcy jedynie, gdy wyrazi na nie pisemną zgodę. Niezależnie od zgody przewoźnika podwykonawcy lub jej braku, przewoźnik związany jest postanowieniami tego szczególnego porozumienia.

4. Jeżeli przewoźnik i przewoźnik podwykonawca odpowiadają razem, ich odpowiedzialność jest solidarna.

5. Całkowita kwota odszkodowań należnych od przewoźnika, przewoźnika podwykonawcy oraz ich pracowników i innych zatrudnionych, którymi się oni posługują przy wykonywaniu przewozu, nie może przekraczać maksymalnych kwot odszkodowania przewidzianych w Przepisach ujednoliconych.

6. Żadne z postanowień niniejszego artykułu nie narusza praw do roszczenia zwrotnego powstałego między przewoźnikiem a przewoźnikiem podwykonawcą.

Artykuł 40

Domniemanie zaginięcia

1. Osoba uprawniona może, bez dalszych dowodów, uważać sztukę bagażu za zaginioną, jeżeli jej nie wydano lub nie przygotowano do wydania w ciągu czternastu dni od chwili zażądania jej wydania stosownie do art. 22 ust. 3.

2. Jeżeli sztuka bagażu, uznana za zaginioną, zostanie odnaleziona w ciągu roku od zażądania jej wydania, przewoźnik jest obowiązany zawiadomić o tym osobę uprawnioną, jeżeli miejsce jej zamieszkania jest znane lub jeżeli można je ustalić.

3. W ciągu trzydziestu dni po otrzymaniu zawiadomienia, o którym mowa w ust. 2, osoba uprawniona może zażądać, aby wydano jej bagaż. W tym wypadku opłaca ona koszty przewozu bagażu od miejsca nadania do miejsca, w którym ma nastąpić wydanie, i zwraca otrzymane odszkodowanie, po potrąceniu kosztów objętych tym odszkodowaniem. Osoba uprawniona zachowuje jednak prawo do odszkodowania z tytułu opóźnionego wydania, przewidziane w art. 43.

4. Jeżeli odnalezionej sztuki bagażu nie zażądano w terminie przewidzianym w ust. 3 lub jeżeli odnaleziono ją dopiero po upływie roku od zażądania jej wydania, przewoźnik rozporządza nią według ustaw i przepisów miejsca, w którym sztuka bagażu się znajduje.

Artykuł 41

Odszkodowanie w razie zaginięcia bagażu

1. Przewoźnik jest zobowiązany zapłacić za całkowite lub częściowe zaginięcie bagażu, bez dalszego odszkodowania:

a) jeżeli udowodniono wysokość szkody, odszkodowanie równe wysokości szkody, najwyżej jednak 80 jednostek obrachunkowych za brakujący kilogram masy brutto lub 1 200 jednostek obrachunkowych za sztukę bagażu;

b) jeżeli nie udowodniono wysokości szkody, kwotę zryczałtowaną, licząc po 20 jednostek obrachunkowych za brakujący kilogram masy brutto lub 300 jednostek obrachunkowych za sztukę bagażu.

Rodzaj odszkodowania za brakujący kilogram lub sztukę bagażu ustalają ogólne warunki przewozu.

2. Przewoźnik zwraca ponadto opłatę za przewóz bagażu, opłaty celne i akcyzowe oraz inne kwoty zapłacone przy przewozie zagubionej sztuki bagażu.

Artykuł 42

Odszkodowanie w razie uszkodzenia bagażu

1. W razie uszkodzenia bagażu przewoźnik obowiązany jest zapłacić, bez dalszego odszkodowania, kwotę, która odpowiada obniżeniu się wartości bagażu.

2. Odszkodowanie nie może jednak przewyższać:

a) jeżeli cały bagaż doznał obniżenia wartości wskutek uszkodzenia — kwoty, którą należałoby zapłacić w razie całkowitego zaginięcia;

b) jeżeli tylko część bagażu doznała obniżenia wartości wskutek uszkodzenia — kwoty, którą należałoby zapłacić w razie zaginięcia części, która doznała obniżenia wartości.

Artykuł 43

Odszkodowanie za opóźnienie w wydaniu bagażu

1. W razie opóźnienia w wydaniu bagażu przewoźnik jest obowiązany zapłacić za każde rozpoczęte 24 godziny, licząc od chwili zażądania wydania, najwyżej jednak za 14 dni:

a) jeżeli osoba uprawniona udowodni, że wskutek opóźnienia powstała szkoda łącznie z uszkodzeniem bagażu, odszkodowanie w wysokości szkody, które nie może przekraczać 0,80 jednostki obrachunkowej za kilogram masy brutto lub 14 jednostek obrachunkowych za sztukę bagażu wydanego z opóźnieniem;

b) jeżeli osoba uprawniona nie udowodni, że wskutek opóźnienia powstała szkoda, odszkodowanie zryczałtowane w wysokości 0,14 jednostki obrachunkowej za kilogram masy brutto lub 2,80 jednostek obrachunkowych za sztukę bagażu wydanego z opóźnieniem.

Rodzaj odszkodowania za kilogram lub sztukę bagażu ustalają ogólne warunki przewozu.

2. Przy zaginięciu całego bagażu nie można płacić odszkodowania zgodnie z postanowieniami ust. 1 obok odszkodowania wynikającego z postanowień art. 41.

3. W razie częściowego zaginięcia bagażu odszkodowanie to płaci się zgodnie z ust. 1 za część niezaginioną.

4. W razie uszkodzenia bagażu, niebędącego następstwem opóźnionego wydania, płaci się odszkodowanie zgodnie z postanowieniami ust. 1, ewentualnie wraz z odszkodowaniem przewidzianym w art. 42.

5. W żadnym wypadku odszkodowanie łączne przewidziane w ust. 1 i odszkodowanie przewidziane w art. 41 i 42 nie może być wyższe niż odszkodowanie, które należałoby zapłacić w razie całkowitego zaginięcia bagażu.

DZIAŁ 3

Pojazdy samochodowe

Artykuł 44

Odszkodowanie w razie opóźnienia

1. Jeżeli pojazd samochodowy towarzyszący podróżnemu zostanie z winy przewoźnika z opóźnieniem załadowany lub wydany, przewoźnik płaci odszkodowanie, pod warunkiem że osoba uprawniona udowodni, że w wyniku tego powstała szkoda; przy czym kwota odszkodowania nie może przekraczać wysokości opłaty za przewóz pojazdu.

2. Jeżeli z powodu opóźnienia załadunku z winy przewoźnika osoba uprawniona zrezygnuje z wykonania umowy przewozu, to otrzymuje zwrot zapłaty za przewóz. Jeżeli osoba ta udowodni, że z powodu opóźnienia powstała szkoda, może ona żądać dodatkowo odszkodowania, które nie może przekraczać wysokości opłaty przewozowej.

Artykuł 45

Odszkodowanie w razie zaginięcia bagażu

W razie całkowitego lub częściowego zagubienia pojazdu osoba uprawniona otrzymuje odszkodowanie za udokumentowaną szkodę, obliczone z uwzględnieniem obecnej wartości pojazdu, które nie może przekraczać kwoty 8 000 jednostek obrachunkowych. Przyczepa z ładunkiem lub bez traktowana jest jako pojazd.

Artykuł 46

Odpowiedzialność za inne przedmioty

1. Jeżeli chodzi o przedmioty pozostawione w pojazdach lub znajdujące się w kontenerach-bagażnikach (np. w kontenerach na bagaż lub na narty), przymocowanych do pojazdu, przewoźnik odpowiada tylko za szkody wynikłe z jego winy. Łączna kwota odszkodowania nie może przekraczać 1 400 jednostek obrachunkowych.

2. Jeżeli chodzi o przedmioty przymocowane na zewnątrz pojazdu włącznie z kontenerami-bagażnikami wymienionymi w ust. 1, przewoźnik odpowiada tylko wówczas, jeżeli zostało udowodnione, że szkoda jest wynikiem działania lub zaniechania popełnionego przez przewoźnika albo z zamiarem spowodowania szkody, albo w wyniku niedbalstwa i ze świadomością dopuszczenia powstania szkody.

Artykuł 47

Obowiązujące prawo

Z zastrzeżeniem postanowień niniejszego działu, postanowienia działu 2 dotyczące odpowiedzialności za przesyłki bagażowe stosuje się do pojazdów samochodowych.

Rozdział IV

Wspólne postanowienia

Artykuł 48

Utrata prawa do ograniczonej odpowiedzialności

Postanowienia niniejszych Przepisów ujednoliconych oraz przepisy prawa krajowego, które ograniczają wysokość odszkodowania do określonej kwoty nie mają zastosowania, jeżeli zostało udowodnione, że szkoda jest wynikiem działania lub zaniechania popełnionego przez przewoźnika albo z zamiarem spowodowania szkody, albo w wyniku niedbalstwa i ze świadomością dopuszczenia powstania szkody.

Artykuł 49

Przeliczenie i oprocentowanie odszkodowania

1. Jeżeli obliczenie odszkodowania wymaga przeliczenia kwot wyrażonych w walutach obcych, przeliczenia dokonuje się według kursu obowiązującego w dniu i w miejscu wypłaty odszkodowania.

2. Osoba uprawniona może żądać odsetek od odszkodowania w wysokości pięciu procent w stosunku rocznym, naliczanych od dnia wniesienia reklamacji przewidzianej w art. 55 lub, jeżeli nie było reklamacji, od dnia wytoczenia powództwa sądowego.

3. Jednakże w stosunku do odszkodowania przysługującego na podstawie art. 27 i 28 odsetki są naliczane od dnia, w którym nastąpiły zdarzenia stanowiące podstawę do ustalenia wysokości odszkodowania, jeżeli dzień ten jest późniejszy od dnia złożenia reklamacji lub od dnia wytoczenia powództwa sądowego.

4. W wypadku przesyłek bagażowych odsetki przysługują, gdy kwota odszkodowania przekracza 16 jednostek obrachunkowych na jeden kwit bagażowy.

5. W wypadku przesyłek bagażowych, jeżeli osoba uprawniona nie przekaże przewoźnikowi w wyznaczonym terminie dokumentów niezbędnych do ostatecznego załatwienia reklamacji, bieg odsetek zawiesza się na czas od upływu tego terminu do przekazania dokumentów.

Artykuł 50

Odpowiedzialność w razie wypadku nuklearnego

Przewoźnik jest zwolniony od odpowiedzialności ciążącej na nim na podstawie Przepisów ujednoliconych, jeżeli szkoda powstała wskutek wypadku nuklearnego i jeżeli według ustaw i przepisów o odpowiedzialności w dziedzinie energii nuklearnej obowiązujących w danym państwie właściciel urządzenia nuklearnego lub równorzędna mu osoba odpowiada za tę szkodę.

Artykuł 51

Odpowiedzialność przewoźnika za swoich pracowników

Przewoźnik odpowiada za swoich pracowników oraz za inne osoby, którymi się posługuje przy wykonywaniu przewozu, jeżeli pracownicy i inne osoby wykonują swoje czynności służbowe. Zarządcy infrastruktury kolejowej, na której odbywa się przewóz, uważani są za pracowników, którymi przewoźnik posługuje się przy wykonywaniu przewozu.

Artykuł 52

Roszczenia szczególne

1. We wszystkich wypadkach, w których mają zastosowanie niniejsze przepisy ujednolicone, można wystąpić przeciwko przewoźnikowi z roszczeniem o odszkodowanie bez względu na tytuł, na jakim jest ono oparte, tylko na warunkach i w granicach przewidzianych w niniejszych przepisach.

2. Powyższe postanowienie dotyczy również roszczeń dochodzonych od pracowników przewoźnika i innych osób, za które przewoźnik odpowiada na podstawie art. 51.

TYTUŁ V

ODPOWIEDZIALNOŚĆ PODRÓŻNEGO

Artykuł 53

Szczególne zasady odpowiedzialności

Podróżny ponosi odpowiedzialność wobec przewoźnika za:

a) szkody, które wynikły z nieprzestrzegania obowiązków podróżnego:

   1) określonych w art. 10, 14 i 20;

   2) określonych w postanowieniach szczególnych dla przewozu pojazdów samochodowych, zawartych w Ogólnych warunkach przewozu; lub

   3) określonych w Regulaminie międzynarodowego przewozu kolejami towarów niebezpiecznych (RID); albo

b) szkody spowodowane przez przedmioty lub zwierzęta, które podróżny zabrał ze sobą,

o ile nie udowodni on, że szkoda powstała w wyniku okoliczności, których mimo zastosowania nakazanej sytuacją staranności nie mógł uniknąć i których skutkom nie mógł zapobiec mimo zachowania niezbędnej i oczekiwanej od zdyscyplinowanego podróżnego staranności. Niniejsze postanowienie nie narusza odpowiedzialności przewoźnika przewidzianej w art. 26 i 33 ust. 1.

TYTUŁ VI

DOCHODZENIE ROSZCZEŃ

Artykuł 54

Stwierdzenie częściowego zaginięcia lub uszkodzenia bagażu

1. Jeżeli przewoźnik ujawni lub jeśli przypuszcza albo też jeżeli osoba uprawniona twierdzi, że przewożony przez przewoźnika przedmiot (bagaż, pojazd samochodowy) częściowo zaginął lub został uszkodzony, przewoźnik jest obowiązany niezwłocznie, w miarę możliwości w obecności osoby uprawnionej, stwierdzić protokolarnie, w zależności od rodzaju szkody, stan przewożonego przedmiotu oraz, jeżeli to możliwe, rozmiar i przyczynę szkody, jak również czas jej powstania.

2. Odpis tego protokołu wydaje się nieodpłatnie osobie uprawnionej.

3. Jeżeli osoba uprawniona nie uznaje stwierdzeń protokołu, może ona zażądać ustalenia stanu bagażu lub pojazdu, jak również przyczyn i rozmiaru szkody, przez rzeczoznawcę powołanego przez obie strony lub przez sąd. Postępowanie to podlega ustawom i przepisom państwa, w którym odbywa się ustalenie szkody.

Artykuł 55

Reklamacje

1. Reklamacje dotyczące odpowiedzialności przewoźnika za śmierć i zranienie podróżnego należy wnosić na piśmie do przewoźnika, przeciwko któremu może być wytoczone powództwo sądowe. W razie przewozu stanowiącego przedmiot jednej umowy przewozu wykonywanego przez kolejnych przewoźników reklamacje mogą być również wniesione do pierwszego i ostatniego przewoźnika oraz przewoźnika mającego w kraju stałego zamieszkania lub stałego pobytu osoby uprawnionej siedzibę swojej firmy, jej filię lub agencję, która zawarła umowę przewozu.

2. Pozostałe reklamacje dotyczące umowy przewozu należy wnosić na piśmie do przewoźnika, o którym mowa w art. 56 ust. 2 i 3.

3. Dokumenty, które osoba uprawniona pragnie dołączyć do reklamacji, należy przedłożyć w oryginale lub w odpisie, odpowiednio uwierzytelnionym na żądanie przewoźnika. Przy załatwianiu reklamacji przewoźnik może zażądać zwrotu biletu na przejazd lub kwitu bagażowego lub kwitu przewozowego.

Artykuł 56

Przewoźnicy, przeciwko którym mogą być wytoczone powództwa sądowe

1. Powództwo sądowe wynikające z odpowiedzialności przewoźnika za śmierć i zranienie podróżnego może być wytoczone jedynie przeciwko przewoźnikowi odpowiedzialnemu zgodnie z art. 26 ust. 5.

2. Z zastrzeżeniem ust. 4, inne powództwa podróżnych wynikające z umowy przewozu mogą być wytaczane przeciwko pierwszemu lub ostatniemu przewoźnikowi lub przewoźnikowi, który wykonywał tę część przewozu, w czasie której miało miejsce zdarzenie będące przyczyną wytoczenia powództwa.

3. W razie wykonywania przewozów przez kolejnych przewoźników, gdy zgoda przewoźnika zobowiązanego do dostarczenia przesyłki bagażowej lub pojazdu samochodowego jest wpisana do kwitu bagażowego lub kwitu przewozowego, może być także przeciwko niemu wytoczone powództwo sądowe zgodnie z ust. 2, nawet gdy nie otrzymał on bagażu lub nie przyjął pojazdu samochodowego.

4. Powództwo sądowe o zwrot zapłaconej kwoty na podstawie umowy przewozu może być wytoczone przeciwko przewoźnikowi, który pobrał tę kwotę, lub przeciwko przewoźnikowi, na rzecz którego została ona pobrana.

5. Powództwo sądowe może być wytoczone przeciwko innemu przewoźnikowi, niż wskazani w ust. 2 i 4, jeżeli zostało ono wytoczone jako powództwo wzajemne lub w drodze zarzutu w związku z roszczeniem głównym, wynikłym z tej samej umowy przewozu.

6. Jeżeli postanowienia przepisów ujednoliconych stosują się do przewoźnika podwykonawcy, również jemu można wytoczyć powództwo sądowe.

7. Jeżeli powód ma wybór między kilkoma przewoźnikami, jego prawo wyboru wygasa z chwilą wytoczenia powództwa przeciwko jednemu z tych przewoźników. Powyższą zasadę stosuje się, gdy powód ma do wyboru jednego lub kilku przewoźników lub przewoźnika podwykonawcę.

Artykuł 58

Wygaśnięcie roszczeń wynikających z odpowiedzialności za śmierć i zranienie podróżnych

1. Wszelkie roszczenia osoby uprawnionej z tytułu odpowiedzialności przewoźnika za śmierć i zranienie podróżnych wygasają, jeżeli w ciągu dwunastu miesięcy, licząc od chwili uzyskania wiadomości, osoba ta nie zgłosiła wypadku, któremu uległ podróżny, jednemu z przewoźników, do których, zgodnie z art. 55 ust. 1, mogą być składane reklamacje. Jeżeli osoba uprawniona zgłasza wypadek przewoźnikowi ustnie, przewoźnik potwierdza zgłoszenia na piśmie.

2. Roszczenia jednak nie wygasają, jeżeli:

a) w terminie przewidzianym w ust. 1 osoba uprawniona zgłosiła reklamację do jednego z przewoźników wymienionych w art. 55 ust. 1;

b) w terminie przewidzianym w ust. 1 przewoźnik w inny sposób dowiedział się o wypadku, któremu uległ podróżny;

c) wypadek nie został zgłoszony lub został zgłoszony z opóźnieniem na skutek okoliczności niezależnych od osoby uprawnionej;

d) osoba uprawniona udowodni, że wypadek zdarzył się z winy przewoźnika.

Artykuł 59

Wygaśnięcie roszczeń wynikających z tytułu umowy o przewozie bagażu

1. Z chwilą wydania bagażu osobie uprawnionej wygasają wszelkie, wynikające z umowy przewozu, roszczenia przeciwko przewoźnikowi z tytułu częściowego zaginięcia, uszkodzenia lub opóźnienia w wydaniu.

2. Roszczenia nie wygasają jednak:

a) w razie częściowego zaginięcia lub uszkodzenia, jeżeli:

   1) zaginięcie lub uszkodzenie zostało stwierdzone zgodnie z art. 54 przed odebraniem bagażu przez osobę uprawnioną;

   2) tylko z winy przewoźnika zaniedbano stwierdzenia, którego należało dokonać zgodnie z art. 54;

b) w razie szkody niedającej się zauważyć z zewnątrz, a którą stwierdzono po odebraniu bagażu przez osobę uprawnioną, jeżeli ona:

   1) zażąda stwierdzenia szkody zgodnie z art. 54, bezpośrednio po jej ujawnieniu, najpóźniej jednak w ciągu trzech dni po odbiorze bagażu; oraz

   2) udowodni przy tym, że szkoda powstała w czasie między przyjęciem bagażu do przewozu a jego wydaniem;

c) w razie przekroczenia terminu wydania, jeżeli osoba uprawniona w ciągu dwudziestu jeden dni skorzystała z przysługujących jej praw wobec jednego z przewoźników wskazanych w art. 56 ust. 3;

d) jeżeli osoba uprawniona udowodni, że szkoda powstała z winy przewoźnika.

Artykuł 60

Przedawnienie roszczeń

1. Roszczenia o odszkodowanie wynikające z odpowiedzialności przewoźnika za śmierć i zranienie podróżnego przedawniają się:

a) roszczenia podróżnego — po trzech latach, licząc od następnego dnia po dniu, w którym nastąpił wypadek;

b) roszczenia innych osób uprawnionych — po trzech latach, licząc od następnego dnia po dniu, w którym nastąpiła śmierć podróżnego, najpóźniej jednak po pięciu latach, licząc od następnego dnia po dniu, w którym nastąpił wypadek.

2. Inne roszczenia wynikające z umowy przewozu ulegają przedawnieniu po upływie jednego roku. Jednakże termin przedawnienia wynosi dwa lata, jeżeli chodzi o roszczenie dotyczące szkody, która jest wynikiem działania lub zaniechania popełnionego albo z zamiarem spowodowania szkody, albo w wyniku niedbalstwa ze świadomością prawdopodobieństwa dopuszczenia powstania szkody.

3. Przedawnienie o którym mowa w ust. 2, biegnie dla roszczeń:

a) o odszkodowanie za całkowite zaginięcie: od czternastego dnia po upływie terminu przewidzianego w art. 22 ust. 3;

b) o odszkodowanie za częściowe zaginięcie, uszkodzenie lub opóźnienie w wydaniu: od dnia, w którym nastąpiło wydanie;

c) we wszystkich innych przypadkach dotyczących przewozu podróżnych: od dnia upływu ważności biletu.

Dnia wskazanego jako początek biegu przedawnienia nie wlicza się do tego terminu.

4. […]

5. […]

6. Z zastrzeżeniem powyższych postanowień zawieszenie i przerwanie biegu przedawnienia reguluje prawo krajowe.

TYTUŁ VII

WZAJEMNE STOSUNKI MIĘDZY PRZEWOŹNIKAMI

Artykuł 61

Podział opłaty przewozowej

1. Każdy przewoźnik, który pobrał lub powinien pobrać opłaty, jest obowiązany zapłacić uczestniczącym w przewozie przewoźnikom przypadający im udział. Rodzaj i sposób zapłaty regulują umowy między przewoźnikami.

2. Postanowienia art. 6 ust. 3, art. 16 ust. 4 i art. 25 stosują się do stosunków między kolejnymi przewoźnikami.

Artykuł 62

Prawo do roszczeń zwrotnych

1. Przewoźnikowi, który na podstawie Przepisów ujednoliconych zapłacił odszkodowanie, przysługuje roszczenie zwrotne przeciwko przewoźnikom uczestniczącym w przewozie, zgodnie z następującymi postanowieniami:

a) przewoźnik, który spowodował szkodę, ponosi za nią wyłączną odpowiedzialność;

b) jeżeli szkodę spowodowało kilku przewoźników, każdy z nich ponosi odpowiedzialność za szkodę przez siebie spowodowaną; jeżeli rozróżnienie takie nie jest możliwe, odszkodowanie dzieli się między nich według zasad podanych w lit. c);

c) jeżeli nie można udowodnić, który z przewoźników spowodował szkodę, odszkodowanie dzieli się między wszystkich przewoźników uczestniczących w przewozie, z wyjątkiem tych, którzy udowodnią, że szkoda nie została przez nich spowodowana; podziału dokonuje się proporcjonalnie do udziału w opłacie za przewóz, przypadającego każdemu z przewoźników.

2. W razie niewypłacalności jednego z przewoźników udział przypadający na niego, lecz niezapłacony, dzieli się między wszystkich pozostałych przewoźników uczestniczących w przewozie, proporcjonalnie do przypadającego każdemu z nich udziału w opłacie za przewóz.

Artykuł 63

Postępowanie przy roszczeniach zwrotnych

1. Przewoźnik, przeciwko któremu wystąpiono z roszczeniem zwrotnym, przewidzianym w art. 62, nie może kwestionować zasadności zapłaty dokonanej przez przewoźnika występującego z roszczeniem zwrotnym, jeżeli odszkodowanie ustalone zostało przez sąd po przypozwaniu go w należyty sposób i po umożliwieniu mu przystąpienia do sporu w charakterze interwenta. Sąd orzekający w sprawie głównej ustala terminy do przypozwania i interwencji.

2. Przewoźnik występujący z roszczeniem zwrotnym powinien pozwać jednym i tym samym pozwem wszystkich zainteresowanych przewoźników, z którymi nie zawarł ugody, pod rygorem utraty prawa do roszczenia zwrotnego w stosunku do przewoźników, których nie pozwał.

3. Sąd powinien rozstrzygać jednym i tym samym wyrokiem o wszystkich roszczeniach zwrotnych, z którymi wystąpiono.

4. Przewoźnik, który chce skorzystać ze swojego prawa do roszczenia zwrotnego, może wnieść pozew do sądu państwa, na którego terytorium jeden z przewoźników uczestniczących w przewozie ma stałą siedzibę, główną siedzibę, filię lub agencję, za pośrednictwem której została zawarta umowa przewozu.

5. Jeżeli powództwo powinno być wytoczone przeciwko kilku przewoźnikom, przewoźnik występujący jako powód ma prawo wyboru między sądami właściwymi na podstawie ust. 4.

6. Postępowanie przy roszczeniach zwrotnych nie może być włączone do postępowania o odszkodowanie wdrożonego przez osobę uprawnioną z tytułu umowy przewozu.

Artykuł 64

Umowy w sprawie roszczeń zwrotnych

Przewoźnicy mogą w drodze umów między sobą ustalić odchylenia od postanowień art. 61 i 62.

ZAŁĄCZNIK II

MINIMALNY ZAKRES INFORMACJI DOSTARCZANYCH PRZEZ PRZEDSIĘBIORSTWA KOLEJOWE LUB SPRZEDAWCÓW BILETÓW

Część I: Informacje dostarczane przed podróżą

Ogólne warunki umów mające zastosowanie do umowy

Rozkłady jazdy i warunki odbycia najszybszej podróży

Rozkłady jazdy i warunki najniższych opłat za przewóz

Dostępność, warunki dostępu i dostosowanie pociągu do potrzeb osób niepełnosprawnych oraz osób o ograniczonej sprawności ruchowej

Możliwość i warunki przewozu rowerów

Dostępność miejsc siedzących w wagonach dla palących i dla niepalących w klasie pierwszej i drugiej oraz w kuszetkach i wagonach sypialnych

Działania mogące przerwać lub opóźnić połączenia

Usługi dostępne w pociągu

Procedury odbioru zagubionego bagażu

Procedury wnoszenia skarg.

Część II: Informacje dostarczane w trakcie przejazdu

Usługi świadczone w pociągu

Następna stacja

Opóźnienia

Główne możliwości przesiadek

Kwestie bezpieczeństwa i ochrony.

ZAŁĄCZNIK III

MINIMALNE NORMY JAKOŚCI OBSŁUGI

Informacje i bilety

Punktualność połączeń międzynarodowych i ogólne zasady dotyczące postępowania w przypadku przerwania połączeń

Odwołania połączeń międzynarodowych

Czystość taboru kolejowego i pomieszczeń stacji (jakość powietrza w wagonach, higiena urządzeń sanitarnych itp.)

Badanie opinii klientów

Obsługa skarg, zwroty opłat i odszkodowania za nieprzestrzeganie norm jakości usług

Pomoc świadczona osobom niepełnosprawnym oraz osobom o ograniczonej zdolności ruchowej.

I

(Akty, których publikacja jest obowiązkowa)

ROZPORZĄDZENIE (WE) NR 1107/2006 PARLAMENTU EUROPEJSKIEGO I RADY

z dnia 5 lipca 2006 r.

w sprawie praw osób niepełnosprawnych oraz osób o ograniczonej sprawności ruchowej podróżujących drogą lotniczą

(Tekst mający znaczenie dla EOG)

PARLAMENT EUROPEJSKI I RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat ustanawiający Wspólnotę Europejską, w szczególności jego art. 80 ust. 2,

uwzględniając wniosek Komisji,

uwzględniając opinię Europejskiego Komitetu Ekonomiczno-Społecznego [1],

po konsultacji z Komitetem Regionów,

działając zgodnie z procedurą określoną w art. 251 Traktatu [2],

a także mając na uwadze, co następuje:

(1) Jednolity rynek usług lotniczych powinien przynosić korzyść ogółowi obywateli. Dlatego też osoby niepełnosprawne oraz osoby o ograniczonej sprawności ruchowej, spowodowanej niepełnosprawnością, wiekiem lub jakimkolwiek innym czynnikiem, powinny mieć możliwości podróżowania drogą lotniczą porównywalne z możliwościami innych obywateli. Osoby niepełnosprawne oraz osoby o ograniczonej sprawności ruchowej mają takie samo jak wszyscy inni obywatele prawo do swobodnego przemieszczania się, do wolności wyboru oraz do niedyskryminacji. Dotyczy to podróży lotniczych, podobnie jak i innych dziedzin życia.

(2) Osoby niepełnosprawne oraz osoby o ograniczonej sprawności ruchowej powinny zatem mieć dostęp do przewozu i nie powinno się odmawiać im prawa do przewozu na podstawie ich niepełnosprawności lub braku sprawności ruchowej, z wyjątkiem przypadków uzasadnionych względami bezpieczeństwa i określonych przepisami prawa. Przed przyjęciem rezerwacji osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej, przewoźnicy lotniczy, ich przedstawiciele oraz organizatorzy wycieczek powinni dołożyć wszelkich należytych starań w celu sprawdzenia, czy istnieje jakikolwiek powód uzasadniony względami bezpieczeństwa, który uniemożliwiałby przyjęcie takich osób na pokład na dany lot.

(3) Niniejsze rozporządzenie nie powinno wpływać na inne prawa pasażerów ustanowione prawodawstwem wspólnotowym, a w szczególności dyrektywą Rady 90/314/EWG z dnia 13 czerwca 1990 r. w sprawie zorganizowanych podróży, wakacji i wycieczek [3] oraz rozporządzeniem (WE) nr 261/2004 Parlamentu Europejskiego i Rady z dnia 11 lutego 2004 r. ustanawiającym wspólne zasady odszkodowania i pomocy dla pasażerów w przypadku odmowy przyjęcia na pokład albo odwołania lub dużego opóźnienia lotów [4]. Jeżeli to samo zdarzenie stanowiłoby podstawę do skorzystania z takiego samego prawa do zwrotu kosztów lub zmiany rezerwacji na podstawie jednego z powyższych aktów prawnych oraz na mocy niniejszego rozporządzenia, to osoba w ten sposób uprawniona powinna mieć możliwość skorzystania ze swego prawa wyłącznie jeden raz, zgodnie z własnym uznaniem.

(4) Aby osoby niepełnosprawne oraz osoby o ograniczonej sprawności ruchowej miały takie same możliwości podróżowania drogą lotniczą jak inni obywatele, powinno zapewnić im się pomoc, odpowiadającą ich szczególnym potrzebom, w portach lotniczych, jak również na pokładzie samolotu poprzez zatrudnienie niezbędnego personelu i zapewnienie niezbędnego sprzętu. Mając na względzie integrację społeczną, zainteresowane osoby powinny otrzymać taką pomoc bez dodatkowych opłat.

(5) Pomoc udzielana w portach lotniczych znajdujących się na terytorium Państwa Członkowskiego, do którego stosują się postanowienia Traktatu, powinna, między innymi, umożliwić osobom niepełnosprawnym oraz osobom o ograniczonej sprawności ruchowej przemieszczenie się z wyznaczonego punktu przylotu w porcie lotniczym do samolotu oraz z samolotu do wyznaczonego punktu odlotu z portu lotniczego, wraz z wejściem na pokład i zejściem z pokładu samolotu. Powyższe punkty powinny być oznaczone przynajmniej przy wejściach głównych do budynków terminalu, w strefach ze stoiskami odprawy, w pociągu, w kolejce naziemnej, na przystankach metra i autobusu, na postojach taksówek i w innych punktach dojazdowych oraz na parkingach samochodowych w portach lotniczych. Pomoc powinna być zorganizowana w sposób pozwalający uniknąć zakłóceń i opóźnień, przy jednoczesnym zapewnieniu wysokich i jednakowych standardów w całej Wspólnocie i przy wykorzystaniu w najlepszy sposób zasobów, bez względu na port lotniczy lub przewoźnika lotniczego.

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[1] Dz.U. C 24 z 31.1.2006, str. 12.

[2] Opinia Parlamentu Europejskiego z dnia 15 grudnia 2005 r. (dotychczas nieopublikowana w Dzienniku Urzędowym) i decyzja Rady z dnia 9 czerwca 2006 r.

[3] Dz.U. L 158 z 23.6.1990, str. 59.

[4] Dz.U. L 46 z 17.2.2004, str. 1.

(6) Aby osiągnąć te cele, zapewnianie wysokiej jakości pomocy w portach lotniczych powinno leżeć w zakresie odpowiedzialności centralnego organu. Ponieważ organy zarządzające portami lotniczymi odgrywają główną rolę w świadczeniu usług we wszystkich ich portach lotniczych, ogólna odpowiedzialność w tym zakresie powinna zostać powierzona właśnie im.

(7) Organy zarządzające portami lotniczymi mogą samodzielnie udzielać pomocy osobom niepełnosprawnym oraz osobom o ograniczonej sprawności ruchowej. Alternatywnie, mając na uwadze pozytywną rolę, jaką odgrywali w przeszłości niektórzy operatorzy i przewoźnicy lotniczy, organy zarządzające mogą zawierać z osobami trzecimi umowy o udzielaniu tej pomocy, bez uszczerbku dla stosowania właściwych przepisów prawa wspólnotowego, w tym przepisów dotyczących zamówień publicznych.

(8) Pomoc powinna być finansowana w taki sposób, aby sprawiedliwie rozłożyć ciężar na wszystkich pasażerów korzystających z portu lotniczego i uniknąć czynników zniechęcających do przewozu osób niepełnosprawnych oraz osób o ograniczonej sprawności ruchowej. Najskuteczniejszym sposobem finansowania wydaje się być nałożenie na każdego przewoźnika lotniczego, korzystającego z portu lotniczego, opłaty proporcjonalnej do liczby pasażerów przewożonych przez niego do lub z portu lotniczego.

(9) W celu zapewnienia, w szczególności, że opłaty nałożone na przewoźnika lotniczego są współmierne do pomocy udzielanej osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej, oraz że opłaty te nie służą finansowaniu działalności organu zarządzającego, innej niż działalność związana z udzielaniem takiej pomocy, opłaty powinny być zatwierdzane i stosowane przy zachowaniu pełnej przejrzystości. Dyrektywa Rady 96/67/WE z dnia 15 października 1996 r. w sprawie dostępu do rynku usług obsługi naziemnej w portach lotniczych Wspólnoty ([1]), a w szczególności zawarte w niej przepisy w sprawie rozdzielenia księgowości, powinna w związku z tym mieć zastosowanie, o ile nie pozostaje to w sprzeczności z niniejszym rozporządzeniem.

(10) Przy organizowaniu pomocy dla osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej oraz szkolenia swoich pracowników porty lotnicze oraz przewoźnicy lotniczy powinni mieć na uwadze Dokument 30 część I sekcja 5, wraz z załącznikami, Europejskiej Konferencji Lotnictwa Cywilnego (ECAC), w szczególności Kodeks dobrego postępowania w obsłudze naziemnej osób o ograniczonej sprawności ruchowej przedstawiony w załączniku J do tego dokumentu, w chwili przyjęcia niniejszego rozporządzenia.

(11) Przy podejmowaniu decyzji w sprawie projektów nowych portów lotniczych i terminali, oraz jako element większych prac remontowych, organy zarządzające portami lotniczymi powinny, tam gdzie jest to możliwe, uwzględnić potrzeby osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej. Podobnie przewoźnicy lotniczy powinni, tam gdzie jest to możliwe, uwzględnić tego rodzaju potrzeby przy podejmowaniu decyzji w sprawie projektów nowych statków powietrznych lub remontowania statków używanych.

(12) Dyrektywa 95/46/WE Parlamentu Europejskiego i Rady z dnia 24 października 1995 r. w sprawie ochrony osób fizycznych w zakresie przetwarzania danych osobowych i swobodnego przepływu tych danych ([2]) powinna być ściśle egzekwowana w celu zagwarantowania poszanowania prywatności osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej oraz zapewnienia, że wymagane informacje służą jedynie do wypełnienia obowiązków w zakresie udzielania pomocy określonych w niniejszym rozporządzeniu i nie są wykorzystywane przeciwko pasażerom ubiegającym się o przedmiotowe usługi.

(13) Wszystkie istotne informacje dostarczane pasażerom lotniczym powinny być dostarczane w alternatywnych formach dostępnych dla osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej oraz powinny być przynajmniej w tych samych językach, co informacje dostępne dla pozostałych pasażerów.

(14) W przypadku gdy, przy obsłudze w porcie lotniczym lub podczas transportu na pokładzie samolotu, dojdzie do zgubienia lub uszkodzenia wózka inwalidzkiego lub innego sprzętu służącego poruszaniu się lub urządzeń do udzielania pomocy, pasażer, do którego ten sprzęt należał, powinien uzyskać odszkodowanie, zgodnie z zasadami prawa międzynarodowego, wspólnotowego i krajowego.

(15) Państwa Członkowskie powinny nadzorować i zapewniać przestrzeganie niniejszego rozporządzenia oraz wyznaczyć właściwy organ odpowiedzialny za stosowanie jego przepisów. Nadzór ten nie wpływa na prawa osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej do dochodzenia odszkodowania przed sądami zgodnie z prawem krajowym.

(16) Istotne jest, aby osoba niepełnosprawna lub osoba o ograniczonej sprawności ruchowej, która uzna, że doszło do naruszenia niniejszego rozporządzenia, mogła zgłosić to organowi zarządzającemu portem lotniczym lub danemu przewoźnikowi lotniczemu, zależnie od okoliczności. Jeżeli osoba niepełnosprawna lub osoba o ograniczonej sprawności ruchowej nie uzyska w ten sposób zadośćuczynienia, powinna ona mieć możliwość złożenia zażalenia do organu lub organów wyznaczonych w tym celu przez właściwe Państwo Członkowskie.

(17) Skargi dotyczące pomocy udzielanej w porcie lotniczym powinny być wnoszone do organu lub organów wyznaczonych do stosowania niniejszego rozporządzenia przez Państwo Członkowskie, na którego terytorium znajduje się port lotniczy. Skargi dotyczące pomocy udzielanej przez przewoźnika lotniczego powinny być wnoszone do organu lub organów wyznaczonych do stosowania niniejszego rozporządzenia przez Państwo Członkowskie, które wydało przewoźnikowi lotniczemu licencję na prowadzenie działalności.

([1]) Dz.U. L 272 z 25.10.1996, str. 36. Dyrektywa zmieniona rozporządzeniem (WE) nr 1882/2003 Parlamentu Europejskiego i Rady (Dz.U. L 284 z 31.10.2003, str. 1).

([2]) Dz.U. L 281 z 23.11.1995, str. 31. Dyrektywa zmieniona rozporządzeniem (WE) nr 1882/2003.

(18) Państwa Członkowskie powinny ustanowić sankcje za naruszenie niniejszego rozporządzenia i zapewnić stosowanie tych sankcji. Sankcje, które mogłyby obejmować nakazanie wypłat odszkodowań dla osób poszkodowanych, powinny być skuteczne, proporcjonalne i odstraszające.

(19) W związku z tym, że cele niniejszego rozporządzenia, mianowicie zapewnienie wysokiego i jednakowego poziomu ochrony i pomocy we wszystkich Państwach Członkowskich oraz zapewnienie, aby podmioty gospodarcze działały zgodnie ze zharmonizowanymi warunkami obowiązującymi na jednolitym rynku, nie mogą zostać osiągnięte w wystarczający sposób przez Państwa Członkowskie, a ze względu na skalę lub skutki działania mogą być lepiej osiągnięte na poziomie Wspólnoty, Wspólnota może przyjąć środki zgodnie z zasadą pomocniczości określoną w art. 5 Traktatu. Zgodnie z zasadą proporcjonalności określoną w tym artykule niniejsze rozporządzenie nie wychodzi poza to, co jest niezbędne do osiągnięcia tych celów.

(20) Niniejsze rozporządzenie nie narusza praw podstawowych i przestrzega zasad uznanych w szczególności przez Kartę Praw Podstawowych Unii Europejskiej.

(21) Ustalenia dotyczące szerszej współpracy w zakresie wykorzystania portu lotniczego w Gibraltarze zostały uzgodnione w Londynie w dniu 2 grudnia 1987 r. przez Królestwo Hiszpanii i Zjednoczone Królestwo we wspólnej deklaracji ministrów spraw zagranicznych obu państw. Ustalenia te nie weszły jeszcze w życie,

PRZYJMUJĄ NINIEJSZE ROZPORZĄDZENIE:

Artykuł 1

Cel i zakres

1. Niniejsze rozporządzenie ustanawia zasady ochrony i udzielania pomocy osobom niepełnosprawnym oraz osobom o ograniczonej sprawności ruchowej, podróżującym drogą lotniczą, zarówno w celu zapewnienia im ochrony przed dyskryminacją, jak i w celu zapewnienia, że zostanie im udzielona pomoc.

2. Przepisy niniejszego rozporządzenia stosuje się do osób niepełnosprawnych oraz do osób o ograniczonej sprawności ruchowej, korzystających lub zamierzających skorzystać z handlowych przewozów pasażerskich rozpoczynających się, kończących się lub z przesiadką w porcie lotniczym znajdującym się na terytorium Państwa Członkowskiego, do którego stosują się postanowienia Traktatu.

3. Artykuły 3, 4 i 10 stosują się również do pasażerów rozpoczynających lot w porcie lotniczym znajdującym się w państwie trzecim do portu lotniczego znajdującego się na terytorium Państwa Członkowskiego, do którego stosuje się postanowienia Traktatu, jeżeli faktyczny przewoźnik lotniczy jest wspólnotowym przewoźnikiem lotniczym.

4. Niniejsze rozporządzenie nie ma wpływu na prawa pasażerów ustanowione dyrektywą 90/314/EWG oraz na podstawie rozporządzenia (WE) nr 261/2004.

5. W przypadku sprzeczności przepisów niniejszego rozporządzenia z przepisami dyrektywy 96/67/WE stosuje się niniejsze rozporządzenie.

6. Stosowanie niniejszego rozporządzenia w stosunku do portu lotniczego w Gibraltarze uważa się za niestanowiące uszczerbku dla odpowiednich stanowisk prawnych Królestwa Hiszpanii oraz Zjednoczonego Królestwa w odniesieniu do sporu dotyczącego władzy nad terytorium, na którym znajduje się port lotniczy.

7. Stosowanie niniejszego rozporządzenia w stosunku do portu lotniczego w Gibraltarze zawiesza się do czasu wejścia w życie ustaleń zawartych we wspólnej deklaracji ministrów spraw zagranicznych Królestwa Hiszpanii i Zjednoczonego Królestwa z dnia 2 grudnia 1987 r. Rządy Hiszpanii i Zjednoczonego Królestwa informują Radę o dacie ich wejścia w życie.

Artykuł 2

Definicje

Do celów niniejszego rozporządzenia stosuje się następujące definicje:

a) „osoba niepełnosprawna" lub „osoba o ograniczonej sprawności ruchowej" oznacza każdą osobę, której możliwość poruszania się jest ograniczona podczas korzystania z transportu na skutek jakiejkolwiek niesprawności fizycznej (zmysłowej lub ruchowej, trwałej lub przejściowej), upośledzenia lub niesprawności umysłowej, lub każdej innej przyczyny niepełnosprawności, lub wieku, i której sytuacja wymaga specjalnej uwagi oraz dostosowania usług dostępnych dla wszystkich pasażerów do szczególnych potrzeb takiej osoby;

b) „przewoźnik lotniczy" oznacza przedsiębiorstwo transportu lotniczego posiadające ważną licencję na prowadzenie działalności;

c) „faktyczny przewoźnik lotniczy" oznacza przewoźnika lotniczego wykonującego lub zamierzającego wykonać lot zgodnie z umową zawartą z pasażerem lub działającego w imieniu innej osoby prawnej lub fizycznej, mającej umowę z tym pasażerem;

d) „wspólnotowy przewoźnik lotniczy" oznacza przewoźnika lotniczego posiadającego ważną licencję na prowadzenie działalności przyznaną przez Państwo Członkowskie zgodnie z rozporządzeniem Rady (EWG) nr 2407/92 z dnia 23 lipca 1992 r. w sprawie przyznawania licencji przewoźnikom lotniczym ([1]);

e) „organizator wycieczek" oznacza organizatora lub punkt sprzedaży detalicznej w rozumieniu art. 2 ust. 2 i 3 dyrektywy 90/314/EWG, z wyjątkiem przewoźnika lotniczego;

f) „organ zarządzający portem lotniczym" lub „organ zarządzający" oznacza organ, którego celem zgodnie z ustawodawstwem krajowym jest w szczególności administrowanie i zarządzanie infrastrukturą portu lotniczego oraz koordynowanie i kontrolowanie działalności różnych podmiotów gospodarczych działających w porcie lotniczym lub w systemie portu lotniczego;

([1]) Dz.U. L 240 z 24.8.1992, str. 1.

g) „użytkownik portu lotniczego" oznacza jakąkolwiek osobę fizyczną lub prawną odpowiedzialną za przewóz pasażerów drogą lotniczą z lub do danego portu lotniczego;

h) „komitet użytkowników portu lotniczego" oznacza komitet przedstawicieli użytkowników portu lotniczego lub reprezentujących ich organizacji;

i) „rezerwacja" oznacza fakt posiadania przez pasażera biletu lub innego dowodu potwierdzającego, że rezerwacja została przyjęta i zarejestrowana przez przewoźnika lotniczego lub organizatora wycieczek;

j) „port lotniczy" oznacza teren przystosowany do lądowania, startowania i manewrów statków powietrznych, łącznie z urządzeniami pomocniczymi niezbędnymi do wykonywania tych manewrów w warunkach ruchu lotniczego oraz świadczenia usług lotniczych, w tym urządzenia pomocnicze potrzebne do świadczenia handlowych przewozów pasażerskich;

k) „parking samochodowy w porcie lotniczym" oznacza parking samochodowy znajdujący się w granicach portu lotniczego lub pod bezpośrednią kontrolą organu zarządzającego portem lotniczym, który służy bezpośrednio pasażerom korzystającym z tego portu lotniczego;

l) „handlowe przewozy pasażerskie" oznaczają usługi transportu pasażerów drogą lotniczą świadczone przez przewoźnika lotniczego w ramach lotów rozkładowych lub nierozkładowych, oferowanych ogółowi społeczeństwa za stosowną opłatą, oddzielnie lub jako część pakietu usług.

Artykuł 3

Zapobieganie odmowie przewozu

Przewoźnik lotniczy lub jego przedstawiciel lub organizator wycieczek nie mogą, ze względu na niepełnosprawność lub ograniczoną sprawność ruchową, odmówić:

a) przyjęcia rezerwacji na lot rozpoczynający lub kończący się w porcie lotniczym, do którego stosuje się niniejsze rozporządzenie;

b) zabrania na pokład osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej w takim porcie lotniczym, pod warunkiem że osoba ta posiada ważny bilet i rezerwację.

Artykuł 4

Odstępstwa, specjalne warunki i informacje

1. Nie naruszając przepisów art. 3, przewoźnik lotniczy lub jego przedstawiciel lub organizator wycieczek mogą, ze względu na niepełnosprawność lub ograniczoną sprawność ruchową, odmówić przyjęcia rezerwacji lub zabrania na pokład osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej:

a) w celu spełnienia mających zastosowanie wymogów bezpieczeństwa ustanowionych prawem międzynarodowym, wspólnotowym lub krajowym lub w celu spełnienia wymogów bezpieczeństwa ustanowionych przez organ, który wydał danemu przewoźnikowi lotniczemu certyfikat przewoźnika lotniczego;

b) jeśli rozmiar samolotu lub jego drzwi czynią fizycznie niemożliwym wprowadzenie na pokład lub przewóz tej osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej.

W przypadku odmowy przyjęcia rezerwacji z przyczyn, o których mowa w akapicie 1 lit. a) lub b), przewoźnik lotniczy, jego przedstawiciel lub organizator wycieczek podejmują należyte starania w celu zaproponowania danej osobie możliwego do zaakceptowania rozwiązania alternatywnego.

Osoba niepełnosprawna lub osoba o ograniczonej sprawności ruchowej, której odmówiono wstępu na pokład ze względu na jej niepełnosprawność lub ograniczoną sprawność ruchową, a także osoba jej towarzysząca zgodnie z ust. 2 niniejszego artykułu, mają prawo do zwrotu kosztów lub zmiany planu podróży zgodnie z art. 8 rozporządzenia (WE) nr 261/2004. Prawo do skorzystania z możliwości lotu powrotnego lub zmiany planu podróży uzależnione jest od spełnienia wszystkich wymogów bezpieczeństwa.

2. Na takich samych warunkach, o których mowa w ust. 1 akapit 1 lit. a), przewoźnik lotniczy, jego przedstawiciel lub organizator wycieczek mogą wymagać, aby osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej towarzyszyła inna osoba zdolna do udzielenia niezbędnej pomocy tej osobie.

3. Przewoźnik lotniczy lub jego przedstawiciel udostępnia publicznie, w dostępnych formach i przynajmniej w tych samych językach, co informacje udostępnione innym pasażerom, zasady bezpieczeństwa, które stosuje do przewozu osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej, jak również wszelkie ograniczenia dotyczące ich przewozu lub przewozu sprzętu do poruszania się ze względu na rozmiary samolotu. Organizator wycieczek udostępnia takie zasady bezpieczeństwa i ograniczenia dotyczące lotów objętych zorganizowanymi podróżami, wakacjami i wycieczkami, które organizuje, sprzedaje lub oferuje do sprzedaży.

4. W przypadku gdy przewoźnik lotniczy lub jego przedstawiciel, lub organizator wycieczek dokonują odstępstwa zgodnie z ust. 1 lub 2, powiadamiają oni niezwłocznie osobę niepełnosprawną lub osobę o ograniczonej sprawności ruchowej o przyczynach tego odstępstwa. Na żądanie przewoźnik lotniczy, jego przedstawiciel lub organizator wycieczek przedstawiają osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej na piśmie wspomniane przyczyny w terminie pięciu dni roboczych od daty żądania.

Artykuł 5

Wyznaczenie punktów przylotu i wylotu

1. We współpracy z użytkownikami portu lotniczego, za pośrednictwem komitetu użytkowników portu lotniczego, jeżeli taki istnieje, oraz odpowiednich organizacji reprezentujących osoby niepełnosprawne i osoby o ograniczonej sprawności ruchowej, organ zarządzający portem lotniczym, uwzględniając warunki lokalne, wyznacza punkty przylotu i wylotu w granicach portu lotniczego lub w punkcie znajdującym się pod bezpośrednią kontrolą organu zarządzającego, zarówno

wewnątrz, jak i na zewnątrz budynków terminalu, w których osoby niepełnosprawne lub osoby o ograniczonej sprawności ruchowej mogą z łatwością powiadomić o swoim przybyciu do portu lotniczego i zwrócić się o pomoc.

2. Punkty przylotu i wylotu, o których mowa w ust. 1, są oznaczone w wyraźny sposób i oferują w dostępnych formach podstawowe informacje o porcie lotniczym.

Artykuł 6

Przekazywanie informacji

1. Przewoźnicy lotniczy, ich przedstawiciele i organizatorzy wycieczek podejmują wszelkie niezbędne środki w celu przyjmowania zgłoszeń potrzeby pomocy od osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej, we wszystkich ich punktach sprzedaży na terytorium Państwa Członkowskiego, do którego stosuje się postanowienia Traktatu, łącznie ze sprzedażą telefoniczną lub za pośrednictwem Internetu.

2. W przypadku gdy przewoźnik lotniczy lub jego przedstawiciel, lub organizator wycieczek otrzyma zgłoszenie potrzeby pomocy, w terminie przynajmniej czterdziestu ośmiu godzin przed opublikowaną godziną odlotu przekazuje tę informację przynajmniej na trzydzieści sześć godzin przed opublikowaną godziną odlotu:

a) organom zarządzającym portami lotniczymi stanowiącymi miejsce wylotu, przylotu i tranzytu; oraz

b) faktycznemu przewoźnikowi lotniczemu, jeśli rezerwacja nie została dokonana u tego przewoźnika, chyba że tożsamość faktycznego przewoźnika lotniczego jest nieznana w chwili zgłoszenia; w tym przypadku informacja zostaje przekazana tak szybko, jak jest to wykonalne.

3. We wszelkich innych przypadkach niż wspomniane w ust. 2 przewoźnik lotniczy lub jego przedstawiciel, lub organizator wycieczek przekazuje informację tak szybko, jak to możliwe.

4. Tak szybko, jak to możliwe po odlocie, faktyczny przewoźnik lotniczy informuje organ zarządzający docelowym portem lotniczym, jeżeli znajduje się on na terytorium Państwa Członkowskiego, do którego stosuje się postanowienia Traktatu, o liczbie osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej korzystających z tego lotu, które wymagają pomocy określonej w załączniku I oraz o charakterze tej pomocy.

Artykuł 7

Prawo do pomocy w portach lotniczych

1. Po przybyciu osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej do portu lotniczego, z którego osoba ta odbędzie podróż drogą lotniczą, organ zarządzający portem lotniczym jest odpowiedzialny za zapewnienie udzielenia pomocy określonej w załączniku I w taki sposób, aby ta osoba mogła skorzystać z lotu, na który ma rezerwację, pod warunkiem że szczególne potrzeby tej osoby w zakresie pomocy zostaną zgłoszone danemu przewoźnikowi lotniczemu, jego przedstawicielowi lub organizatorowi wycieczek, co najmniej czterdzieści osiem godzin przed opublikowaną godziną odlotu. Zgłoszenie dotyczy również lotu powrotnego, jeżeli na dalszy lot i lot powrotny została zawarta umowa z tym samym przewoźnikiem lotniczym.

2. W przypadku gdy wymagane jest użycie certyfikowanego psa przewodnika, należy to uwzględnić, pod warunkiem że takie zgłoszenie zostało przedstawione przewoźnikowi lotniczemu lub jego przedstawicielowi lub organizatorowi wycieczek, zgodnie z mającymi zastosowanie przepisami krajowymi dotyczącymi przewożenia psów przewodników na pokładzie samolotu, w przypadku gdy przepisy takie istnieją.

3. Jeżeli nie dokonano żadnego zgłoszenia zgodnie z ust. 1, organ zarządzający podejmuje wszelkie należyte starania w celu udzielenia pomocy określonej w załączniku I w taki sposób, aby dana osoba mogła skorzystać z lotu, na który ma rezerwację.

4. Przepisy ust. 1 stosuje się, pod warunkiem, ze:

a) dana osoba stawi się do odprawy:

   i) o godzinie określonej z góry na piśmie (w tym również za pomocą środków elektronicznych) przez przewoźnika lotniczego lub jego przedstawiciela lub organizatora wycieczek; lub

   ii) jeżeli nie jest określona godzina, nie później niż jedną godzinę przed opublikowaną godziną odlotu;

   lub

b) dana osoba dotrze do punktu w granicach portu lotniczego wyznaczonego zgodnie z art. 5:

   i) o godzinie określonej z góry na piśmie (w tym również za pomocą środków elektronicznych) przez przewoźnika lotniczego lub jego przedstawiciela lub organizatora wycieczek; lub

   ii) jeżeli nie jest określona godzina, nie później niż dwie godziny przed opublikowaną godziną odlotu.

5. W przypadku gdy osoba niepełnosprawna lub osoba o ograniczonej sprawności ruchowej przemieszcza się tranzytem przez port lotniczy, do którego stosuje się niniejsze rozporządzenie lub jeżeli dla tej osoby przewoźnik lotniczy lub organizator wycieczek dokonał zmiany rezerwacji na inny lot, organ zarządzający jest odpowiedzialny za zapewnienie udzielenia pomocy określonej w załączniku I w taki sposób, aby zainteresowana osoba mogła skorzystać z lotu, na który ma rezerwację.

6. Po przybyciu drogą lotniczą osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej do portu lotniczego, do którego stosuje się niniejsze rozporządzenie, organ zarządzający portem lotniczym jest odpowiedzialny za zapewnienie udzielenia pomocy określonej w załączniku I w taki sposób, aby osoba ta mogła dotrzeć do punktu swojego wylotu z portu lotniczego, o którym mowa w art. 5.

7. Udzielana pomoc jest w miarę możliwości dostosowana do szczególnych potrzeb poszczególnych pasażerów.

Artykuł 8

Odpowiedzialność za udzielenie pomocy w portach lotniczych

1. Organ zarządzający portem lotniczym jest odpowiedzialny za zapewnienie udzielenia osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej, bez dodatkowych opłat, pomocy określonej w załączniku I.

2. Organ zarządzający może sam udzielać takiej pomocy. Ewentualnie, zgodnie ze spoczywającą na nim odpowiedzialnością i zawsze pod warunkiem zgodności z normami jakości, o których mowa w art. 9 ust. 1, organ zarządzający może zawrzeć z jedną lub kilkoma stronami trzecimi umowę o dostarczeniu pomocy. We współpracy z użytkownikami portu lotniczego, za pośrednictwem komitetu użytkowników portu lotniczego, jeżeli taki istnieje, organ zarządzający zawiera taką umowę lub umowy z własnej inicjatywy lub na wniosek, w tym na wniosek pochodzący od przewoźnika lotniczego, przy uwzględnieniu usług oferowanych w danym porcie lotniczym. W przypadku odrzucenia takiego wniosku organ zarządzający przedstawia uzasadnienie na piśmie.

3. Organ zarządzający portem lotniczym może, na zasadzie braku dyskryminacji, nałożyć specjalną opłatę na użytkowników portu lotniczego w celu sfinansowania tej pomocy.

4. Wysokość tej specjalnej opłaty jest rozsądna, powiązana z kosztami, przejrzysta i ustanowiona przez organ zarządzający portem lotniczym we współpracy z użytkownikami portu lotniczego, za pośrednictwem komitetu użytkowników portu lotniczego, jeżeli taki istnieje, lub jakiegokolwiek innego odpowiedniego podmiotu. Opłata jest dzielona pomiędzy użytkowników portu lotniczego proporcjonalnie do całkowitej liczby wszystkich pasażerów, jaką każdy z nich przewozi do i z tego portu lotniczego.

5. Organ zarządzający portem lotniczym prowadzi oddzielną księgowość dla działalności związanej z udzielaniem pomocy osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej od księgowości związanej z innym rodzajem działalności, zgodnie z bieżącą praktyką handlową.

6. Organ zarządzający portem lotniczym za pośrednictwem komitetu użytkowników portu lotniczego, jeżeli taki istnieje, lub innego odpowiedniego podmiotu, udostępnia użytkownikom lotniska, a także organowi lub organom wykonawczym, o których mowa w art. 14, zweryfikowany roczny przegląd pobranych opłat i dokonanych wydatków z przeznaczeniem na pomoc udzielaną osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej.

Artykuł 9

Jakość norm w zakresie pomocy

1. Z wyjątkiem portów lotniczych, w których roczna wielkość ruchu handlowego wynosi mniej niż 150 000 pasażerów, organ zarządzający ustala normy jakości w zakresie pomocy określonej w załączniku I i określa wymagania w zakresie środków dla ich spełnienia, we współpracy z użytkownikami portu lotniczego, za pośrednictwem komitetu użytkowników portu lotniczego, jeżeli taki istnieje, oraz organizacjami reprezentującymi pasażerów niepełnosprawnych i pasażerów o ograniczonej sprawności ruchowej.

2. Przy ustalaniu takich norm należy w pełni uwzględnić uznane na arenie międzynarodowej polityki i kodeksy postępowania dotyczące ułatwienia przewozu osób niepełnosprawnych lub osób o ograniczonej sprawności ruchowej, w szczególności Kodeks dobrego postępowania w obsłudze naziemnej osób o ograniczonej sprawności ruchowej Europejskiej Konferencji Lotnictwa Cywilnego (ECAC).

3. Organ zarządzający portem lotniczym publikuje swoje normy jakości.

4. Przewoźnik lotniczy oraz organ zarządzający portem lotniczym mogą uzgodnić, że organ zarządzający portem lotniczym udziela pomocy o wyższym standardzie niż standard wymieniony w ust. 1 lub świadczy usługi dodatkowe w stosunku do określonych w załączniku I, dla pasażerów, których ten przewoźnik lotniczy przewozi do i z portu lotniczego.

5. W celu finansowania jednego lub drugiego, organ zarządzający portem lotniczym może nałożyć na przewoźnika lotniczego opłatę dodatkową oprócz opłaty wymienionej w art. 8 ust. 3, która jest przejrzysta, powiązana z kosztami i ustanowiona po konsultacji z danym przewoźnikiem lotniczym.

Artykuł 10

Pomoc udzielana przez przewoźników lotniczych

Przewoźnik lotniczy udziela bez dodatkowych opłat pomocy określonej w załączniku II osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej odlatującej, przylatującej lub przemieszczającej się tranzytem przez port lotniczy, do którego stosuje się niniejsze rozporządzenie, pod warunkiem że osoba ta spełnia warunki określone w art. 7 ust. 1, 2 i 4.

Artykuł 11

Szkolenie

Przewoźnicy lotniczy i organy zarządzające portami lotniczymi:

a) zapewniają, aby zatrudniony przez nich, jak również przez podwykonawców personel udzielający bezpośredniej pomocy osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej posiadał wiedzę w zakresie zaspokajania potrzeb osób o różnych rodzajach niepełnosprawności lub upośledzenia ruchowego;

b) zapewniają wszystkim swoim pracownikom pracującym w porcie lotniczym, którzy mają bezpośredni kontakt z pasażerami, szkolenie w zakresie równego traktowania osób niepełnosprawnych i świadomości niepełnosprawności;

c) zapewniają, aby przy zatrudnieniu wszyscy nowi pracownicy otrzymali szkolenie na temat niepełnosprawności, a także, jeżeli okaże się to potrzebne, aby zatrudniony personel otrzymał szkolenia odświeżające wiedzę.

Artykuł 12

Odszkodowanie za zagubione lub uszkodzone wózki inwalidzkie, inny sprzęt do poruszania się i urządzenia do udzielania pomocy

W przypadku gdy wózek inwalidzki lub inny sprzęt do poruszania się lub urządzenia do udzielania pomocy zostały

zagubione lub uszkodzone podczas obsługi na lotnisku lub w czasie przewozu na pokładzie samolotu, pasażer, do którego należy ten sprzęt, otrzymuje odszkodowanie zgodnie z przepisami prawa międzynarodowego, wspólnotowego i krajowego.

Artykuł 13

Niedopuszczalność wyłączeń

Nie można ograniczyć ani uchylić obowiązków wobec osób niepełnosprawnych oraz osób o ograniczonej sprawności ruchowej przewidzianych na podstawie niniejszego rozporządzenia.

Artykuł 14

Organ wykonawczy i jego zadania

1. Każde Państwo Członkowskie wyznacza organ lub organy odpowiedzialne za wykonanie niniejszego rozporządzenia w odniesieniu do odlotów z lub przylotów do portów lotniczych znajdujących się na jego terytorium. W stosownych przypadkach organ ten lub organy podejmują niezbędne środki w celu zapewnienia przestrzegania praw osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej, w tym przestrzegania norm jakości wymienionych w art. 9 ust. 1. Państwa Członkowskie powiadamiają Komisję o organie lub organach, które zostały wyznaczone.

2. W stosownych przypadkach Państwa Członkowskie zapewniają, aby organ lub organy wykonawcze wyznaczone na podstawie ust. 1 zapewniły także zadowalające wdrożenie art. 8, w tym w odniesieniu do przepisów dotyczących opłat, w celu uniknięcia nieuczciwej konkurencji. Mogą one również wyznaczyć do tego celu specjalny organ.

Artykuł 15

Procedura dotycząca skarg

1. Osoba niepełnosprawna lub osoba o ograniczonej sprawności ruchowej, która uzna, że doszło do naruszenia niniejszego rozporządzenia, może zgłosić to organowi zarządzającemu portem lotniczym lub danemu przewoźnikowi lotniczemu, w zależności od przypadku.

2. Jeżeli osoba niepełnosprawna lub osoba o ograniczonej sprawności ruchowej nie może uzyskać w ten sposób zadośćuczynienia, skargi w sprawie domniemanego naruszenia niniejszego rozporządzenia mogą być wnoszone do organu lub organów wyznaczonych na podstawie art. 14 ust. 1 lub do jakiegokolwiek innego właściwego organu wyznaczonego przez Państwo Członkowskie.

3. Organ Państwa Członkowskiego, do którego wniesiono skargę dotyczącą sprawy, za której rozpatrzenie odpowiedzialny jest wyznaczony organ innego Państwa Członkowskiego, przekazuje tę skargę organowi tego Państwa Członkowskiego.

4. Państwa Członkowskie podejmują środki w celu poinformowania osób niepełnosprawnych i osób o ograniczonej sprawności ruchowej o przysługujących im na mocy niniejszego rozporządzenia prawach i o możliwości wniesienia skargi do wyznaczonego organu lub organów.

Artykuł 16

Sankcje

Państwa Członkowskie określają przepisy dotyczące sankcji mających zastosowanie do naruszeń niniejszego rozporządzenia i podejmują wszelkie środki niezbędne do zapewnienia wprowadzenia tych przepisów w życie. Przewidziane sankcje muszą być skuteczne, proporcjonalne i odstraszające. Państwa Członkowskie zgłaszają te przepisy Komisji i niezwłocznie powiadamiają ją o każdej kolejnej zmianie ich dotyczącej.

Artykuł 17

Sprawozdanie

Komisja przedstawia Parlamentowi Europejskiemu i Radzie sprawozdanie w sprawie funkcjonowania i skutków niniejszego rozporządzenia najpóźniej do dnia 1 stycznia 2010 r. Do sprawozdania dołączone są, jeżeli jest to konieczne, wnioski legislacyjne w sprawie dalszego szczegółowego wykonania przepisów niniejszego rozporządzenia lub jego przeglądu.

Artykuł 18

Wejście w życie

Niniejsze rozporządzenie wchodzi w życie dwudziestego dnia po jego opublikowaniu w *Dzienniku Urzędowym Unii Europejskiej*.

Niniejsze rozporządzenie stosuje się ze skutkiem od dnia 26 lipca 2008 r., z wyjątkiem art. 3 i 4, które stosuje się ze skutkiem od dnia 26 lipca 2007 r.

Niniejsze rozporządzenie wiąże w całości i jest bezpośrednio stosowane we wszystkich Państwach Członkowskich.

Sporządzono w Strasburgu, dnia 5 lipca 2006 r.

W imieniu Parlamentu Europejskiego	*W imieniu Rady*
J. BORRELL FONTELLES	P. LEHTOMÄKI
Przewodniczący	*Przewodniczący*

ZAŁĄCZNIK I

Pomoc pozostająca w zakresie odpowiedzialności organów zarządzających portami lotniczymi

Pomoc i uzgodnienia niezbędne do umożliwienia osobom niepełnosprawnym i osobom o ograniczonej sprawności ruchowej:

— zgłaszania swojego przybycia do portu lotniczego i swojego żądania otrzymania pomocy w wyznaczonych punktach wewnątrz i na zewnątrz budynków terminalu wymienionych w art. 5,

— przemieszczenia się z wyznaczonego punktu do stanowiska odprawy,

— dokonania odprawy i nadania bagażu,

— przemieszczenia się ze stanowiska odprawy do samolotu wraz z wypełnieniem procedury emigracyjnej, celnej i bezpieczeństwa,

— wejścia na pokład samolotu przy wykorzystaniu udostępnionych wind, wózków inwalidzkich lub innej potrzebnej pomocy, w zależności od okoliczności,

— przemieszczenia się od drzwi samolotu do ich miejsc,

— przechowania i pobrania bagażu w samolocie,

— przemieszczenia się z ich miejsc do drzwi samolotu,

— zejścia z pokładu samolotu przy wykorzystaniu udostępnionych wind, wózków inwalidzkich lub innej potrzebnej pomocy, w zależności od okoliczności,

— przemieszczenia się z samolotu do hali bagażowej i odbiór bagażu wraz z dopełnieniem procedury imigracyjnej, celnej i bezpieczeństwa,

— przemieszczenia się z hali bagażowej do wyznaczonego punktu,

— uzyskania lotów połączeniowych, gdy podróżują tranzytem, z pomocą udzieloną po stronie powietrznej i lądowej oraz w terminalach i pomiędzy terminalami, w zależności od potrzeb,

— przemieszczania się do toalet, jeżeli jest to konieczne.

W przypadku gdy osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej pomaga osoba towarzysząca, osoba ta musi, jeżeli jest to niezbędne, otrzymać pozwolenie na udzielenie koniecznej pomocy w porcie lotniczym oraz podczas wejścia na pokład i zejścia z pokładu.

Obsługa naziemna całego niezbędnego sprzętu do poruszania się, w tym sprzętu takiego, jak elektryczne wózki inwalidzkie, pod warunkiem powiadomienia z czterdziestoośmio godzinnym wyprzedzeniem oraz z zastrzeżeniem możliwych ograniczeń miejsca na pokładzie samolotu i pod warunkiem zastosowania odpowiedniego prawodawstwa dotyczącego towarów niebezpiecznych.

Tymczasowa wymiana uszkodzonego lub utraconego sprzętu do poruszania się, przy czym nie musi być on identyczny.

W stosownych wypadkach, naziemna obsługa certyfikowanych psów przewodników.

Przekazywanie w dostępnych formach informacji potrzebnych do korzystania z lotów.

ZAŁĄCZNIK II

Pomoc udzielana przez przewoźników lotniczych

Przewóz certyfikowanych psów przewodników w kabinie, z zastrzeżeniem przepisów krajowych.

Oprócz sprzętu medycznego, transport nie więcej niż dwóch urządzeń do poruszania się na jedną osobę niepełnosprawną lub osobę o ograniczonej sprawności ruchowej, w tym elektrycznych wózków inwalidzkich, pod warunkiem powiadomienia z czterdziestoośmiogodzinnym wyprzedzeniem oraz z zastrzeżeniem możliwych ograniczeń miejsca na pokładzie samolotu i pod warunkiem zastosowania odpowiedniego prawodawstwa dotyczącego towarów niebezpiecznych.

Przekazywanie w dostępnych formach niezbędnych informacji o locie.

Podjęcie wszelkich należytych starań w celu rozdysponowania miejsc siedzących, tak aby sprostać potrzebom osób niepełnosprawnych lub o ograniczonej sprawności ruchowej zgodnie z prośbą i z zastrzeżeniem zachowania wymogów bezpieczeństwa i dostępności.

Pomoc w przemieszczaniu się do toalet, jeżeli jest to konieczne.

W przypadku gdy osobie niepełnosprawnej lub osobie o ograniczonej sprawności ruchowej pomaga osoba towarzysząca, przewoźnik lotniczy podejmie wszelkie należyte starania, by zapewnić takiej osobie miejsce obok osoby niepełnosprawnej lub osoby o ograniczonej sprawności ruchowej.

KOMISJA WSPÓLNOT EUROPEJSKICH

Bruksela, dnia 7.8.2008
KOM(2008) 510 wersja ostateczna

KOMUNIKAT KOMISJI

Komunikat w sprawie zakresu odpowiedzialności przewoźników lotniczych i portów lotniczych w przypadku zniszczenia, uszkodzenia lub zagubienia sprzętu do poruszania się pasażerów o ograniczonej sprawności ruchowej, podróżujących transportem lotniczym

Tekst mający znaczenie dla EOG

KOMUNIKAT KOMISJI

Komunikat w sprawie zakresu odpowiedzialności przewoźników lotniczych i portów lotniczych w przypadku zniszczenia, uszkodzenia lub zagubienia sprzętu do poruszania się pasażerów o ograniczonej sprawności ruchowej, podróżujących transportem lotniczym

Tekst mający znaczenie dla EOG

1. PRZEBIEG PROCEDURY

Dnia 5 lipca 2006 r. Rada i Parlament Europejski przyjęły rozporządzenie 1107/2006 w sprawie praw osób niepełnosprawnych oraz osób o ograniczonej sprawności ruchowej podróżujących drogą lotniczą[1] (dalej zwane „rozporządzeniem"). Zasadniczym celem rozporządzenia jest zapewnienie niepełnosprawnym pasażerom i osobom o ograniczonej sprawności ruchowej (dalej zwanym „PRM") niedyskryminującego traktowania w czasie podróży transportem lotniczym. Dnia 30 listopada 2005 r., w trakcie politycznych negocjacji dotyczących wniosku Komisji oraz w związku z przyszłym art. 12 odnoszącym się do „odszkodowania za zagubione lub uszkodzone wózki inwalidzkie, inny sprzęt do poruszania się i urządzenia do udzielania pomocy", Komisja przedstawiła oświadczenie do protokołu[2], w którym zobowiązała się do przeprowadzenia analizy i złożenia sprawozdania z niej, dotyczącej możliwości zwiększenia praw pasażerów linii lotniczych, wynikających ze wspólnotowych, krajowych lub międzynarodowych przepisów, których wózki inwalidzkie lub inny sprzęt do poruszania się zostały zniszczone, uszkodzone lub zagubione w trakcie obsługi w porcie lotniczym lub w transporcie na pokładzie statku powietrznego.

Komisja opublikowała ogłoszenie o zamówieniu[3] *„analizy górnych limitów odszkodowania za uszkodzenie lub zagubienie sprzętu i urządzeń należących do pasażerów o ograniczonej sprawności ruchowej podróżujących transportem lotniczym"* (dalej zwanej „analizą"), które dostępne jest na stronie internetowej Komisji. Niniejszy komunikat stanowi sprawozdanie z wyników analizy i możliwości zwiększenia obowiązujących praw.

2. ZAKRES PROBLEMU

„*Uszkodzony lub zagubiony bagaż stanowi kłopot. Uszkodzony lub zagubiony sprzęt do poruszania się może zepsuć całą podróż i znacznie skomplikować życie na długi czas. Oznacza utratę niezależności i godności*[4]*."*

Znaczny odsetek obecnej populacji UE ma problemy z poruszaniem się, które wymagają stosowania wózków inwalidzkich, innego rodzaju sprzętu do poruszania się lub urządzeń do

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1 Dz. U. L 204 z 26.7.2006, s.1.
2 Dokument roboczy Rady nr 15206/05 (COD 2005/007).
3 Ogłoszenie o zamówieniu 2006/S 111-118193 z 14.6.2006.
4 Z odpowiedzi stowarzyszenia PRM do konsultantów.

udzielania pomocy (dalej zwanych „sprzętem do poruszania się"). Odsetek PRM wśród ludności prawdopodobnie wzrośnie w związku ze starzeniem się społeczeństwa UE.

W niniejszym komunikacie Komisja nie chce ponownie przytaczać danych zawartych w analizie, która powinna być traktowana jako uzupełnienie niniejszego komunikatu. Na podstawie tych danych Komisja stwierdza jednak istnienie wyraźnych dowodów potwierdzających, że pasażerowie o ograniczonej sprawności ruchowej, korzystający ze sprzętu do poruszania się, rzadziej podróżują samolotem niż pozostałe osoby. Jest bardzo prawdopodobne, że obawa przed utratą, uszkodzeniem lub zniszczeniem sprzętu do poruszania się przyczynia się do rezygnacji z podróży, a tym samym ogranicza ich integrację w społeczeństwie. Obawa ta wynika z kilku obiektywnych przyczyn:

(1) Zagubienie lub uszkodzenie wózków inwalidzkich lub innego sprzętu do poruszania się skutkuje utratą niezależności przez PRM i ma wpływ na każdy aspekt ich codziennego życia, aż do czasu pomyślnego rozwiązania sprawy.

(2) W razie zagubienia, uszkodzenia lub zniszczenia sprzętu do poruszania się zagrożone jest zdrowie i bezpieczeństwo PRM, gdyż nie zawsze dostępny jest sprzęt zastępczy, a nawet jeśli, to nie zawsze jest on odpowiedni do potrzeb danej osoby.

(3) Czas, jaki linie lotnicze lub porty lotnicze potrzebują na rozwiązanie praktycznych problemów związanych z uszkodzeniem lub zagubieniem sprzętu do poruszania się jest zbyt długi, zważywszy na pilny charakter sprawy.

(4) Obowiązujące procedury i średni poziom przeszkolenia personelu większości linii lotniczych i portów lotniczych w zakresie reagowania na przypadki zagubienia lub uszkodzenia sprzętu do poruszania się są niewystarczające.

(5) Skutki finansowe zagubienia, uszkodzenia lub zniszczenia sprzętu do poruszania się stanowią dodatkowe ryzyko dla PRM podróżujących samolotem w stosunku do innych pasażerów.

(6) System wypłaty odszkodowania za uszkodzony, zniszczony lub zagubiony sprzęt do poruszania się różni się w zależności od przewoźnika i portu lotniczego.

3. WYNIKI ANALIZY: WYZWANIA

Rzeczywista liczba przypadków w roku na przedsiębiorstwo, obejmująca zdarzenia związane ze sprzętem do poruszania się, jest bardzo niska. Całkowita liczba tego typu reklamacji waha się pomiędzy 600 a 1 000 przypadków rocznie w stosunku do 706 mln pasażerów przewożonych rocznie transportem lotniczym w Unii Europejskiej[5]. Oznacza to maksymalny wskaźnik poniżej 1- 1,5 reklamacji na milion pasażerów.

W analizie uwzględniono zarówno sytuację w USA, jak i w Europie. Połączenie jednej i drugiej stanowi solidną podstawę pozwalającą wierzyć, że szacunki te bliskie są rzeczywistości. W wyniku analizy wskazano także na liczne ważne kwestie, dotyczące zarówno aspektów ilościowych jak i jakościowych problemu, warte podkreślenia:

[5] 705,8 mln pasażerów przewiezionych drogą lotniczą w UE w 2005 r.

3.1. Cel ilościowy: ograniczenie liczby zdarzeń

Liczba przypadków zniszczenia, uszkodzenia lub zagubienia sprzętu do poruszania się należącego do PRM jest powiązana z prawidłową obsługą i załadunkiem sprzętu do poruszania się na pokładzie statku powietrznego, natomiast obsługa sprzętu w porcie lotniczym stanowi zasadniczy warunek przewozu PRM zgodnie z ich potrzebami i wymaga odpowiedniego przeszkolenia personelu. PRM powinni mieć możliwość korzystania ze swojego osobistego sprzętu tak długo, jak to tylko jest możliwe. Idealnym rozwiązaniem byłoby, gdyby sprzęt do poruszania się był oddawany i odbierany osobiście przez PRM przy drzwiach statku powietrznego we wszystkich tych przypadkach, gdy PRM nie mogą korzystać na pokładzie z własnego sprzętu do poruszania się. Można ustalić odrębne procedury wymagające zastosowania z uwagi na bezpieczeństwo i ochronę lub ze względów praktycznych.

Załącznik do zobowiązania linii lotniczych do obsługi pasażerów z 2001 r.[6], podpisany przez większość europejskich przewoźników krajowych (dalej zwany „zobowiązaniem linii lotniczych"), stanowi, że linie będące sygnatariuszami zobowiązania muszą podjąć wszelkie uzasadnione kroki w celu zapobieżenia przypadkom zagubienia lub uszkodzenia sprzętu do poruszania się lub innych urządzeń do udzielania pomocy. Opracują one indywidualne plany obsługi zawierające zobowiązanie linii lotniczych. Linie ustanowią programy szkolenia personelu i wprowadzą zmiany w systemach komputerowych w celu realizacji zobowiązania linii lotniczych. Ponadto *„PRM muszą mieć możliwość zachowania niezależności w możliwie najszerszym zakresie"*.

Dobrowolne zobowiązanie portów lotniczych w sprawie obsługi pasażerów (dalej zwane „zobowiązaniem portów lotniczych"), przyjęte przez europejskie porty lotnicze pod auspicjami Międzynarodowej Rady Portów Lotniczych Europa[7] stanowi, że *„personel zostanie odpowiednio przeszkolony w zakresie zrozumienia potrzeb PRM i sprostania im"*. Celem sygnatariuszy było opracowanie własnych indywidualnych planów obsługi na podstawie zobowiązania i włączenie stosownych postanowień Konferencji Europejskiego Lotnictwa Cywilnego (ECAC), dokument 30 (sekcja 5)[8] oraz Międzynarodowej Organizacji Lotnictwa Cywilnego[9] (ICAO załącznik 9).

Punkt 5.2.3.2 dokumentu ECAC nr 30[10] stanowi, że „*państwa członkowskie powinny wspierać rozpowszechnianie wśród personelu linii lotniczych i portów lotniczych broszurki dotyczącej procedur i sprzętu, jakie należy zapewnić w celu obsługi PRM, zawierającej wszelkie niezbędne informacje w zakresie warunków przewozu takich osób oraz niezbędnej im pomocy, a także działań, jakie personel ten musi podjąć. Państwa członkowskie powinny zapewnić włączenie przez linie lotnicze do swoich instrukcji wszystkich procedur odnoszących się do PRM"*. Punkt 5.5 tego samego dokumentu stwierdza, że *„państwa członkowskie powinny zapewnić w portach lotniczych obsługę naziemną dla PRM obejmującą: personel*

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6 Zobowiązanie linii lotniczych do obsługi pasażerów: zob. art. 8 i załącznik

7 ACI Europa (2001) dobrowolne zobowiązanie portów lotniczych w sprawie obsługi pasażerów i specjalny protokół do niego w sprawie sprostania potrzebom osób o ograniczonej sprawności ruchowej.

8 Deklaracja ECAC w sprawie polityki w dziedzinie ułatwień w lotnictwie cywilnym (ECAC.CEAC dokument nr 30 (część 1), wydanie dziesiąte, grudzień 2006 r.

9 Standardy i zalecane rozwiązania Międzynarodowej Organizacji Lotnictwa Cywilnego (załącznik 9 do Konwencji chicagowskiej).

10 Zob. przypis 8.

odpowiednio przeszkolony i wykwalifikowany, aby sprostać potrzebom tych osób (...), odpowiedni sprzęt, aby im pomóc".

Jednak te dobrowolne zobowiązania nie zawsze są odpowiednio realizowane. Po pierwsze nieliczne linie lotnicze i porty lotnicze w UE rzeczywiście opracowały własne plany lub politykę obsługi pasażera w celu wdrożenia tych dobrowolnych porozumień. Po drugie te, które to zrobiły, przyjęły tak różne plany i stosują tak odmienną politykę, że poziom ochrony PRM jest bardzo zróżnicowany. Po trzecie plany te i polityka obsługi pasażera nie zawsze są publikowane, co utrudnia PRM sprawdzenie, czego mogą się spodziewać.

Jeśli chodzi o zobowiązanie portów lotniczych, większość z nich spontanicznie udziela pomocy pasażerom o ograniczonej sprawności ruchowej. Jednak procedury umożliwiające PRM dojazd do drzwi statku powietrznego na własnym wózku inwalidzkim lub odbiór tego wózka przy drzwiach statku powietrznego po przylocie różnią się w zależności od portu lotniczego.

3.2. Cel jakościowy: zminimalizowanie konsekwencji zdarzenia

3.2.1. Aktualnie brak jest wspólnej procedury zapewniającej natychmiastowe rozwiązania na miejscu.

Zakres szkody w sprzęcie do poruszania się może mieć poważne skutki nie tylko ze względu na koszty. Jest to również kwestia czasu, w którym PRM nie będzie mógł korzystać ze swojego sprzętu, oraz długiego oczekiwania na wypłatę odszkodowania. Trudności w ustaleniu, gdzie należy kierować reklamacje dotyczące szkody i prośby o pomoc po przylocie, często w nieznanym otoczeniu portu lotniczego, potęgują dodatkowo stres i wydłużają czas potrzebny na znalezienie tymczasowego rozwiązania praktycznych problemów życia codziennego bez sprzętu do poruszania się.

Obecnie nie ma międzynarodowych, wspólnotowych lub krajowych przepisów w zakresie zapewnienia PRM natychmiastowej pomocy w przypadku zagubienia, uszkodzenia lub zniszczenia ich sprzętu do poruszania się, ani też przepisów, które określałyby, jak takiej pomocy należy udzielić lub jakie mają być zasadnicze elementy tej pomocy.

Zobowiązanie linii lotniczych nie określa szczegółowo, jak należy rozpatrywać wnioski o odszkodowanie lub jakie należy podjąć kroki na miejscu w przypadku uszkodzenia lub zagubienia sprzętu do poruszania się.

Większość portów lotniczych nie ma procedur dotyczących reklamacji w sprawie uszkodzonych lub zniszczonych wózków inwalidzkich lub sprzętu do poruszania się. Wypłata odszkodowania i procedury, na podstawie których porty lotnicze zapewniają sprzęt zastępczy, różnią się w zależności od portu lotniczego, pomimo zobowiązania portów lotniczych[11]. Może to skutkować różnicami i rozbieżnościami, jeśli chodzi o sprzęt zastępczy i odszkodowanie dla PRM, których sprzęt został zniszczony lub uszkodzony w czasie, gdy odpowiedzialny za niego jest port lotniczy. To z kolei powoduje niepewność i dezorientację PRM, którzy nigdy nie wiedzą, jak się mają zachować lub do kogo mają się zwrócić w razie zdarzenia obejmującego ich sprzęt do poruszania się.

[11] Zob. przypis 6.

3.2.2. Różnica pomiędzy rodzajem i zakresem odpowiedzialności linii lotniczych i odpowiedzialności portów lotniczych.

Tradycyjnie istnieją różnice pomiędzy rodzajem i zakresem odpowiedzialności linii lotniczych i odpowiedzialności portów lotniczych. Różnice mogą powodować dezorientację u zainteresowanych osób.

3.2.2.1. Przewóz sprzętu na pokładzie statku powietrznego (odpowiedzialność linii lotniczej).

Obecnie przewoźnicy lotniczy udzielają pomocy PRM w ramach obsługi naziemnej. Przewoźnicy lotniczy mogą udzielić pomocy bezpośrednio, poprzez zewnętrzną firmę, albo za pośrednictwem portu lotniczego, gdy ten świadczy usługi dla przewoźnika. Odpowiedzialność linii lotniczej jest obecnie ograniczona mieszanką międzynarodowych konwencji[12], rozporządzeń Wspólnoty wdrażających te międzynarodowe konwencje na terytorium UE[13], oraz procedur prawnych lub administracyjnych narzucanych przez inne kraje na przedsiębiorstwa unijne pragnące wejść na ich rynki krajowe. Przedsiębiorstwa mogą odstąpić od ograniczonej odpowiedzialności i wypłacić pełną wartość zagubionego sprzętu do poruszania się lub jego naprawy.

Wszystkie akty prawne działają na zasadzie tego samego mechanizmu: domniemanej odpowiedzialności przewoźnika w przypadku bagażu rejestrowanego[14]. Oznacza to, że poszkodowany nie będzie musiał udowadniać winy przewoźnika w celu pociągnięcia przewoźnika do odpowiedzialności. Jedyne co musi udowodnić PRM, to fakt wystąpienia uszkodzenia lub zagubienia w czasie, gdy sprzęt pozostawał pod opieką przewoźnika (powszechnie nazywany „okresem przewozu").

Jeśli chodzi o sprzęt, który został zarejestrowany przy stanowisku odprawy (przez przewoźnika lub w jego imieniu) i tym samym zaopatrzony w przywieszkę bagażową, jasne jest, że okres przewozu biegnie od momentu rozpoczęcia procedury odprawy bagażowo-biletowej. To samo dotyczy bagażu, który jest „przekazywany w kabinie". Chociaż sprzęt może zostać zaopatrzony w przywieszkę bagażową zanim w rzeczywistości zostanie przekazany przewoźnikowi (przy wyjściu (gate) lub przy drzwiach statku powietrznego), odpowiedzialność przewoźnika powinna rozpoczynać się dopiero w momencie, gdy sprzęt zostaje mu fizycznie przekazany (przy wyjściu (gate) lub przy drzwiach statku powietrznego).

3.2.2.2. Obsługa sprzętu w porcie lotniczym (odpowiedzialność portu lotniczego).

Porty lotnicze przyjęły na siebie odpowiedzialność za udzielanie pomocy PRM od momentu wejścia w życie rozporządzenia w dniu 26 lipca 2008 r. Zasadniczo odpowiedzialność portu

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12 Konwencje te to: 1 - Konwencja o ujednostajnieniu niektórych prawideł, dotyczących międzynarodowego przewozu lotniczego, podpisana w Warszawie w październiku 1929 r., w skrócie zwana Konwencją warszawską (1929). 2 – Protokół zmieniający Konwencję o ujednostajnieniu niektórych prawideł, dotyczących międzynarodowego przewozu lotniczego podpisaną w Warszawie dnia 12 października 1929 r., podpisany w Hadze dnia 28 września 1955 r., w skrócie zwany Protokołem Haskim (1955). 3 - Konwencja o ujednostajnieniu niektórych prawideł, dotyczących międzynarodowego przewozu lotniczego, podpisana w Montrealu dnia 28 maja 1999 r., w skrócie zwana Konwencją montrealską (1999).

13 Rozporządzenie (WE) nr 889/2002 Parlamentu Europejskiego i Rady z dnia 13 maja 2002 r. (Dz.U. L 140 z 30.5.2002, s. 2) zmieniające rozporządzenie Rady (WE) nr 2027/97 w sprawie odpowiedzialności przewoźnika lotniczego z tytułu wypadków.

14 Zob. 1 ust. 10 rozporządzenia (WE) nr 889/2002.

lotniczego nie jest ograniczona[15] i ustalana jest zgodnie z krajowymi przepisami w zakresie odpowiedzialności/ czynów niedozwolonych. Fakt, że obowiązujące przepisy różnią się w zależności od tego, czy chodzi o porty lotnicze czy linie lotnicze, powoduje, że zakresy ich odpowiedzialności są diametralnie różne. Przede wszystkim, odpowiedzialność portu lotniczego opiera się z reguły na udowodnionej winie podmiotu zarządzającego portem lotniczym. Po drugie, o ile odpowiedzialność portu lotniczego nie jest ograniczona, o tyle odpowiedzialność linii lotniczej tak. To oznacza, że w przypadku portów lotniczych PRM będą musieli udowodnić winę sprawcy przed sądem, jeśli port lotniczy odrzuci roszczenie (inaczej niż w przypadku odpowiedzialności przewoźnika lotniczego), ale równocześnie mają możliwość odzyskania pełnej wartości szkody (inaczej niż w przypadku odpowiedzialności przewoźnika lotniczego, gdyż jest ona ograniczona).

3.2.3. Odszkodowanie: jego wysokość i obowiązująca procedura.

Przez długi czas organizacje PRM naciskały na nieograniczoną odpowiedzialność w przypadku zdarzeń obejmujących sprzęt do poruszania się powstałych zarówno w trakcie obsługi w porcie lotniczym, jak i w trakcie jego przewozu na pokład statku powietrznego. Podejście to wynika z wysokich kosztów nowoczesnego sprzętu do poruszania się[16] i stosunkowo niskiego limitu odpowiedzialności za bagaż ustalonego na mocy międzynarodowych konwencji, w szczególności Konwencji montrealskiej[17]. Sugeruje to, iż kwota odszkodowania wynikająca z międzynarodowych konwencji prawdopodobnie jest niewystarczająca w wielu przypadkach.
Większość przewoźników wypłaca odszkodowanie zgodnie z Konwencją montrealską. Za szkody w sprzęcie do poruszania się, których wartość przekracza 1 000 SDR wyłączne ryzyko ponosi pasażer, chyba że, w momencie przekazywania zarejestrowanego bagażu przewoźnikowi, złożył specjalną deklarację zainteresowania dostawą w miejscu przeznaczenia i w razie konieczności wniósł dodatkową opłatę[18]. Specjalne ubezpieczenie sprzętu do poruszania się dla PRM proponuje tylko niewielka liczba przedsiębiorstw i jedynie w kilku portach lotniczych. Większość przewoźników lotniczych i portów lotniczych nie oferuje specjalnej ochrony ubezpieczeniowej na wypadek uszkodzenia lub zniszczenia wózków inwalidzkich lub sprzętu do poruszania się.

Z analizy wynika, że tylko niektóre przedsiębiorstwa UE dopuszczają zgłoszenie przez PRM większej wartości ich sprzętu do poruszania się, a tym samym dochodzenia roszczeń w większej wysokości. Wśród tych przedsiębiorstw niektóre ograniczają deklarowaną większą wartości do określonej kwoty powyżej górnego limitu odszkodowania określonego międzynarodowymi i unijnymi przepisami, jednak poniżej rzeczywistej wartości sprzętu do poruszania się. Kilku przewoźników wskazało, że zadeklarowanie specjalnej wartości skutkuje „pobraniem od pasażera dopłaty".

Wszystkie zainteresowane strony zgadzają się, że koszt zaspokajania potrzeb PRM nie może być bezpośrednio przenoszony na PRM. Jednak tylko kilka z nich wyciągnęło logiczne wnioski i w pełni zwraca koszt uszkodzonego lub zagubionego sprzętu do poruszania się. Rozporządzenie podkreśla zasadę, że pomocy należy udzielać PRM[19] bez żadnych

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15 Odpowiedzialność portu lotniczego nie jest uregulowana żadną konwencją międzynarodową lub prawem Wspólnoty.

16 Na przykład elektryczny wózek inwalidzki może kosztować do 10 000 EUR.

17 Do 1 000 SDR (orientacyjna kwota w EUR wynikająca z wartości SDR na dzień 10 marca 2008 na podstawie wyceny SDR Międzynarodowego Funduszu Walutowego: 1 060 EUR).

18 Zgodnie z art. 22 ust. 2 Konwencji montrealskiej i art. 1 ust. 5 rozporządzenia 889/2002.

19 Zob. art. 8 rozporządzenia nr 1107/2006.

dodatkowych opłat, jednak jej zakres nie obejmuje określonej kwoty odszkodowania, która wysokość ustala się zgodnie z „przepisami prawa międzynarodowego, wspólnotowego i krajowego[20]".

Należy zauważyć, że w transporcie kolejowym prawodawstwo Wspólnoty nakłada na przedsiębiorstwa kolejowe obowiązek wypłaty pełnego odszkodowania, w przypadku ich odpowiedzialności za całkowite lub częściowe zagubienie lub uszkodzenie sprzętu do poruszania się[21].

3.2.4. Wpisanie lub wykreślenie sprzętu do poruszania się w definicji „bagażu".

Organizacje PRM oraz większość urzędów lotnictwa cywilnego uczestniczących w ankiecie w ramach przeprowadzanej analizy stoją na stanowisku, że sprzęt do poruszania się nie powinien być traktowany jako bagaż. Celem takiego wyłączenia jest, aby sprzęt do poruszania się nie podlegał przepisom o ograniczonej odpowiedzialności linii lotniczych ustalonym w międzynarodowych konwencjach. W konsekwencji linie lotnicze i porty lotnicze powinny wypłacać odszkodowanie w wysokości całkowitego kosztu zagubionego sprzętu do poruszania się lub ceny jego naprawy.

Amerykańska ustawa ACAA (US Air Carrier Access Act) nie podaje definicji sprzętu do poruszania się i nie wyklucza go wyraźnie z definicji bagażu. Nakłada jednak pełną, obiektywną odpowiedzialność bez ograniczeń finansowych, w przypadku zdarzenia obejmującego sprzęt do poruszania się, na wszystkich przewoźników chcących obsługiwać połączenia krajowe w Stanach Zjednoczonych[22]. Departament Transportu Stanów Zjednoczonych zamierza wkrótce zmienić rozporządzenie wdrażające ustawę ACAA, aby objąć zagranicznych przewoźników lotniczych, obsługujących połączenia do i ze Stanów Zjednoczonych, większością wymogów dotyczących osób niepełnosprawnych, obecnie obowiązujących przewoźników amerykańskich na mocy części 382, w tym dotyczących obsługi pomocy i urządzeń służących poruszaniu się.

Obowiązujące w Kanadzie przepisy w zakresie PRM to *część VII rozporządzeń w sprawie transportu lotniczego: zasady i warunki przewozu osób*[23]. Kanadyjska Agencja Transportu wydaje się definiować pomoc służącą poruszaniu się jako priorytetowo zarejestrowane do przewozu elementy osobistego użytku, nawet jeśli sprzęt do poruszania się nie jest wyłączony z definicji bagażu w ścisłym tego słowa znaczeniu. W ten sposób Kanadyjska Agencja Transportu nie dopuszcza, aby przedsiębiorstwa działające na jej terenie stosowały w odniesieniu do sprzętu do poruszania się przepisy o ograniczonej odpowiedzialności w zakresie zniszczonego, uszkodzonego lub zagubionego bagażu wynikające z międzynarodowych konwencji. Zakłada się, że przewoźnik, aby wylądować w Kanadzie, musi przestrzegać kanadyjskich przepisów. Nie wydaje się, aby założenie to zostało zakwestionowane przez zagranicznych przewoźników.

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20 Zob. art. 12 rozporządzenia nr 1107/2006.

21 Rozporządzenie (WE) nr 1371/2007 Parlamentu Europejskiego i Rady z dnia 23 października 2007 r. dotyczące praw i obowiązków pasażerów w ruchu kolejowym, Dz.U. L 315 z 31.12.2007, s. 14, art. 25.

22 Amerykańska ustawa ACAA (Air Carrier Access Act) zabrania dyskryminacji osób niepełnosprawnych w transporcie lotniczym. Departament Transportu Stanów Zjednoczonych wydał rozporządzenie (14 CFR część 382) wdrażające ustawę ACAA, które wyraźnie odnosi się do obsługi pomocy i urządzeń służących poruszaniu się.

23 Zasady i warunki przewozu osób wydane na mocy kanadyjskiej ustawy o transporcie. Część V ustawy dotyczy przewozu osób niepełnosprawnych. Sekcja 155 części V zawiera przepisy w zakresie uszkodzonych lub zagubionych urządzeń do pomocy.

4. ODPOWIEDŹ NA WYZWANIE: ROZPORZĄDZENIE NR 1107/2006.

4.1. Cel ilościowy: ograniczenie liczby zdarzeń.

Jak już wykazano w pkt 3.1 niniejszego komunikatu, brak szczegółowych procedur w zakresie obsługi wózków inwalidzkich lub innego sprzętu do poruszania się oraz fakt, że nie wszystkie porty lotnicze i nie wszystkie linie lotnicze przeprowadzają szkolenie swojego personelu w tym zakresie, wskazują, że łatwo można osiągnąć poprawę w tej dziedzinie. Rozporządzenie 1107/2006 zajmuje się tym zagadnieniem w aktualnej sytuacji i ustanawia prawne obowiązki dotyczące zarówno niezbędnych procedur jak i koniecznego przeszkolenia personelu w celu zapewnienia odpowiedniej pomocy dla PRM[24].

Obowiązki te obejmują między innymi obsługę sprzętu do poruszania się w porcie lotniczym lub jego przewiezienie na pokład statku powietrznego. Dlatego też jakość i zakres pomocy udzielanej przez linie lotnicze i przewoźników lotniczych powinny ulec znacznej poprawie. Szczegółowe procedury w zakresie odprawy bagażowo-biletowej oraz szkolenia personelu w zakresie obsługi sprzętu do poruszania się przyczynią się do podniesienia świadomości pracowników i pracodawców oraz umożliwią dalsze ograniczenie liczby i rozmiaru zdarzeń oraz przyniosą zmniejszenie kosztów osobowych i finansowych.

4.2. Cel jakościowy: zminimalizowanie konsekwencji zdarzenia.

Punkt 3.2.1 niniejszego komunikatu wskazuje luki prawne spowodowane brakiem wspólnej procedury zapewniającej natychmiastowe rozwiązania na miejscu, w przypadku uszkodzonego lub zagubionego sprzętu do poruszania się. Rozporządzenie 1107/2006 częściowo eliminuje te luki prawne. Przede wszystkim załącznik I do rozporządzenia 1107/2006 wyraźnie zawiera w definicji pomocy udzielanej przez port lotniczy *„tymczasową wymianę uszkodzonego lub utraconego sprzętu do poruszania się, przy czym nie musi być on identyczny”*[25]. Po drugie art. 9 ustanawia prawny obowiązek dla portów lotniczych ustalenia *„norm jakości w zakresie pomocy określonej w załączniku I i określa wymagania w zakresie środków dla ich spełnienia”*.

Jeśli chodzi o różnicę pomiędzy rodzajem i zakresem odpowiedzialności linii lotniczych i odpowiedzialności portów lotniczych, o której mowa w pkt 3.2.2 niniejszego komunikatu, art. 12 rozporządzenia 1107/2006 ustanawia obowiązek wypłaty odszkodowania *„zgodnie z przepisami prawa międzynarodowego, wspólnotowego i krajowego”*.

Komisja będzie uważnie monitorować, jak porty lotnicze i linie lotnicze wdrażają ten obowiązek w nowym kontekście ustanowionym przez rozporządzenie, aby ocenić w przyszłości, czy byłoby wskazane wprowadzenie bardziej precyzyjnej definicji odpowiedzialności portów lotniczych, odpowiadającej tej ustalonej w rozporządzeniu 889/2002 dla przewoźników lotniczych.

Jeśli chodzi o wysokość odszkodowania i odpowiednią procedurę, o których mowa w pkt 3.2.3 niniejszego komunikatu, liczba zdarzeń obejmujących sprzęt do poruszania się jest niewielka i nowa ochrona gwarantowana przez rozporządzenie 1107/2006 powinna pomóc dodatkowo zmniejszyć liczbę takich zdarzeń i ograniczyć ich konsekwencje. Wydaje się zatem oczywiste, że w przypadku, gdyby obecne przepisy dotyczące odszkodowań miały

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[24] Zob. art. 9 i 11 rozporządzenia

[25] Zob. załącznik I do rozporządzenia nr 1107/2006.

zostać zmienione, konsekwencje ekonomiczne, jakimi zdarzenia te mogłyby skutkować dla przedsiębiorstw i portów lotniczych, nie miałyby większego wpływu na sytuację finansową przewoźników lub portów lotniczych.

W pkt 3.2.4 niniejszego komunikatu jest mowa o tym, czy sprzęt do poruszania się powinien zostać włączony do definicji „bagażu". Kwestia ta ma zasadnicze znaczenie, gdyż związana jest z wysokością odszkodowania, a limity odpowiedzialności narzucone przez międzynarodowe konwencje dotyczą tylko bagażu. Niektórzy z największych wspólnotowych partnerów z branży transportu lotniczego już opracowali szczegółowe procedury administracyjne dotyczące praw PRM w tym zakresie. Ogólnie mówiąc procedury te nakładają na przewoźników powietrznych, czasami także na porty lotnicze, obiektywną odpowiedzialność i obowiązek wypłaty pełnego odszkodowania. Europejscy przewoźnicy powietrzni obsługujący połączenia transoceaniczne do Kanady lub połączenia krajowe w USA lub Kanadzie już obecnie stosują się to tych zasad poza terytorium Wspólnoty. Niektóre przedsiębiorstwa odstąpiły już od stosowania ograniczonej odpowiedzialności na podstawie własnej polityki obsługi klienta lub wewnętrznych standardów jakości.

Jak pokazują te przykłady, możliwe są różne warianty, jeśli chodzi o wysokość odszkodowania wypłacanego w przypadku zniszczonego, uszkodzonego lub zagubionego sprzętu do poruszania się, tak aby w możliwie najszerszym zakresie odpowiadało ono rzeczywistej wartości sprzętu. Cel ten można osiągnąć próbując interpretować lub definiować pojęcie bagażu w taki sposób, aby wyłączyć sprzęt do poruszania się, równocześnie zapewniając pozostawienie tego typu sprzęt w zakresie stosowania konwencji międzynarodowych, albo też usuwając lub zmieniając limity odszkodowania finansowego wynikające z tych konwencji. Ponadto linie lotnicze i porty lotnicze mogą dobrowolnie zrezygnować z ograniczonej odpowiedzialności w zakresie sprzętu do poruszania się.

Komisja uważa, że warto zająć się tą kwestią na poziomie ICAO w celu zlikwidowania lub zmiany limitów finansowych w odniesieniu do zagubionego, uszkodzonego lub zniszczonego sprzętu do poruszania się, ustalonych na mocy Konwencji montrealskiej. Komisja dostrzega trudności związane z renegocjowaniem międzynarodowej konwencji. Jednak fakt, że niektórzy członkowie ICAO zdecydowali się jednostronnie zmienić stosowane zasady i wypłacać na trasach krajowych pełne odszkodowanie za sprzęt do poruszania się, wskazuje, że inicjatywa UE może znaleźć polityczne poparcie.

W okresie średnioterminowym Komisja uważa, że pełne stosowanie rozporządzenia 1107/2006 poprawi zarówno monitorowanie jak i egzekwowanie istniejących praw PRM związanych z odszkodowaniem i/lub wymianą zniszczonego, uszkodzonego lub zagubionego sprzętu do poruszania się, jak również rodzajem pomocy udzielanej na miejscu w razie zdarzenia. Zanim podjęta zostanie decyzja, czy należy przedstawić wniosek legislacyjny w tej sprawie, Komisja uważa za wskazane, aby umożliwić rozporządzeniu 1107/2006 wejście w życie, a następnie dokonać oceny jego wpływu na ewentualny spadek liczby zdarzeń. Biorąc pod uwagę obecne rozwiązania w innych krajach oraz prawodawstwo Wspólnoty dotyczące transportu kolejowego, w okresie krótkoterminowym Komisja zachęca linie lotnicze do dobrowolnej rezygnacji z ograniczonej odpowiedzialności.

5. WNIOSKI

(1) Komisja przypomina portom lotniczym o ich obowiązku wdrożenia standardów jakości oraz koniecznych szkoleń i procedur w zakresie obsługi sprzętu do poruszania

się i praw PRM w przypadku zdarzenia obejmującego ich sprzęt do poruszania się, w szczególności w świetle dokumentu ECAC nr 30 i załączników do niego.

(2) Jeśli chodzi o wysokość odszkodowania oraz w celu przybliżenia go do rzeczywistej wartości sprzętu, Komisja zaproponuje Radzie, aby Wspólnota, we współpracy z państwami członkowskimi, podjęła inicjatywę w ramach ICAO mającą na celu sprecyzowanie lub zdefiniowanie pojęcia „bagaż", tak aby wyłączyć z niego sprzęt do poruszania się, albo zlikwidować lub zmienić limity odpowiedzialności w odniesieniu do zagubionego, uszkodzonego lub zniszczonego sprzętu do poruszania się, ustalonych na mocy Konwencji montrealskiej.

(3) Komisja zachęca linie lotnicze w UE do dobrowolnej rezygnacji z obowiązujących limitów odpowiedzialności w celu przybliżenia wysokości odszkodowania do rzeczywistej wartości sprzętu do poruszania się.

(4) W latach 2008-2009 Komisja będzie monitorować przestrzeganie przez państwa członkowskie, przewoźników powietrznych i porty lotnicze przepisów Wspólnoty, w tym rozporządzenia 1107/2006.

(5) Komisja zachęca zainteresowane strony do lepszego i bardziej regularnego gromadzenia danych dotyczących reklamacji związanych ze sprzętem do poruszania się.

(6) Do sprawozdania, o którym mowa w art. 17 rozporządzenia 1107/2006, Komisja włączy rozdział poświęcony prawom PRM, których sprzęt do poruszania się został zagubiony, uszkodzony lub zniszczony. Komisja dokona oceny rozwoju sytuacji po wejściu w życie rozporządzenia 1107/2006 oraz postępów inicjatywy w ramach ICAO, o której mowa w pkt 2 wniosków. Jeśli ocena wykaże brak niezbędnej poprawy, Komisja przedstawi odpowiedni wniosek legislacyjny mający na celu wzmocnienie obowiązujących na mocy przepisów Wspólnoty praw pasażerów linii lotniczych, których wózki inwalidzkie lub inny sprzęt do poruszania się zostały zniszczone, uszkodzone lub zagubione w trakcie obsługi w porcie lotniczym lub w transporcie na pokładzie statku powietrznego, a także zmianę obowiązujących limitów odszkodowania i dokładniejsze zdefiniowanie odpowiedzialności portu lotniczego.

KOMISJA WSPÓLNOT EUROPEJSKICH

Bruksela, dnia 1.12.2008
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KOMUNIKAT KOMISJI DO PARLAMENTU EUROPEJSKIEGO, RADY, EUROPEJSKIEGO KOMITETU EKONOMICZNO-SPOŁECZNEGO I KOMITETU REGIONÓW

„Dążenie do dostępnego społeczeństwa informacyjnego”

KOMUNIKAT KOMISJI DO PARLAMENTU EUROPEJSKIEGO, RADY, EUROPEJSKIEGO KOMITETU EKONOMICZNO-SPOŁECZNEGO I KOMITETU REGIONÓW

„Dążenie do dostępnego społeczeństwa informacyjnego”

[SEC(2008) 2915]

[SEC(2008) 2916]

1. STRESZCZENIE

W miarę rozwoju „społeczeństwa informacyjnego” stajemy się coraz bardziej uzależnieni w życiu codziennym od produktów i usług opartych na technologii. Jednakże niski poziom dostępności elektronicznej („e-dostępności”) oznacza, że wielu niepełnosprawnych Europejczyków nadal nie może czerpać korzyści ze społeczeństwa informacyjnego.

W ostatnich latach kwestii e-dostępności poświęcono wiele uwagi na szczeblu politycznym. W 2006 r. ministrowie europejscy założyli w deklaracji z Rygi osiągnięcie znaczącego postępu do 2010 r. Analiza porównawcza z 2007 r. wykazała, że tempo postępu jest nadal niewystarczające oraz że dla osiągnięcia celów założonych w deklaracji z Rygi niezbędne będą dalsze działania. Dostępność internetu, a w szczególności stron internetowych administracji publicznej, okazała się priorytetem ze względu na coraz większe znaczenie internetu w życiu codzien44ym.

Zdaniem Komisji należy jak najszybciej stworzyć bardziej **spójne, wspólne i skuteczne podejście do e-dostępności, a w szczególności dostępności stron internetowych**, aby przyspieszyć powstanie dostępnego społeczeństwa informacyjnego, zgodnie z odnowioną agendą społeczną[1]. W niniejszym komunikacie Komisja opisuje obecną sytuację, uzasadnia działania na szczeblu europejskim oraz określa najważniejsze kroki, które należy podjąć.

W celu osiągnięcia wspólnego, spójnego **podejścia do e-dostępności**:

- Europejskie organizacje normalizacyjne (ESO) powinny dążyć do **większej normalizacji e-dostępności,** która przyczyni się do ograniczenia fragmentacji rynku i ułatwi upowszechnienie towarów i usług opartych na technologiach informacyjno-komunikacyjnych (ICT).

- Państwa członkowskie, zainteresowane strony i Komisja powinny **stymulować innowacyjność i szersze stosowanie** e-dostępności, w szczególności poprzez unijne programy w dziedzinie badań i innowacji oraz fundusze strukturalne.

- Wszystkie zainteresowane strony powinny **w pełni wykorzystać** szanse zajęcia się kwestią e-dostępności w ramach **istniejącego prawodawstwa UE**. Komisja uwzględni stosowne wymagania dotyczące e-dostępności w przeglądach lub w nowych aktach prawnych.

- Komisja **wzmocni współpracę zainteresowanych stron** w celu zwiększenia spójności, koordynacji oraz skutków ich działań. Nowa grupa doraźna wysokiego szczebla opracuje wytyczne dotyczące ogólnego spójnego podejścia do e-dostępności (w tym dostępności stron internetowych) oraz zaproponuje działania priorytetowe mające na celu zniesienie barier w tej dziedzinie.

[1] COM(2008)412.

W celu przyspieszenia postępu w zakresie **dostępności stron internetowych**:

- Po przyjęciu przez konsorcjum World Wide Web uaktualnionych wytycznych dotyczących dostępności zawartości stron internetowych (WCAG 2.0) ESO powinny **jak najszybciej przyjąć normy europejskie** w tym zakresie.

- Państwa członkowskie powinny **przyspieszyć prace** nad **udostępnieniem** publicznych stron internetowych oraz **przygotować się wspólnie na szybkie przyjęcie** europejskich norm dotyczących dostępności zawartości stron internetowych.

- Komisja będzie **monitorować postępy i publikować ich wyniki**, a także może na późniejszym etapie podjąć działania legislacyjne.

2. E-DOSTĘPNOŚĆ

e-dostępność oznacza zlikwidowanie barier technicznych oraz problemów, z jakimi stykają się osoby niepełnosprawne, w tym często osoby starsze, pragnące uczestniczyć na równych warunkach w społeczeństwie informacyjnym.

Aby umożliwić wszystkim obywatelom jednakowe warunki uczestnictwa w społeczeństwie należy zapewnić dostęp do pełnego zakresu towarów, produktów i usług opartych na ICT. Kategoria ta obejmuje komputery, telefony, telewizory, internetowe portale rządowe, zakupy przez internet, centra obsługi telefonicznej, terminale samoobsługowe jak np. bankomaty czy automaty do sprzedaży biletów.

2.1. Bieżąca sytuacja

Rozmiar wyzwania związanego z dostępnością jest ogromny i ciągle wzrasta: niepełnosprawność dotyczy około 15 % ludności Europy, a stan zdrowia jednego na pięciu Europejczyków w wieku produkcyjnym wymaga zastosowania rozwiązań w zakresie dostępności. W sumie trzy na pięć osób może skorzystać z e-dostępności, jako że poprawia ona ogólną łatwość obsługi[2].

Skutki społeczno-gospodarcze e-dostępności dotyczą zarówno jednostek, jak i całej Europy. Oparte na ICT rozwiązania w zakresie dostępności mogą na przykład pomóc starszym pracownikom w utrzymaniu pracy oraz przyczynić się do szerszego korzystania z internetowych usług publicznych takich jak e-administracja czy e-zdrowie. Brak e-dostępności prowadzi do wykluczenia znaczących grup społeczeństwa i zapobiega ich pełnemu uczestnictwu w życiu zawodowym i edukacyjnym, wypoczynku, procesach demokratycznych czy życiu społecznym. Większa e-dostępność przyczyni się do osiągnięcia celów związanych z integracją ekonomiczną i włączeniem społecznym.

W wielu krajach przyjęto przynajmniej pewne środki prawne lub środki wsparcia promujące e-dostępność, a niektóre sektory branży ICT podejmują daleko idące działania w celu zwiększenia dostępności produktów i usług[3].

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[2] The Demographic Change — Impacts of New Technologies and Information Society (Zmiany demograficzne - wpływ nowych technologii i społeczeństwa informacyjnego).

[3] Zob. informacje szczegółowe w dołączonym dokumencie roboczym służb Komisji.

e-dostępność jest również kluczowym elementem europejskiej polityki w dziedzinie e-integracji[4]. W szerszym kontekście ICT są objęte zakresem proponowanej dyrektywy w sprawie równego traktowania w odniesieniu do dostępu do towarów i usług udostępnionych społeczeństwu oraz dostaw tych towarów i usług[5]. Wspólnota Europejska i państwa członkowskie muszą również wypełnić zobowiązania wynikające z Konwencji ONZ w sprawie praw osób niepełnosprawnych w odniesieniu do dostępności towarów i usług ICT. Niektóre akty prawne UE poruszają kwestie e-dostępności w sposób pośredni lub bezpośredni.

2.2. Uzasadnienie dalszych działań

Pomimo potencjalnych korzyści oraz uwagi poświęcanej temu zagadnieniu na szczeblu politycznym postęp w zakresie e-dostępności nadal jest zbyt mały. Istnieje wiele uderzających przykładów niedociągnięć w zakresie dostępności. Usługi transmisji tekstu niezbędne dla osób niesłyszących lub z upośledzeniem mowy są dostępne tylko w połowie państw członkowskich; dostęp do służb ratowniczych przez telefoniczne wiadomości tekstowe jest możliwy tylko w siedmiu państwach członkowskich; nadaje się bardzo niewiele audycji z opisem głosowym, napisami lub z lektorem języka migowego; tylko 8% bankomatów dwóch głównych europejskich banków detalicznych posiada opcję głosową[6].

Dorobek prawny UE związany z e-dostępnością jest ograniczony. Na szczeblu państw członkowskich występuje znaczne rozproszenie działań w odniesieniu do e-dostępności, zarówno pod względem poruszanych kwestii (zazwyczaj dostępność usług telefonii stacjonarnej, usług telewizyjnych oraz publicznych stron internetowych), jak również pod względem kompletności zastosowanych instrumentów politycznych. Branża ICT zmagająca się ze zróżnicowanymi wymogami i brakiem pewności odczuwa negatywne skutki takiej fragmentacji rynku, utrudniającej osiągnięcie korzyści skali niezbędnych do zapewnienia innowacyjności i rozwoju rynku. Część branży czynnie angażuje się w działania i współpracuje z użytkownikami (np. w odniesieniu do dostępnej telewizji cyfrowej), ale zbyt wiele podmiotów tylko obserwuje sytuację.

Główną kwestią związaną z e-dostępnością jest fakt, że podejmowane obecnie działania nie wywierają wystarczająco dużego wpływu ze względu na brak spójności, niejasne priorytety oraz słabe wsparcie prawne i finansowe.

Dlatego kluczem do znaczącej poprawy jest **wspólne i spójne europejskie podejście** do e-dostępności.

2.3. Proponowane działania

(1) Osiągnięcie zmian – wzmocnienie priorytetów politycznych, koordynacji i współpracy zainteresowanych stron

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4 Komunikat „i2010” COM(2005) 229, komunikat w sprawie e-dostępności COM(2005) 425 i komunikat w sprawie e-integracji COM(2007)694.

5 COM (2008) 426.

6 Dalsze szczegóły można znaleźć w badaniu MeAC (Measuring progress of e-accessibility in Europe – pomiar postępu w dziedzinie e-dostępności w Europie).

W ostatnich latach zrealizowano szereg działań na szczeblu europejskim. Teraz nadszedł czas na zwiększenie synergii między tymi działaniami oraz wzmocnienie poszczególnych obszarów działań w celu uzyskania znaczniejszych i bardziej konsekwentnych skutków.

Państwa członkowskie, użytkownicy i branża muszą wzmocnić wysiłki i starać się wywrzeć większy wpływ poprzez ściślejszą współpracę na szczeblu europejskim oraz lepsze wykorzystanie istniejących instrumentów politycznych UE. W celu wsparcia i wzmocnienia spójności i skuteczności wspólnego podejścia oraz przyczynienia się do określenia priorytetów Komisja ustanowi **doraźną grupę wysokiego szczebla ds. e-dostępności**, składającą sprawozdania grupie wysokiego szczebla ds. inicjatywy i2010, w skład której wejdą organizacje konsumenckie, przedstawiciele niepełnosprawnych i starszych użytkowników, branży ICT, branży technologii i usług wspomagających, środowiska akademickiego i właściwych organów.

Na początku 2009 r. Komisja powoła **doraźną grupę wysokiego szczebla**, której celem będzie określenie wytycznych dotyczących priorytetów i bardziej spójnego podejścia do e-dostępności. Wzywa się zainteresowane strony do współpracy.

Komisja **zwiększy obecne wsparcie dla współpracy** z zainteresowanymi stronami, jak również wsparcie dla wzajemnej współpracy stron. W szczególności, po wprowadzeniu inicjatywy i2010 i planu działania w sprawie niepełnosprawności oraz po zajęciu się kwestiami normalizacji i telekomunikacji, wspomniane grupy powinny zastosować wytyczne grupy wysokiego szczebla przy określaniu priorytetów. Użytkownicy, właściwe organy oraz branża również powinni bardziej zaangażować się w kwestie e-dostępności i zwiększyć współpracę w tej dziedzinie.

Należy określić priorytety w zakresie e-dostępności. Pierwszym z nich jest dostępność stron internetowych, w ramach której można zastosować zaproponowane spójne, wspólne podejście. Kolejne kwestie dotyczą dostępności telewizji cyfrowej i komunikacji elektronicznej, w tym dostępności jednego europejskiego numeru alarmowego. W odniesieniu do tych priorytetów należy wzmocnić współpracę użytkowników i branży oraz, z pomocą grupy wysokiego szczebla, udzielić tej współpracy większego wsparcia ze strony UE w zakresie prawodawstwa i innowacyjności.

Kolejny priorytet stanowią terminale samoobsługowe i bankowość elektroniczna[7]. Bliższa współpraca zainteresowanych stron umożliwi stworzenie wytycznych na temat dalszych priorytetów oraz określenie wspólnego programu przyszłych prac.

Komisja poruszyła już kwestię e-dostępności we wniosku dotyczącym nowej wersji Europejskich Ram Interoperacyjności e-administracji[8], a także zajmie się nią w dalszych działaniach związanych z inicjatywą i2010 oraz planem działania w sprawie niepełnosprawności.

Komisja zagwarantuje, że e-dostępność pozostanie **priorytetem politycznym** w ramach tych działań.

Bliższą koordynację i współpracę jeszcze bardziej wzmocnią poniższe działania.

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7 Zob. sprawozdanie w sprawie konsultacji społecznej.

8 http://ec.europa.eu/idabc/en/document/7728

(2) Monitorowanie postępu i wzmocnienie skuteczności najlepszych praktyk

W 2009 r., w następstwie dwóch badań przeprowadzonych w latach 2006-2008[9], Komisja przeprowadzi badanie mające na celu dalsze monitorowanie ogólnego postępu działań związanych z e-dostępnością i dostępnością stron internetowych.

W ramach programu na rzecz konkurencyjności i innowacji (CIP) na rok 2009 Komisja zaproponuje nową sieć tematyczną ds. e-dostępności i dostępności stron internetowych w celu dalszego zwiększenia współpracy zainteresowanych stron oraz zebrania doświadczeń i najlepszych praktyk. Komisja będzie również starała się wzmocnić sieć wymiany najlepszych praktyk „ePraktyka" w odniesieniu do e-administracji, e-zdrowia i e-integracji. W ramach sieci zgromadzono już ogromne zasoby wiedzy specjalistycznej w odniesieniu do e-dostępności.

Komisja będzie monitorowała postępy w zakresie dostępności stron internetowych i e-dostępności oraz wspierała współpracę i wymianę najlepszych praktyk poprzez **badania** i **sieć tematyczną CIP**, która powstanie w 2009 r.

(3) Wsparcie innowacyjności i zastosowania

Badania naukowe i innowacyjność w dziedzinie e-dostępności otrzymują już znaczne wsparcie. W 2008 r. 13 nowych projektów otrzymało ok. 43 mln EUR z unijnego programu badawczego. Komisja będzie nadal aktywnie wspierać działania poświęcone e-dostępności i ICT w służbie samodzielnego życia osób starszych poprzez unijne programy badawcze; w 2009 r. zostanie zorganizowany dalszy przetarg w tej dziedzinie.

Komisja **zapewni, aby e-dostępność stanowiła priorytet w dziedzinie badań i innowacyjności** w perspektywie roku 2009 i dalszej.

Wykorzystując wspólny program badawczy dotyczący nowoczesnych technologii w służbie osobom starszym, rozpoczęty w 2008 r., państwa członkowskie i Komisja będą stymulowały poszukiwanie opartych na ICT rozwiązań kwestii samodzielnego życia oraz zapobiegania przewlekłym chorobom i sposobu postępowania z nimi.

W ramach CIP na 2008 r., mając na względzie przyspieszenie zastosowania technologii, Komisja sfinansowała pilotażowy projekt dotyczący dostępnej telewizji oraz pilotażowe projekty dotyczące ICT w służbie osobom starszym. W 2009 r. Komisja sfinansuje pilotażowy projekt dotyczący „rozmowy wielokanałowej" (ang. „total conversation" – połączenia komunikacji głosowej, tekstowej i wizyjnej w celu uwzględnienia potrzeb osób niepełnosprawnych), który pomoże osobom z upośledzeniem mowy lub słuchu w dostępie do europejskiego numeru alarmowego 112.

Wzywa się państwa członkowskie i zainteresowane strony do **stymulowania innowacyjności w dziedzinie e-dostępności i jej zastosowania** poprzez fundusze strukturalne, 7 PR, program nowoczesnych technologii w służbie osobom starszym i programy krajowe.

[9] MeAC oraz badanie dotyczące dostępności produktów i usług ICT dla osób niepełnosprawnych i starszych.

Rozporządzenie w sprawie funduszy strukturalnych[10] wymaga, aby państwa członkowskie uznały dostępność dla osób niepełnosprawnych za jedno z kryteriów przyznania finansowania. W tym kontekście Komisja przedstawi w 2009 r. zestaw środków w dziedzinie niepełnosprawności mających zastosowanie do ICT oraz będzie zachęcać państwa członkowskie i regiony do zapewnienia, aby kryteria przyznawania przetargów i finansowania uwzględniały dostępność ICT.

Komisja udostępni w 2009 r. zestaw środków w dziedzinie niepełnosprawności mających zastosowanie do ICT, z którego będzie można korzystać w przypadku funduszy strukturalnych i innych programów.

(4) Ułatwianie normalizacji

W programie prac nad normalizacją Komisja w dalszym ciągu wyraża silne poparcie dla e-dostępności. W szczególności mandat 376 udzielony europejskim organizacjom normalizacyjnym stanowi **ważny krok w dziedzinie normalizacji sprzyjający e-dostępności**[11]. Komisja będzie zachęcała do wykorzystywania wyników prac nad normalizacją, a także będzie dążyła do zapewnienia szybkiej kontynuacji mandatu 376 w celu ustanowienia norm i powiązanych systemów oceny zgodności. Proces ten **zostanie uzupełniony i wsparty poprzez dialog zainteresowanych stron, wymianę dobrych praktyk i pilotażowe projekty zastosowania, o których mowa w sekcji „Proponowane działania" niniejszego komunikatu**.

Na mocy mandatu 376 ESO, we współpracy z zainteresowanymi stronami, powinny **jak najszybciej opracować unijne normy** dotyczące e-dostępności w perspektywie roku 2009 i dalszej.

(5) Wykorzystanie obecnego prawodawstwa i rozważenie potrzeby opracowania nowych aktów

Na szczeblu krajowym istnieje wyraźny związek między obecnością prawodawstwa a rzeczywistym postępem w odniesieniu do e-dostępności[12]. Badania wskazują na zagrożenie fragmentacją prawa w UE wynikającą z różnych środków prawnych. W oparciu o te badania oraz o komunikaty z 2005 i 2007 r. Komisja rozpoczęła poszukiwanie bardziej ogólnego podejścia prawnego do e-dostępności.

Jednakże biorąc pod uwagę ogromny, kompleksowy zakres i zmienny charakter dziedziny e-dostępności, nadal nie ma wyraźnej zgody co do ewentualnego prawodawstwa unijnego poświęconego e-dostępności[13], np. w odniesieniu do zakresu, norm, mechanizmów zgodności i powiązań z istniejącym prawodawstwem. Ponadto, pomimo istnienia wyraźnej zgody co do potrzeby wspólnego działania w celu poprawy e-dostępności, istnieją różne poglądy co do

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10 Rozporządzenie Rady (WE) nr 1083/2006.

11 Celem mandatu 376 jest umożliwienie zastosowania zamówień publicznych i praktyk ICT w celu usunięcia barier dla uczestnictwa osób niepełnosprawnych i starszych w społeczeństwie informacyjnym. Komisja Europejska udzieliła mandatu ESO w celu opracowania wspólnych wymogów (np. w odniesieniu do rozmiaru tekstu, kontrastu ekranu, rozmiaru klawiatury itd.) i oceny zgodności.

12 Zob. MeAC oraz badanie dotyczące dostępności produktów i usług ICT dla osób niepełnosprawnych i starszych.

13 W toku konsultacji społecznych 90 % organizacji użytkowników uznało wiążące prawodawstwo za priorytet, jednak zdanie to podzielało tylko 33 % przedstawicieli branży i władz publicznych.

kolejnych priorytetów, którymi należy się zająć. Dlatego Komisja uznała, że nie nadszedł jeszcze czas na przedstawienie konkretnego wniosku legislacyjnego, ale będzie w dalszym ciągu poddawała ocenie możliwość opracowania i stosowność takiego wniosku, biorąc pod uwagę rzeczywisty postęp w dziedzinie e-dostępności.

Jednakże w ramach obecnego prawodawstwa unijnego istnieją przepisy, które mogłyby być lepiej wykorzystane, w szczególności w odniesieniu do sprzętu radiowego i telekomunikacyjnego, komunikacji elektronicznej, zamówień publicznych, praw autorskich w społeczeństwie informacyjnym, równości w zatrudnieniu, podatku od wartości dodanej i wyłączeń dotyczących pomocy państwa[14]. Pełne zastosowanie tych przepisów spowodowałoby znaczną poprawę e-dostępności w państwach członkowskich. Dlatego Komisja zachęca państwa członkowskie do ich jak najlepszego wykorzystania przed rozważeniem nowych przepisów.

W odniesieniu do szeregu powyższych aktów prawnych UE toczy się procedura przeglądu lub zostanie ona wkrótce rozpoczęta[15]. Komisja będzie starała się zapewnić, aby w stosownych przypadkach uwzględniono i wzmocniono wymogi dotyczące e-dostępności. Ponadto wnioski legislacyjne dotyczące komunikacji elektronicznej wzmacniają znacząco obecne przepisy dotyczące użytkowników niepełnosprawnych w istniejących ramach prawnych. Komisja będzie również uważnie monitorowała transpozycję i wdrożenie dyrektywy o medialnych usługach audiowizualnych[16], w szczególności artykułu 3c, stanowiącego, że państwa członkowskie zachęcają dostawców usług medialnych podlegających ich jurysdykcji do zapewniania, by świadczone przez nich usługi stawały się stopniowo dostępne dla osób z upośledzeniami wzroku lub słuchu.

Komisja **zapewni, aby stosowne przepisy dotyczące e-dostępności zostały uwzględnione w przeglądach** aktów prawnych UE. Państwa członkowskie, zainteresowane strony i Komisja powinny **w pełni wykorzystać możliwości** poprawy e-dostępności **oferowane przez obecne prawodawstwo**.

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14 Dyrektywy 2000/78/WE, 2002/21/WE, 1999/5/WE, 2004/18/WE, 2001/29/WE, 2007/65/WE.

15 Na przykład dokonuje się obecnie przeglądu dyrektywy 1999/5/WE w sprawie urządzeń końcowych: w tym kontekście Komisja zagwarantuje zachowanie możliwości zastosowania odnośnego art. 3 ust. 3 lit. f).

16 Dyrektywa 2007/65/WE.

3. DOSTĘPNOŚĆ STRON INTERNETOWYCH

Dostępność stron internetowych jest ważnym elementem e-dostępności, umożliwiającym osobom niepełnosprawnym odbiór, zrozumienie i nawigację stron internetowych, jak również interakcję i udział w ich tworzeniu. Pomaga ona również innym osobom mającym problemy ze wzrokiem, zręcznością manualną lub o ograniczonych zdolnościach poznawczych, na przykład osobom starszym. Dostępność stron internetowych jest szczególnie ważna ze względu na gwałtowny rozwój internetowych usług informacyjnych i interaktywnych, takich jak: bankowość elektroniczna, zakupy przez internet, administracja i służby użyteczności publicznej, komunikacja na odległość z krewnymi lub znajomymi.

3.1. Bieżąca sytuacja

Pomimo znaczenia dostępności stron internetowych, pozostaje ona niska w całej UE. W szeregu badań krajowych i europejskich przeprowadzonych w ostatnich latach stwierdzono, że większość stron internetowych, zarówno publicznych jak i prywatnych, nie przestrzega nawet najbardziej podstawowych międzynarodowych wytycznych dotyczących dostępności. Z niedawnego badania wynika, że tylko 5,3 % skontrolowanych stron rządowych w pełni przestrzega podstawowych wytycznych dotyczących dostępności, zaś odsetek przestrzegających tych wytycznych stron komercyjnych jest znikomy[17]. Z powyższych względów wiele osób uznaje ważne strony internetowe za trudne w obsłudze, co powoduje częściowe lub całkowite wykluczenie tych osób ze społeczeństwa informacyjnego.

W ostatnich latach kwestia dostępności publicznych stron internetowych nabrała w państwach członkowskich znaczenia politycznego[18]. Na szczeblu europejskim w komunikacie dotyczącym dostępności stron internetowym z 2001 r. zachęca się państwa członkowskie do poparcia wytycznych dotyczących dostępności zawartości stron internetowych (WCAG)[19]. Rada podkreśliła w dwóch rezolucjach[20] potrzebę szybszego uzyskania dostępności stron internetowych i ich zawartości. Parlament Europejski zasugerował w 2002 r., że wszystkie publiczne strony internetowe powinny być w pełni dostępne dla osób niepełnosprawnych do 2003 r[21]. W 2006 r. w deklaracji ministerialnej z Rygi dotyczącej integracyjnego społeczeństwa informacyjnego zobowiązano się do osiągnięcia dostępności wszystkich publicznych stron internetowych do 2010 r.

Wersja 1 WCAG została przyjęta w 1999 r. przez konsorcjum World Wide Web (W3C) na szczeblu międzynarodowym. Jednakże ze względu na wieloznaczności państwa członkowskie zastosowały wytyczne w sposób fragmentaryczny, zaś w świetle rozwoju internetu WCAG 1.0 stają się nieaktualne. Od kilku lat W3C pracuje nad nową wersją wytycznych (WCAG 2.0); ich przyjmowanie znajduje się obecnie w końcowej fazie. Uniknięcie ponownej fragmentacji stanowi wyzwanie dla nowej wersji.

3.2. Uzasadnienie dalszych działań

Zapewnienie większej dostępności stron internetowych może w niektórych przypadkach być trudne, a także wymagać nakładów finansowych i zastosowania wiedzy specjalistycznej.

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17 Badanie MeAC.
18 Zob. powiązany dokument roboczy służb Komisji.
19 COM (2001) 529.
20 2002/C 86/02 i 2003/C 39/03.
21 C5-0074/2002-2002/2032(COS).

Jednakże istnieje coraz więcej dowodów oraz udokumentowanych przykładów potwierdzających tezę, że zapewnienie dostępności strony internetowej przynosi realne korzyści nie tylko dla użytkowników niepełnosprawnych, ale również dla właścicieli stron internetowych i ogółu użytkowników. Korzystanie z usług staje się łatwiejsze, utrzymanie stron internetowych jest prostsze, a liczba użytkowników wzrasta[22]. W wyniku powyższego większa dostępność stron internetowych jest korzystna dla osób niepełnosprawnych jak i dla innych, co pomaga zwiększyć konkurencyjność przedsiębiorstw europejskich.

Analizy przykładów: korzyści płynące z dostępnych stron internetowych

Przedsiębiorstwo świadczące usługi finansowe w Zjednoczonym Królestwie odniosło następujące korzyści z zapewnienia dostępności swojej strony internetowej:

- klienci szybciej znajdowali informacje i dłużej przeglądali stronę

- z usługi skorzystali nowi klienci, co doprowadziło do zwiększenia sprzedaży przez internet

- utrzymanie strony było prostsze, szybsze i tańsze

- strona miała wyższą pozycję w wyszukiwarkach

- wyeliminowano problemy związane z kompatybilnością, zaś dostęp z urządzeń przenośnych uległ poprawie

- inwestycja zwróciła się w całości przed upływem 12 miesięcy.

Pomimo tych korzyści fragmentacja prawodawstwa w państwach członkowskich w połączeniu z brakiem wyraźnych działań legislacyjnych na szczeblu europejskim utrudnia funkcjonowanie rynku wewnętrznego, stanowi barierę dla konsumentów i obywateli w środowisku transgranicznym oraz utrudnia rozwój przemysłu. Konwencja ONZ w sprawie praw osób niepełnosprawnych przewiduje wprowadzenie zobowiązań dotyczących internetu, które muszą zostać spełnione przez państwa będące jej stronami. Dlatego należy podjąć dalsze działania na szczeblu europejskim.

3.3. Proponowane działania

Za poprawę dostępności stron internetowych odpowiedzialne pozostają przede wszystkim państwa członkowskie i poszczególni dostawcy usług. Komisja może jednak podjąć lub ułatwić pewne działania, które pomogą w szybszym uzyskaniu lepszej dostępności stron internetowych w Europie, nawet bez ustanowienia szczegółowych przepisów UE w odniesieniu do dostępności stron internetowych. Wspólne, konsekwentne podejście zapewni powodzenie tych działań. Najważniejsze obszary działań są następujące:

(1) Ułatwienie szybkiego przyjęcia i wdrożenia w Europie wytycznych międzynarodowych

Istnieje ogólna zgoda, że wytyczne WCAG 2.0 stanowią specyfikacje techniczne, których należy ściśle przestrzegać w celu zapewnienia dostępności stron internetowych. Po uzgodnieniu wytycznych przez W3C, co ma nastąpić w najbliższej przyszłości, dzięki mandatowi 376 możliwe będzie osiągnięcie harmonizacji na szczeblu europejskim. Zanim to

[22] Dokument roboczy służb Komisji.

nastąpi państwa członkowskie powinny podejmować działania w celu zapewnienia osiągnięcia celów z Rygi w odniesieniu do publicznych stron internetowych oraz powinny przygotować się wspólnie i w sposób spójny na szybkie wdrożenie w przepisach krajowych nowych specyfikacji dotyczących dostępności, poprzez:

– Opublikowanie w latach 2009-2010 uaktualnionych wytycznych technicznych oraz w stosownych przypadkach przetłumaczenie odpowiednich specyfikacji W3C;

– Wskazanie w 2009 r. przedmiotowych publicznych stron internetowych i sieci intranetowych[23] oraz zapewnienie ich dostępności do 2010 r.

Komisja będzie nadal prowadziła prace nad zwiększeniem dostępności swoich stron internetowych oraz uaktualni wewnętrzne wytyczne, uwzględniając nowe specyfikacje.

Niepublicznych dostawców usług, w szczególności właścicieli stron internetowych świadczących usługi w interesie ogólnym[24] oraz dostawców stron komercyjnych niezbędnych dla uczestnictwa w gospodarce i społeczeństwie również zachęca się do zwiększenia dostępności stron internetowych (od 2008 r.).

Państwa członkowskie powinny **osiągnąć stuprocentową** dostępność publicznych stron internetowych do 2010 r. i przygotować się **wspólnie w spójny sposób** na szybką aktualizację specyfikacji dotyczących dostępności stron internetowych.

Właściciele stron internetowych świadczący usługi w interesie ogólnym oraz pozostali właściciele stron internetowych powinni zwiększyć dostępność własnych stron internetowych.

Europejskie organizacje normalizacyjne we współpracy z zainteresowanymi stronami, powinny jak najszybciej opracować **unijne normy dotyczące dostępności stron internetowych** w oparciu o WCAG 2.0.

Komisja pracuje nad zwiększeniem dostępności własnych stron internetowych i uaktualni wewnętrzne wytyczne uwzględniając nowe specyfikacje.

Komisja będzie monitorowała i wspierała te działania oraz zachęcała państwa członkowskie do podejmowania szybkich kroków w odniesieniu do kluczowych aspektów wdrażania dostępności oraz ułatwiania zbierania i wymiany doświadczeń, w szczególności poprzez platformę „ePraktyka”[25]. W zależności od osiągniętego postępu oraz terminu wejścia w życie norm Komisja rozważy potrzebę stworzenia wspólnych wytycznych UE, w tym podjęcia działań legislacyjnych[26].

Komisja będzie monitorować postępy i publikować ich wyniki, a także rozważy potrzebę stworzenia wspólnych wytycznych UE, w tym podjęcia działań legislacyjnych (od 2009 r.).

(2) Poprawa wiedzy na temat dostępności stron internetowych i jej promowanie

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23 Zgodnie z dyrektywą w sprawie równego traktowania w zakresie zatrudnienia i pracy 2000/78/WE.

24 O których mowa w dokumencie COM(2007) 725.

25 www.epractice.eu.

26 Zob. ocena skutków towarzysząca dokumentowi COM (2007) 694.

Istnieje wyraźna potrzeba zwiększenia widoczności, zrozumienia i świadomości w odniesieniu do potrzeb i rozwiązań związanych z dostępnością stron internetowych. Państwa członkowskie powinny podjąć wiodącą rolę w tym zakresie poprzez:

– szeroko zakrojoną promocję dostępności stron internetowych poprzez oferowanie jasnych informacji i wytycznych dotyczących dostępności stron internetowych, w tym technologii wspomagających[27], oraz zachęcanie do publikowania oświadczeń na temat dostępności[28];

– wsparcie systemów szkoleń, wymiany wiedzy i najlepszych praktyk;

– wybór w zamówieniach publicznych narzędzi i stron internetowych spełniających wymogi dostępności;

– wyznaczenie w 2009 r. krajowego punktu kontaktowego ds. dostępności stron internetowych, np. na stronie internetowej;

– monitorowanie postępów w odniesieniu do zgodności, zadowolenia użytkowników i kosztów zapewnienia dostępności publicznych i pozostałych stron internetowych oraz składanie sprawozdań proponowanej grupie wysokiego stopnia i społeczeństwu.

Państwa członkowskie powinny **odgrywać wiodącą rolę w zwiększaniu świadomości** na temat dostępności stron internetowych i **zrozumienia** tej kwestii poprzez spójne, wydajne i skuteczne działania oraz **składać sprawozdania na temat postępów** grupie wysokiego stopnia.

4. WNIOSEK

Dla osiągnięcia e-dostępności niezbędne są wspólne, spójne, wielopoziomowe działania. W szczególności konieczne jest osiągnięcie natychmiastowego, szybkiego postępu w dziedzinie dostępności stron internetowych. Wszystkie zainteresowane strony odgrywają decydującą rolę w osiągnięciu wspólnego celu, jakim jest prawdziwie integracyjne społeczeństwo informacyjne.

Komisja zwraca się do Rady, Parlamentu Europejskiego, Komitetu Regionów i Komitetu Ekonomiczno-Społecznego z prośbą o wyrażenie poglądów na temat działań, które należy podjąć w celu zapewnienia wszystkim obywatelom dostępu do społeczeństwa informacyjnego.

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[27] Urządzenia oparte na ICT pomagające osobom niepełnosprawnym.

[28] Dostarczanie informacji dodatkowych takich jak polityka dostępności strony internetowej, przestrzeganie stosownych specyfikacji, pomoc osobom niepełnosprawnym, mechanizmy składania skarg.

Załącznik – streszczenie działań

e-dostępność

Działania	*Data*	*Odpowiedzialność*
Powołanie **doraźnej grupy wysokiego szczebla**, której celem będzie określenie priorytetów i bardziej spójnego podejścia do e-dostępności. Wzywa się zainteresowane strony do współpracy	Początek 2009 r.	Komisja, zainteresowane strony
Zagwarantowanie, że e-dostępność pozostanie **priorytetem politycznym** w dalszych działaniach związanych z inicjatywą i2010 oraz planem działania w sprawie niepełnosprawności	2009-	Komisja
Monitorowanie postępów w zakresie wdrażania dostępności stron internetowych i e-dostępności, wsparcie współpracy i wymiany dobrych praktyk poprzez **badania** i **sieć tematyczną CIP**	2009-	Komisja, branża, zainteresowane strony
Zapewnienie, aby e-dostępność stanowiła **priorytet w dziedzinie badań i innowacyjności**	2009 -	Komisja
Stymulowanie **innowacyjności w dziedzinie e-dostępności i jej upowszechnienia** poprzez fundusze strukturalne, 7 PR, program nowoczesnych technologii w służbie osobom starszym i programy krajowe	2009 -	Państwa członkowskie, inne zainteresowane strony
Udostępnienie **zestawu środków w dziedzinie niepełnosprawności** mających zastosowanie do ICT, z którego będzie można korzystać w przypadku funduszy strukturalnych i innych programów	2009	Komisja
Jak najszybsze opracowanie unijnych norm dotyczących e-dostępności na mocy mandatu 376, we współpracy z zainteresowanymi stronami	2009-	ESO
Zapewnienie, aby stosowne **przepisy dotyczące e-dostępności zostały uwzględnione w przeglądach** aktów prawnych UE	2008-	Komisja
Pełne wykorzystanie możliwości poprawy e-dostępności oferowanych przez **obecne prawodawstwo**	2008-	Państwa członkowskie, Komisja, branża, zainteresowane strony

Dostępność stron internetowych

Osiągnięcie stuprocentowej **dostępności publicznych stron internetowych** w celu **wspólnego i spójnego** przygotowania się do szybkiej aktualizacji specyfikacji dotyczących dostępności stron internetowych.	*2009-2010*	Państwa członkowski e
Jak najszybsze opracowanie **unijnych norm dotyczących dostępności stron internetowych** w oparciu o WCAG 2.0.	2009-	ESO (i zainteresowa

		ne strony)
Zwiększenie dostępności **stron internetowych Komisji** i uaktualnienie wewnętrznych wytycznych, uwzględniając nowe specyfikacje.	2009-	Komisja
Właściciele stron internetowych świadczący usługi w interesie ogólnym oraz pozostali właściciele stron internetowych powinni zwiększyć dostępność własnych stron internetowych.	2009-	Inne zainteresowane strony
Monitorowanie postępów i publikacja ich wyników, a także rozważenie potrzeby stworzenia wspólnych wytycznych UE, w tym podjęcia działań legislacyjnych	2009-	Komisja
Odgrywanie wiodącej roli w zwiększaniu **świadomości** na temat dostępności stron internetowych i **zrozumienia** tej kwestii poprzez spójne, wydajne i skuteczne działania oraz składanie sprawozdań na temat postępów grupie wysokiego stopnia.	2008-	Państwa członkowskie

KOMISJA WSPÓLNOT EUROPEJSKICH

Bruksela, dnia 13.9.2005
KOM(2005)425 wersja ostateczna

KOMUNIKAT KOMISJI DO RADY, PARLAMENTU EUROPEJSKIEGO, EUROPEJSKIEGO KOMITETU EKONOMICZNO-SPOŁECZNEGO ORAZ KOMITETU REGIONÓW

eDostępność

[SEK(2005) 1095]

KOMUNIKAT KOMISJI DO RADY, PARLAMENTU EUROPEJSKIEGO, EUROPEJSKIEGO KOMITETU EKONOMICZNO-SPOŁECZNEGO ORAZ KOMITETU REGIONÓW

eDostępność

Dostępność technologii informacyjnych i komunikacyjnych (ICT) znacznie poprawi jakość życia osób niepełnosprawnych, natomiast brak równych szans w dostępie do ICT może prowadzić do ich wykluczenia. W niniejszym komunikacie Komisja proponuje szereg działań strategicznych promujących eDostępność (ang. eAccessibility). Wzywa ona Państwa Członkowskie oraz zainteresowane strony do wspierania dobrowolnych, pozytywnych działań mających na celu znaczne zwiększenie w Europie gamy dostępnych produktów i usług ICT (ang. accessible ICT products and services).

Niniejszy komunikat w sprawie eDostępności przyczynia się do realizacji nowej inicjatywy „**i2010 – Europejskie społeczeństwo informacyjne na rzecz wzrostu i zatrudnienia**”[1], która przedstawia nowe ramy strategiczne oraz szeroką strategię polityki w celu wspierania otwartej i konkurencyjnej gospodarki cyfrowej oraz podkreśla rolę ICT jako czynnika wspierającego integrację społeczną i podnoszącego jakość życia. Komisja postanowiła zrealizować ambitny cel stworzenia „społeczeństwa informacyjnego dla wszystkich” poprzez promowanie integracyjnego społeczeństwa cyfrowego (inclusive digital society), które daje wszystkim szanse oraz minimalizuje ryzyko wykluczenia.

1. WPROWADZENIE

Osoby niepełnosprawne stanowią około 15 % ludności europejskiej i wiele z nich napotyka trudności przy korzystaniu z produktów i usług ICT. W niektórych przypadkach starsi ludzie mają podobne problemy. Ze względu na zmiany demograficzne dostępność produktów i usług ICT stała się priorytetem w Europie: w roku 1990 osoby powyżej 60 roku życia stanowiły 18 % europejskiej ludności, liczba ta ma wzrosnąć do 30 % do roku 2030[2].

Badanie przeprowadzone ostatnio w USA[3] wykazało, że 60 % osób dorosłych w wieku produkcyjnym mogłoby skorzystać z dostępnych technologii (ang. accessible technologies), ponieważ korzystanie z obecnie osiągalnych technologii jest utrudnione lub problematyczne.

Z badania przeprowadzonego w 2002 r.[4] wynika, że ponad 48 % Europejczyków powyżej 50 roku życia uważa, że producenci nie uwzględniają w sposób wystarczający ich potrzeb przy projektowaniu produktów. Równocześnie 10 do 12 milionów z tych osób to potencjalni nabywcy nowoczesnych telefonów komórkowych, komputerów oraz usług internetowych.

Wnioski są oczywiste: **należy upewnić się, że korzyści wynikające z rozwoju ICT dostępne są dla jak najszerszej części społeczeństwa. Stanowi to społeczną, etyczną i**

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1 COM(2005) 229 wersja ostateczna z dnia 1 czerwca 2005 r.
2 UN World Population Prospects (2002 Revision) oraz 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

polityczną konieczność, ponadto przyczyni się do stworzenia rynków o rosnącym znaczeniu gospodarczym.

Przezwyciężanie technicznych barier i trudności napotykanych przez osoby niepełnosprawne oraz innych ludzi, którzy próbują w pełni uczestniczyć w społeczeństwie informacyjnym (IS) określa się mianem „***eDostępności***" (eAccessibility). Wpisuje się ona w szersze ramy polityki eIntegracji (ang. eInclusion), która odnosi się do innych typów przeszkód np. natury finansowej, geograficznej bądź edukacyjnej.

Niniejszy komunikat opiera się na uprzednich pracach w dziedzinie eDostępności przeprowadzonych w ramach dwóch planów działań eEuropa oraz na wnioskach i wynikach projektów BRT. Uwzględnia on również najważniejsze wyniki **konsultacji przy użyciu Internetu**[5], przeprowadzonej na początku 2005 roku, która wykazała silne poparcie (ponad 88 % odpowiedzi) dla podjęcia przez instytucje europejskie inicjatyw mających na celu zaradzenie sytuacji, w której, według znacznej większości respondentów (ponad 74 %), istnieje brak spójności pomiędzy dostępnymi (w rozumieniu eDostępności) produktami i usługami w Europie. 84 % respondentów uważa, że istnieje potrzeba wprowadzenia szerszej gamy dostępnych produktów i usług.

Głównym celem niniejszego komunikatu jest promowanie spójnego podejścia do inicjatyw eDostępności dobrowolnie podejmowanych w Państwach Członkowskich, a także wspieranie samoregulacji sektora.

2. KONKRETNE WYZWANIA

Nowe technologie stanowią już oczywistą pomoc dla osób niepełnosprawnych pozwalając im na wykonywanie w sposób niezależny czynności, które wcześniej mogli wykonywać jedynie z pomocą innych ludzi. Jednak, mimo wysiłków sektora osoby niepełnosprawne nadal napotykają wiele trudności przy korzystaniu z produktów i usług technologii informacyjnych jak np.:

- brak zharmonizowanych rozwiązań np. brak dostępu w wielu Państwach Członkowskich do numeru alarmowego 112 z telefonów tekstowych;
- brak współdziałających pomiędzy sobą rozwiązań dla dostępnych ICT;
- niedostosowanie oprogramowania do urządzeń wspomagających, często po wprowadzeniu na rynek nowych systemów operacyjnych czytniki ekranu używane przez niewidomych nie działają;
- zakłócenia pomiędzy zwykłymi produktami a urządzeniami wspomagającymi np. między telefonami GSM a aparatami słuchowymi;
- brak ogólnoeuropejskich norm np. siedem różnych i niekompatybilnych systemów w przypadku telefonów tekstowych przeznaczonych dla osób niesłyszących i niedosłyszących;
- brak odpowiednich usług np. wiele stron internetowych jest zbyt skomplikowanych dla osób mających trudności poznawcze lub niedoświadczonych użytkowników, bądź nieprzystosowanych do czytania lub nawigacji przez osoby z upośledzeniem wzroku;

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[5] Wyniki dostępne na stronie: http://europa.eu.int/information_society/policy/accessibility/com_ea_2005/a_documents/com_consult_res.html#_Toc97028181

- brak produktów i usług przeznaczonych dla pewnych grup np. komunikacja telefoniczna dla użytkowników posługujących się językiem migowym;
- sposób projektowania urządzeń stwarzający trudności przy ich wykorzystaniu np. klawiatury lub monitory wielu urządzeń;
- niedostępna zawartość (stron www);
- ograniczony wybór usług łączności elektronicznej, ich jakość i cena;

Z technicznego punktu widzenia większość z tych trudności można byłoby łatwo rozwiązać. Wymaga to jednak współpracy, koordynacji i determinacji na poziomie europejskim, ponieważ poleganie jedynie na działaniu mechanizmów rynkowych okazało się jak dotychczas niewystarczające.

W niedalekiej przyszłości aspekty związane z dostępnością należy uwzględnić między innymi w przypadku następujących nowych technologii:

- telewizja cyfrowa np. w zakresie norm i kompatybilności, a także projektowania usług i sprzętu;
- telefonia komórkowa trzeciej generacji np. w zakresie projektowania sprzętu, oprogramowania oraz usług;
- łączność szerokopasmowa np. wykorzystanie możliwości jakie oferują multimodalne rozwiązania w celu zwiększania dostępności a nie jej ograniczania.

Uwzględnienie tych zagadnień, które wcześniej uważano za przeznaczone jedynie dla specyficznej, docelowej grupy społeczeństwa, w rzeczywistości będzie miało pozytywne skutki dla większości użytkowników technologii.

3. ASPEKTY RYNKOWE I GOSPODARCZE

Badania w zakresie ICT jak również sam rynek znalazły już innowacyjne rozwiązania w celu zaradzenia wspomnianym trudnościom. Główne przeszkody w powszechnym dostępie do nich są jednak następujące:

- do tej pory rozwiązania te były ukierunkowane na wąski rynek (obejmujący głównie osoby niepełnosprawne oraz, w pewnych przypadkach, osoby starsze) reprezentowany przede wszystkim przez MŚP funkcjonujące na poziomie krajowym lub regionalnym;
- brak odpowiednich norm technicznych oraz specyfikacji technicznych;
- w prawodawstwie wspólnotowym dopiero niedawno wyraźnie rozważono możliwość uwzględniania wymagań dotyczących dostępności w specyfikacji technicznej w przypadku procedur zamówień publicznych;
- istnieją znaczne różnice pomiędzy Państwami Członkowskimi w zakresie sposobu opracowywania ich własnych rozwiązań.

W związku z powyższym rynek dostępnych produktów i usług ICT znajduje się ciągle we wstępnej fazie rozwoju: jest on w dużym stopniu podzielony według granic narodowych oraz cierpi z powodu braku zharmonizowanego prawodawstwa i odpowiednich norm technicznych. Czynniki te nie ułatwiają funkcjonowania jednolitego rynku i stanowią dodatkowe obciążenie dla sektora, który musi dostosowywać się do niejednolitych wymogów w różnych Państwach Członkowskich.

Coraz częściej uświadamiamy sobie jednak, że docelowymi konsumentami tych rozwiązań już nie są jedynie osoby niepełnosprawne lub, w pewnych przypadkach, osoby starsze, lecz całe społeczeństwo. Stajemy się przez to świadkami początków zmian na tym rynku, również ważniejsze podmioty przemysłu w Europie zaczynają się tym sektorem interesować. Upłynie jednak jeszcze trochę czasu zanim będzie można rzeczywiście odczuć wpływ ich zaangażowania.

Podobna sytuacja występuje w sektorze telekomunikacyjnym; stopień rozpowszechnienia produktów i usług telekomunikacyjnych jest tak wysoki, że nawet taka (obecnie relatywnie niewielka) nisza rynkowa stanowi ważny element przewagi konkurencyjnej i wzrostu przyciągając tym samym uwagę większych podmiotów działających na rynku.

Podsumowując, eDostępność oraz związane z nią produkty i usługi technologii wspomagających stanowią dziś jeden z celów średnioterminowych ważniejszych dostawców technologii nie tylko w Europie ale także w innych częściach świata.

4. ASPEKTY PRAWNE I STRATEGICZNE

Niejednokrotnie Rada wspierała działania na szczeblu UE np. wzywając Państwa Członkowskie i Komisję do „*wykorzystania potencjału jaki społeczeństwo informacyjne stanowi dla osób niepełnosprawnych oraz, w szczególności, do przyczynienia się do zniesienia barier natury technicznej i innej, aby umożliwić tym osobom efektywny udział w gospodarce oraz społeczeństwie opartych na wiedzy*[6]*”*. Parlament Europejski również poparł działania tego typu[7].

W szczególności, w europejskich strategiach i prawodawstwie uznano, że zatrudnienie i praca mają zasadnicze znaczenie jeśli chodzi o zapewnienie wszystkim równych szans, przyczynianie się do pełnego uczestnictwa obywateli w życiu gospodarczym, kulturalnym i społecznym oraz do realizacji ich potencjału. Oczywiście szerszy dostęp do wysokiej jakości, dostępnych produktów i usług ICT odgrywa znaczącą rolę, zwiększy bowiem szanse na znalezienie pracy, przyczyni się do poprawy integracji społecznej oraz pozwoli ludziom żyć dłużej w sposób niezależny.

Instytucje europejskie przy wielu okazjach wyrażały potrzebę udziału wszystkich Europejczyków w społeczeństwie informacyjnym. Komisja w ramach dwóch planów działania *eEuropa* podjęła inicjatywy w celu stworzenia bardziej dostępnego społeczeństwa informacyjnego. Plan działania z 2002 r. zawiera odrębne działanie dotyczące powyższych kwestii. Zaleca on przyjęcie wytycznych w sprawie inicjatywy dostępności sieci (ang. Web Accessibility Inititiative (WAI))[8], rozwijanie ogólnoeuropejskiego programu szkoleniowego w zakresie projektowania uniwersalnego (ang. European Design for All (DFA)), a także zaleca działania w kierunku rozwijania norm w zakresie technologii wspomagających oraz projektowania uniwersalnego. Celem planu działania eEuropa 2005 jest uwzględnienie

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6 Rezolucja Rady z dnia 2-3 grudnia 2002 r. w sprawie „eDostępności dla ludzi niepełnosprawnych”, http://www.socialdialogue.net/docs/cha_key/consilium_2002_14892en2.pdf

7 Rezolucja PE w sprawie „eEuropa 2002: dostępność publicznych stron internetowych i ich zawartości” (2002 (0325))

8 „eEuropa 2002: dostępność publicznych stron internetowych i ich zawartości” COM(2001) 529 wersja ostateczna, http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0529en01.pdf

eIntegracji we wszystkich liniach działania. Ponadto proponuje on wprowadzenie wymogów związanych z dostępnością ICT w dziedzinie zamówień publicznych.

Rada ds. telekomunikacji poparła te działania oraz wyraziła potrzebę poprawienia eDostępności w Europie[9]. Ponadto deklaracja ministrów[10] w sprawie eIntegracji zaproponowała podjęcie wszelkich niezbędnych działań na rzecz otwartego, opartego na wiedzy i dostępnego dla wszystkich społeczeństwa integracyjnego.

Co więcej Rada ds. zatrudnienia i spraw społecznych w swej rezolucji z 2003 r. w sprawie eDostępności[11] wezwała Państwa Członkowskie do zwalczania technicznych, prawnych i innych barier uniemożliwiających osobom niepełnosprawnym efektywny udział w społeczeństwie i gospodarce opartych na wiedzy.

Zgodnie z powyższym Parlament Europejski w swej rezolucji z 2002 r. w sprawie dostępności sieci[12] *„podkreśla potrzebę unikania wszelkich form wykluczenia z IS oraz wzywa do integracji osób niepełnosprawnych i starszych*". Ponadto w innej rezolucji jest mowa o wykorzystaniu języka migowego w telekomunikacji w Europie[13].

Zasadniczo, art. 13 Traktatu ustanawiającego Wspólnotę Europejską przewiduje podjęcie środków niezbędnych w celu zwalczania wszelkiej dyskryminacji między innymi ze względu na niepełnosprawność.

Na podstawie wspomnianego artykułu dyrektywa Rady 2000/78/WE z dnia 27 listopada 2000 r.[14] (w art. 1) wyraźnie stawia za cel: *„wyznaczenie ogólnych ram dla walki z dyskryminacją ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w odniesieniu do zatrudnienia i pracy"*. W szczególności dyrektywa stanowi, że *„należy przyjąć właściwe, to znaczy skuteczne i praktyczne środki w celu przystosowania miejsca pracy z uwzględnieniem niepełnosprawności, na przykład przystosowując pomieszczenia lub wyposażenie (...)"*.

Ponadto wiele dyrektyw europejskich związanych ze społeczeństwem informacyjnym zawiera klauzule dotyczące integracji osób niepełnosprawnych i starszych. Są to między innymi dyrektywy w sprawie łączności elektronicznej, w szczególności dyrektywa ramowa[15] i dyrektywa w sprawie usług powszechnych[16], dyrektywa w sprawie urządzeń radiowych i końcowych urządzeń telekomunikacyjnych[17], dyrektywa w sprawie zamówień publicznych[18] oraz dyrektywa w sprawie równego traktowania w zakresie zatrudnienia i pracy[19].

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9 Rezolucja Rady w sprawie planu działania eEuropa 2002: dostępność publicznych stron internetowych i ich zawartości, Dz.U. C 86 z 10.4.2002.

10 Deklaracja ministrów w sprawie eIntegracji z dnia 11 kwietnia 2003 r. http://www.eu2003.gr/en/articles/2003/4/11/2502/

11 Rezolucja Rady 14892/02.

12 Rezolucja PE w sprawie „eEuropa 2002: dostępność publicznych stron internetowych i ich zawartości" (2002 (0325)).

13 Rezolucja PE w sprawie języka migowego – rezolucja B4/ 0985/98.

14 Dostępna na stronie: http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/2000_78_en.pdf

15 Dyrektywa 2002/21/WE.

16 Dyrektywa 2002/22/WE.

17 Dyrektywa 1999/5/WE.

18 Dyrektywy 2004/17/WE i 2004/18/WE.

19 Dyrektywa 2000/78/WE.

Jednym z czterech obszarów działania planu działania Komisji[20] opublikowanego w grudniu 2003 r. w sprawie dalszych działań związanych z Europejskim Rokiem Osób Niepełnosprawnych jest dostęp do nowych technologii oraz ich wykorzystanie. Opisuje on działania podjęte w celu zwiększenia dostępu do społeczeństwa informacyjnego przy wykorzystaniu instrumentów istniejących na poziomie UE.

Działania podejmowane na poziomie UE mają wartość dodaną, ponieważ niektóre Państwa Członkowskie w celu zaradzenia wspomnianym problemom opracowują na poziomie krajowym prawodawstwo, przepisy, normy oraz wytyczne. Działania te sprawiają, że istnieją podobne aczkolwiek różniące się wymogi związane z eDostępnością produktów i usług. Stanowi to wysokie zagrożenie dla przemysłu europejskiego, który może zostać zmuszony do funkcjonowania na podzielonym rynku co w konsekwencji wpłynie to na utratę konkurencyjności i efektywności.

Zagrożenie dla konsumentów jest jeszcze większe, w szczególności dla osób niepełnosprawnych lub starszych: podzielony rynek oznacza droższe, mniej znane i niekompatybilne produkty oraz większe trudności przy dostępie do informacji i ich rozpowszechniania między krajami, itp.

Działania UE uwzględniają również doświadczenia międzynarodowe, jak np. środki przyjęte w USA i Kanadzie, z którymi to krajami Komisja podjęła dialog, zwłaszcza jeśli chodzi o stosowanie przepisów prawnych jako silnej dźwigni finansowej w kontekście zamówień publicznych.

W związku z powyższym określono podstawowe warunki dla inicjatyw, które należy podjąć na poziomie UE. Taką opinię wyraziła zdecydowana większość osób, które wzięły udział we wspomnianej publicznej konsultacji (84 %).

5. BIEZACE DZIALANIA NA POZIOMIE UE

Niektóre działania są już realizowane na poziomie UE. Będą one doskonalone i kontynuowane.

Wymogi i normy związane z dostępnością

Normy są narzędziem strategicznym dla przemysłu oraz dla sektora publicznego, a także kluczowym katalizatorem nowych możliwości rynkowych. Mimo że produkcja i wdrażanie norm odbywają się w sposób dobrowolny, stanowią one ważne narzędzie wspierające działania strategiczne. Europejskie normy dotyczące eDostępności przyczynią się do lepszego funkcjonowania jednolitego europejskiego rynku, a więc do rozwoju nowych rynków, konkurencyjności i zatrudnienia. Komisja będzie zatem nadal zapewniać wsparcie finansowe na realizację konkretnych działań proponowanych przez europejskie organizacje normalizacyjne (ESO) w ramach europejskiego planu działania w sprawie normalizacji lub też upoważni ESO do określania norm[21].

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[20] Europejski plan działania w sprawie równych szans dla osób z niepełnosprawnych, COM(2003) 650 wersja ostateczna.

[21] Proces ten reguluje dyrektywa 98/34. http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_204/l_20419980721en00370048.pdf

Wymogi związane z dostępnością określone przez normy muszą odpowiadać potrzebom sektora, projektantów i dostawców produktów i usług tak, aby nie stały na przeszkodzie kreatywności lub innowacji. Równocześnie muszą one odpowiadać potrzebom użytkownika. Zaangażowanie użytkowników w opracowywanie norm ma więc zasadnicze znaczenie. Należy zatem zachować równowagę pomiędzy interesem sektora a interesem publicznym. Normy powinny być łatwe do wprowadzenia w życie oraz jasno określone w prawodawstwie, przepisach oraz innych instrumentach wspierających dostępność. Bezpłatny dostęp do norm lub dostęp za niewielką opłatą ułatwi ich przyjmowanie, w szczególności przez MŚP, które dysponują ograniczonymi środkami na ich kupno oraz przez użytkowników pragnących się z nimi zapoznać.

Należy zapewnić, jednocześnie promując współdziałanie, aby opatentowane technologie nieposiadające rozsądnych i niedyskryminujących licencji (RAND) nie stały się standardowymi rozwiązaniami.

Projektowanie uniwersalne (DFA)

Metodologia DFA określa projektowanie produktów i usług w taki sposób, aby były one dostępne dla jak największej liczby użytkowników[22]. DFA zajmuje już powszechnie uznaną pozycję, jednak nie jest jeszcze powszechnie stosowane. Konieczne jest zatem ciągłe podnoszenie świadomości oraz promowanie DFA w Europie. W tym celu Komisja ustanowiła sieć centrów doskonałości, znaną jako EDEAN[23], która skupia ponad stu członków.

DFA nie tylko pozwala na **większe uwzględnienie wymogów związanych z dostępnością przy projektowaniu produktów lub usług**, ale także prowadzi do znacznych **oszczędności dzięki unikaniu wysokich kosztów związanych z koniecznością przeprojektowania lub wprowadzania modyfikacji technicznych** już po zrealizowaniu projektu.

Opracowano podstawową strukturę programu szkoleniowego DFA dla inżynierów i projektantów a także przeprowadzono kilka pilotażowych kursów w Państwach Członkowskich. Jego szersze wykorzystywanie w szkolnictwie pomaturalnym i zawodowym pozwoli doprowadzić w przyszłości do dostępnego IS[24]. Obecność specjalisty w dziedzinie DFA w ważniejszych organizacjach mogłaby natomiast sprawić, że eDostępność zyskałaby na profesjonalizmie.

Dostępność sieci

Na mocy komunikatu Komisji z 2001 r.[25] w sprawie dostępności publicznych stron internetowych, oraz rezolucji Rady i Parlamentu z 2002 r. Państwa Członkowskie

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22 Trzy główne strategie DFA są następujące: 1) projekt stosowny dla większości użytkowników bez potrzeby wprowadzania zmian, 2) projekt pozwalający na łatwe dostosowanie do różnych użytkowników (np. przy użyciu wymienialnych interfejsów), 3) projekt pozwalający na bezproblemowe podłączenie urządzeń wspierających.

23 Strona internetowa EDEAN (European Design for All e-Accessibility Network), http://www.e-accessibility.org/

24 DFA curriculum report of IDCnet project (Sprawozdanie projektu IDCnet na temat programu szkoleniowego DFA).

25 COM(2001) 529 wersja ostateczna.

zobowiązały się zapewnić zgodnie z międzynarodowymi wytycznymi[26]dostępność publicznych stron internetowych.

Za pośrednictwem grupy ekspertów w dziedzinie eDostępności, Komisja oraz Państwa Członkowskie mogą monitorować podejmowane działania, między innymi dzięki metodom[27] i procedurom oceny, analizie porównawczej, gromadzeniu danych oraz określeniu „najlepszych praktyk". **Dostępność sieci jest katalizatorem** dostępnych usług online leżących w interesie publicznym. W celu usprawnienia tego procesu, ważne jest, aby wspierać rozwój narzędzi do tworzenia stron internetowych, które uwzględniają zagadnienia dostępności[28].

Potrzeba systemów certyfikacji dostępności wynika z faktu, że w niektórych Państwach Członkowskich obowiązuje prawodawstwo regulujące dostępność oraz istnieje potrzeba oceny zgodności. Warsztaty Europejskiego Komitetu Normalizacyjnego (CEN)[29] rozważają obecnie odpowiednie rozwiązania.

Analiza porównawcza i monitorowanie

Niektóre Państwa Członkowskie wprowadzają do krajowego prawodawstwa kryteria analizy porównawczej w odniesieniu do dostępności i monitorowania. Na szczeblu UE Rada i Parlament Europejski zwróciły się z wnioskiem o monitorowanie dostępności stron internetowych. Parlament wystąpił również z wnioskiem o monitorowanie napisów i opisów głosowych w przypadku telewizji cyfrowej.

Aby móc kontynuować rozwój odpowiednich europejskich strategii eDostępności **konieczne jest by w poszczególnych Państwach Członkowskich istniały porównywalne dane europejskie**. Komisja oprze się na rozpoczętych europejskich działaniach z zakresu monitorowania, uwzględniając zrewidowaną strategię lizbońską.

Komisja prowadzi dialog z urzędami statystycznymi w celu opracowania i doskonalenia odpowiednich wskaźników, w szczególności w odniesieniu do uwzględnienia kwestii związanych z dostępnością w już istniejących wskaźnikach.

Badania naukowe

Badania i rozwój technologiczny (BRT) stanowią podstawowy element wysiłków podjętych na rzecz dostępnego IS. Od 1991 r. blisko 200 europejskich projektów BRT, stanowiących około 200 mln EUR współfinansowania WE[30], przyczyniło się już do poprawy dostępności dzięki większej wiedzy na temat problemów związanych z dostępnością oraz potrzebnych rozwiązań.

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26 W3C/WAI/WCAG1.0 Web Content Accessibility Guidelines 1.0 (Wytyczne (1.0) dotyczące dostępności zawartości stron internetowych). Wersja 2 jest w przygotowaniu. Dotyczyć ona będzie rozwoju technologii internetowych, który dokonał się od czasu opublikowania pierwszej wersji oraz ułatwi analizę zgodności.

27 Grupa Web Accessibility Benchmarking (WAB) cluster.

28 W3C/WAI/ATAG Authoring Tools Accessibility Guidelines (ATAG) (wytyczne dla twórców oprogramowania do tworzenia stron internetowych w zakresie dostępności).

29 http://www.cenorm.be/cenorm/businessdomains/businessdomains/isss/activity/ws-wac.asp

30 Przykłady projektów są dostępne np. na stronach: http://www.cordis.lu/ist/so/einclusion/home.html oraz http://www.cordis.lu/ist/directorate_f/einclusion/previous-research.htm

Na konkretnych przykładach wykazano możliwe rozwiązania, jak np. zdalnie dostępne usługi dla osób starszych (w tym usługi alarmowe i pomoc w nagłych wypadkach). Opracowano rozwiązania w celu lepszego dostępu osób niewidomych lub niedowidzących do informacji cyfrowej (tekst, rysunki, obrazy trójwymiarowe, kodowana muzyka, programy telewizyjne). Przetestowano systemy ułatwiające osobom z upośledzeniem ruchu poruszanie się, operowanie przedmiotami i ich kontrolowanie oraz usługi mające zwiększyć możliwości porozumiewania się osób niesłyszących, w tym język migowy i czytanie z ust. Inne przykłady to: wprowadzenie środowiska komputerowego ułatwiającego zintegrowaną edukację dzieciom niepełnosprawnym lub zatrudnianie dorosłych osób niepełnosprawnych oraz udział w kształtowaniu polityk (eEuropa, czyli dostępność sieci, projektowanie uniwersalne).

Wiele rozwiązań będących wynikiem projektów wspólnotowych znalazło skuteczne zastosowanie przy opracowywaniu produktów wprowadzonych do obrotu. W innych przypadkach zdobyta wiedza przyczyniła się do zwiększenia dostępności produktów i usług ICT.

Ze względu na fakt, że technologie nadal szybko się rozwijają i oferują nowe rozwiązania techniczne, trzeba inwestować w badania, aby wykorzystać znaczące możliwości jakie oferują one osobom niepełnosprawnym i starszym. Obecny wniosek dotyczący siódmego programu ramowego uwzględnia **potrzebę kontynuowania, a nawet rozszerzenia zakresu BRT na eDostępność** w celu dalszego rozwoju europejskiego sektora technologii wspomagających[31] oraz aby dostępność stała się standardową kwestią dla sektora tradycyjnego.

6. ZWIĘKSZANIE EDOSTĘPNOŚCI PRODUKTÓW I USŁUG ICT W EUROPIE – TRZY NOWE ŚRODKI DZIAŁANIA

Oprócz promowania bieżących działań wspomnianych powyżej Komisja wesprze stosowanie trzech środków działania jeszcze niewykorzystywanych na szeroką skalę w Europie, mianowicie wymogi związane z dostępnością w przypadku zamówień publicznych, certyfikację dostępności oraz lepsze wykorzystanie obowiązujących przepisów.

Dwa lata po opublikowaniu niniejszego komunikatu, Komisja oceni wyniki tych działań. Zgodnie z zasadą lepszego stanowienia prawa[32] Komisja wymienia opinie z Państwami Członkowskimi i, w zależności od ogólnej oceny wpływu, może rozważyć możliwość podjęcia dodatkowych działań, również natury prawnej, jeśli uzna to za konieczne.

1. Zamówienia publiczne

Ogółem zamówienia publiczne w Europie stanowią 16 % produktu krajowego brutto. Organy publiczne wszystkich szczebli mogą wymagać spełnienia kryterium dostępności w odniesieniu do towarów i usług, których zakupu dokonują. W rzeczywistości europejskie dyrektywy w sprawie zamówień publicznych wyraźnie określają możliwość uwzględnienia wymogów związanych z DFA i dostępnością w warunkach przetargu (specyfikacji technicznej).

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[31] Sprawozdanie DG EMPL, Dostęp do technologii wspierających w UE (Access to Assistive Technology in the EU), E-V/5-03-003-EN-C.

[32] Biała Księga Komisji na temat europejskiego systemu rządów, COM(2001) 428 wersja ostateczna.

Podejście takie stanowi jasne zobowiązanie do realizowania **polityki integracji sprzyjającej udostępnianiu produktów i usług większej liczbie użytkowników, obywateli i pracowników**. Polityka ta zachęca firmy przemysłowe do uznania dostępności za nieodłączną charakterystykę ich produktów oraz tworzy większy rynek dla dostępnych ICT. Takie rezultaty zaobserwowano w USA[33], gdzie prawodawstwo wymaga, by kryteria związane z dostępnością były uwzględnione w federalnych zamówieniach publicznych.

90 % respondentów biorących udział w konsultacji przy użyciu Internetu opowiedziało się za zasadą, zgodnie z którą agencje publiczne muszą wymagać by wszystkie produkty i usługi ICT, których dokonują zakupu spełniały wymogi związane z dostępnością. Niektóre z Państw Członkowskich już uwzględniają wymogi związane z dostępnością w przypadku zamówień publicznych. Ustanowienie wspólnych wymogów związanych z dostępnością na poziomie UE może wpłynąć na zmniejszenie podziału rynku oraz wesprzeć współdziałanie.

Istnieje wyraźna potrzeba uspójnienia wymogów związanych z dostępnością w odniesieniu do zamówień publicznych w Europie. W tym celu Komisja zamierza udzielić mandatu europejskim organizacjom normalizacyjnym w celu opracowania europejskich wymogów związanych z dostępnością w odniesieniu do zamówień publicznych na produkty i usługi w dziedzinie ICT. Obecnie mandat przedłożono Państwom Członkowskim w celu konsultacji. Przewiduje się, że zostanie on udzielony europejskim organizacjom normalizacyjnym przed końcem 2005 r.

Komisja wesprze dyskusję na ten temat z Państwami Członkowskimi w ramach grupy ekspertów w dziedzinie eDostępności[34]. Będzie ona nadal gromadzić wyniki działań podejmowanych w Europie oraz wspierać międzynarodowy dialog, w szczególności z USA w ramach Transatlantyckiego Partnerstwa Gospodarczego (TEP) w zakresie harmonizacji wymogów związanych z eDostępnością w przypadku zamówień publicznych.

2. Certyfikacja

Przy zakupie produktów ICT nie zawsze wiadomo jakie wymogi spełniają te produkty. Jest to szczególnie ważne przy zakupie dostępnych ICT. Niektóre normy określające sposoby jak można zapewnić by produkty i usługi były dostępne istnieją lub są opracowywane. Obecnie jednak nie ma żadnych niezawodnych sposobów oceny zgodności produktów z normami związanymi z dostępnością. Odpowiednie systemy certyfikacji w odniesieniu do dostępności produktów, procesów organizacyjnych oraz specjalistów (oparte na europejskim znaku certyfikacji KeyMark[35] i normach europejskich) będą wskazówkami dla konsumentów i klientów pragnących korzystać z dostępnych produktów i usług oraz będą stanowić wyraz zasłużonego uznania dla producentów i osób świadczących usługi za ich starania. Ponadto systemy certyfikacji ułatwią monitorowanie zgodności z przepisami związanymi z dostępnością.

Rada w swej rezolucji w sprawie eDostępności ze stycznia 2003 r. wezwała do stworzenia „znaku eDostępności" dla towarów i usług. Deklaracja ministrów z 2002 r. w sprawie

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33 Artykuł 508 „Rehabilitation Act " zmieniony przez „Workforce Investment Act" z 1998 r.

34 Grupa ekspertów w dziedzinie eDostępności skupia ekspertów z Państw Członkowskich, którzy wspierają realizację planu działania eEuropa.

35 http://www.cenorm.be/conf_assess/keymark/keymarktext.htm

eIntegracji stwierdza, że *„europejski znak dostępności do zawartości sieci świadczący o zgodności z wytycznymi W3C WAI*[36] *może przyczynić się do uniknięcia podziału rynku”.*

Komisja przeanalizuje wraz z głównymi zainteresowanymi stronami **możliwości rozwijania, wprowadzenia i stosowania systemów certyfikacji w odniesieniu do dostępnych produktów i usług**, a także definicje kontroli kryteriów i metod oceny. Możliwość samocertyfikacji lub certyfikacji przez osobę trzecią również zostanie przeanalizowana, a skuteczność różnych rozwiązań zostanie porównana[37]. Komisja rozpocznie badania w tej kwestii w ostatnim kwartale 2005 r.[38]

3. Lepsze stosowanie obowiązującego prawodawstwa

Kilka dyrektyw zawiera przepisy, które mogą być wykorzystane do wprowadzenia w życie eDostępności (np. dyrektywa w sprawie równego traktowania w zakresie zatrudnienia i pracy[39], dyrektywa w sprawie urządzeń radiowych i końcowych urządzeń telekomunikacyjnych i dyrektywa w sprawie zamówień publicznych). Ważna jest współpraca z Państwami Członkowskimi mająca na celu wypracowanie praktycznego sposobu stosowania tych dyrektyw, aby rozwijać eDostępność.

W szczególności zrealizowanie propozycji Inclusive Communications Group (INCOM)[40] pozwoliłoby na rozwiązanie niektórych problemów obecnie istniejących w Europie, jak np.: zapewnienie użytkownikom niepełnosprawnym dzięki jednemu europejskiemu numerowi 112 dostępu do służb ratunkowych, zharmonizowanie częstotliwości bezprzewodowych systemów wspierających, zapewnienie między Państwami Członkowskimi komunikacji tekstowej i migowej w czasie rzeczywistym, ułatwienie zakupu przez organy publiczne towarów dostępnych. Należy rozważyć potencjalne trudności we wprowadzaniu w życie obowiązującego prawodawstwa.

Komisja, w ramach dialogu dotyczącego polityki audiowizualnej, będzie wspierać wspólne lub współdziałające rozwiązania w tej dziedzinie np. ułatwienie dostępu do programów telewizji cyfrowej. Takie wspólne rozwiązania pozwolą na wykorzystanie ekonomii skali

„Potencjał eDostępności” istniejącego prawodawstwa europejskiego musi zostać w pełni wykorzystany. W 2005 r. Komisja rozpocznie badania[41] w celu określenia najlepszych praktyk i ustanowienia dialogu z Państwami Członkowskimi i głównymi zainteresowanymi stronami za pośrednictwem odpowiednich grup odpowiedzialnych za wdrożenie wspomnianych dyrektyw.

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36 World Wide Web Consortium (W3C) Web Accessibility Initiative (WAI)

37 Konsultacja przy użyciu Internetu wykazała silne poparcie (ponad 72 % respondentów) dla certyfikacji i znakowania dostępnych produktów i usług ICT. Odnotowano wyraźne różnice pomiędzy różnymi grupami docelowymi (jedynie 61,4 % *„producentów, dostawców lub sprzedawców produktów i usług związanych z eDostępnością”* wyraziło opinię pozytywną). Ponadto, wśród osób opowiadających się za certyfikacją i znakowaniem produktów *„osoby niepełnosprawne”* i *„organy publiczne”* wyraźnie opowiadają się za rozwiązaniami obowiązkowymi, natomiast *„producenci, dostawcy lub sprzedawcy produktów i usług związanych z eDostępnością”* preferują rozwiązania mające charakter dobrowolny. Opinie pozostałych grup plasują się pomiędzy opiniami grup wspomnianych powyżej.

38 Patrz sekcja Kontrola i wnioski.

39 Dyrektywa Rady 2000/78/WE z dnia 27 listopada 2000 r. zakazuje dyskryminacji osób niepełnosprawnych, między innymi w pracy oraz przewiduje się wprowadzenie racjonalnych usprawnień, również w zakresie ICT.

40 Grupa utworzona w 2003 r., składająca się z przedstawicieli Państw Członkowskich, operatorów telekomunikacyjnych, organizacji użytkowników oraz organów normalizacyjnych.

41 Patrz sekcja Kontrola i wnioski.

7. WNIOSKI I KONTROLA

Niniejszy komunikat oraz wyniki konsultacji przy użyciu Internetu wykazują i potwierdzają zdecydowanie Komisji Europejskiej w zakresie kwestii związanych z eDostępnością oraz rozwiązań, które pozwolą zrozumieć Państwom Członkowskim, że istnieje pilna potrzeba wspólnego wypracowania spójnej strategii w dziedzinie eDostępności, które zachęcą sektor do opracowania dostępnych rozwiązań w odniesieniu do produktów i usług ICT, oraz które ukażą niepełnosprawnym użytkownikom aktywne zaangażowanie Komisji na rzecz zwiększenia dostępności w społeczeństwie informacyjnym.

W ciągu najbliższych dwóch lat (2005-2007) Komisja będzie nadal podnosić świadomość społeczną, promować wykorzystanie proponowanych instrumentów, gromadzić dane oraz konsultować się z zainteresowanymi stronami w celu podjęcia świadomych decyzji w dziedzinie eDostępności.

W tym celu, Komisja zamierz przeprowadzić w ostatnim kwartale 2005 r. badania na temat *„Oceny postępu jaki dokonał się w zakresie eDostępności w Europie"* w celu określenia i oceny działań strategicznych zmierzających do zwiększenia eDostępności w Europie. Początkowe wyniki badania będą dostępne na początku 2007 r.

Dwa lata po opublikowaniu niniejszego komunikatu zostanie przeprowadzona kontrola sytuacji w dziedzinie eDostępności. Polegać ona będzie na ocenie wyników działań zaproponowanych w niniejszym dokumencie, zgodnie z zasadą lepszego stanowienia prawa[42]. W zależności od wyników ogólnej oceny wpływu Komisja może rozważyć dodatkowe działania, również natury prawnej, jeśli uzna to za konieczne. Te prace w dziedzinie eDostępności z kolei wniosą wkład do już zapowiedzianej na 2008 r. europejskiej inicjatywy na rzecz eIntegracji[43].

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42 Biała Księga Komisji na temat europejskiego systemu rządów, COM(2001) 428 wersja ostateczna.

43 COM(2005) 229 „i2010 - Europejskie społeczeństwo informacyjne na rzecz wzrostu i zatrudnienia".

KOMISJA WSPÓLNOT EUROPEJSKICH

Bruksela, dnia 13.9.2005
KOM(2005)425 wersja ostateczna

KOMUNIKAT KOMISJI DO RADY, PARLAMENTU EUROPEJSKIEGO, EUROPEJSKIEGO KOMITETU EKONOMICZNO-SPOŁECZNEGO ORAZ KOMITETU REGIONÓW

eDostępność

[SEK(2005) 1095]

KOMUNIKAT KOMISJI DO RADY, PARLAMENTU EUROPEJSKIEGO, EUROPEJSKIEGO KOMITETU EKONOMICZNO-SPOŁECZNEGO ORAZ KOMITETU REGIONÓW

eDostępność

Dostępność technologii informacyjnych i komunikacyjnych (ICT) znacznie poprawi jakość życia osób niepełnosprawnych, natomiast brak równych szans w dostępie do ICT może prowadzić do ich wykluczenia. W niniejszym komunikacie Komisja proponuje szereg działań strategicznych promujących eDostępność (ang. eAccessibility). Wzywa ona Państwa Członkowskie oraz zainteresowane strony do wspierania dobrowolnych, pozytywnych działań mających na celu znaczne zwiększenie w Europie gamy dostępnych produktów i usług ICT (ang. accessible ICT products and services).

Niniejszy komunikat w sprawie eDostępności przyczynia się do realizacji nowej inicjatywy „**i2010 – Europejskie społeczeństwo informacyjne na rzecz wzrostu i zatrudnienia**”[1], która przedstawia nowe ramy strategiczne oraz szeroką strategię polityki w celu wspierania otwartej i konkurencyjnej gospodarki cyfrowej oraz podkreśla rolę ICT jako czynnika wspierającego integrację społeczną i podnoszącego jakość życia. Komisja postanowiła zrealizować ambitny cel stworzenia „społeczeństwa informacyjnego dla wszystkich” poprzez promowanie integracyjnego społeczeństwa cyfrowego (inclusive digital society), które daje wszystkim szanse oraz minimalizuje ryzyko wykluczenia.

1. WPROWADZENIE

Osoby niepełnosprawne stanowią około 15 % ludności europejskiej i wiele z nich napotyka trudności przy korzystaniu z produktów i usług ICT. W niektórych przypadkach starsi ludzie mają podobne problemy. Ze względu na zmiany demograficzne dostępność produktów i usług ICT stała się priorytetem w Europie: w roku 1990 osoby powyżej 60 roku życia stanowiły 18 % europejskiej ludności, liczba ta ma wzrosnąć do 30 % do roku 2030[2].

Badanie przeprowadzone ostatnio w USA[3] wykazało, że 60 % osób dorosłych w wieku produkcyjnym mogłoby skorzystać z dostępnych technologii (ang. accessible technologies), ponieważ korzystanie z obecnie osiągalnych technologii jest utrudnione lub problematyczne.

Z badania przeprowadzonego w 2002 r.[4] wynika, że ponad 48 % Europejczyków powyżej 50 roku życia uważa, że producenci nie uwzględniają w sposób wystarczający ich potrzeb przy projektowaniu produktów. Równocześnie 10 do 12 milionów z tych osób to potencjalni nabywcy nowoczesnych telefonów komórkowych, komputerów oraz usług internetowych.

Wnioski są oczywiste: **należy upewnić się, że korzyści wynikające z rozwoju ICT dostępne są dla jak najszerszej części społeczeństwa. Stanowi to społeczną, etyczną i**

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1 COM(2005) 229 wersja ostateczna z dnia 1 czerwca 2005 r.
2 UN World Population Prospects (2002 Revision) oraz 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

polityczną konieczność, ponadto przyczyni się do stworzenia rynków o rosnącym znaczeniu gospodarczym.

Przezwyciężanie technicznych barier i trudności napotykanych przez osoby niepełnosprawne oraz innych ludzi, którzy próbują w pełni uczestniczyć w społeczeństwie informacyjnym (IS) określa się mianem „***eDostępności***" (eAccessibility). Wpisuje się ona w szersze ramy polityki eIntegracji (ang. eInclusion), która odnosi się do innych typów przeszkód np. natury finansowej, geograficznej bądź edukacyjnej.

Niniejszy komunikat opiera się na uprzednich pracach w dziedzinie eDostępności przeprowadzonych w ramach dwóch planów działań eEuropa oraz na wnioskach i wynikach projektów BRT. Uwzględnia on również najważniejsze wyniki **konsultacji przy użyciu Internetu**[5], przeprowadzonej na początku 2005 roku, która wykazała silne poparcie (ponad 88 % odpowiedzi) dla podjęcia przez instytucje europejskie inicjatyw mających na celu zaradzenie sytuacji, w której, według znacznej większości respondentów (ponad 74 %), istnieje brak spójności pomiędzy dostępnymi (w rozumieniu eDostępności) produktami i usługami w Europie. 84 % respondentów uważa, że istnieje potrzeba wprowadzenia szerszej gamy dostępnych produktów i usług.

Głównym celem niniejszego komunikatu jest promowanie spójnego podejścia do inicjatyw eDostępności dobrowolnie podejmowanych w Państwach Członkowskich, a także wspieranie samoregulacji sektora.

2. KONKRETNE WYZWANIA

Nowe technologie stanowią już oczywistą pomoc dla osób niepełnosprawnych pozwalając im na wykonywanie w sposób niezależny czynności, które wcześniej mogli wykonywać jedynie z pomocą innych ludzi. Jednak, mimo wysiłków sektora osoby niepełnosprawne nadal napotykają wiele trudności przy korzystaniu z produktów i usług technologii informacyjnych jak np.:

- brak zharmonizowanych rozwiązań np. brak dostępu w wielu Państwach Członkowskich do numeru alarmowego 112 z telefonów tekstowych;
- brak współdziałających pomiędzy sobą rozwiązań dla dostępnych ICT;
- niedostosowanie oprogramowania do urządzeń wspomagających, często po wprowadzeniu na rynek nowych systemów operacyjnych czytniki ekranu używane przez niewidomych nie działają;
- zakłócenia pomiędzy zwykłymi produktami a urządzeniami wspomagającymi np. między telefonami GSM a aparatami słuchowymi;
- brak ogólnoeuropejskich norm np. siedem różnych i niekompatybilnych systemów w przypadku telefonów tekstowych przeznaczonych dla osób niesłyszących i niedosłyszących;
- brak odpowiednich usług np. wiele stron internetowych jest zbyt skomplikowanych dla osób mających trudności poznawcze lub niedoświadczonych użytkowników, bądź nieprzystosowanych do czytania lub nawigacji przez osoby z upośledzeniem wzroku;

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[5] Wyniki dostępne na stronie: http://europa.eu.int/information_society/policy/accessibility/com_ea_2005/a_documents/com_consult_res.html#_Toc97028181

- brak produktów i usług przeznaczonych dla pewnych grup np. komunikacja telefoniczna dla użytkowników posługujących się językiem migowym;
- sposób projektowania urządzeń stwarzający trudności przy ich wykorzystaniu np. klawiatury lub monitory wielu urządzeń;
- niedostępna zawartość (stron www);
- ograniczony wybór usług łączności elektronicznej, ich jakość i cena;

Z technicznego punktu widzenia większość z tych trudności można byłoby łatwo rozwiązać. Wymaga to jednak współpracy, koordynacji i determinacji na poziomie europejskim, ponieważ poleganie jedynie na działaniu mechanizmów rynkowych okazało się jak dotychczas niewystarczające.

W niedalekiej przyszłości aspekty związane z dostępnością należy uwzględnić między innymi w przypadku następujących nowych technologii:

- telewizja cyfrowa np. w zakresie norm i kompatybilności, a także projektowania usług i sprzętu;
- telefonia komórkowa trzeciej generacji np. w zakresie projektowania sprzętu, oprogramowania oraz usług;
- łączność szerokopasmowa np. wykorzystanie możliwości jakie oferują multimodalne rozwiązania w celu zwiększania dostępności a nie jej ograniczania.

Uwzględnienie tych zagadnień, które wcześniej uważano za przeznaczone jedynie dla specyficznej, docelowej grupy społeczeństwa, w rzeczywistości będzie miało pozytywne skutki dla większości użytkowników technologii.

3. ASPEKTY RYNKOWE I GOSPODARCZE

Badania w zakresie ICT jak również sam rynek znalazły już innowacyjne rozwiązania w celu zaradzenia wspomnianym trudnościom. Główne przeszkody w powszechnym dostępie do nich są jednak następujące:

- do tej pory rozwiązania te były ukierunkowane na wąski rynek (obejmujący głównie osoby niepełnosprawne oraz, w pewnych przypadkach, osoby starsze) reprezentowany przede wszystkim przez MŚP funkcjonujące na poziomie krajowym lub regionalnym;
- brak odpowiednich norm technicznych oraz specyfikacji technicznych;
- w prawodawstwie wspólnotowym dopiero niedawno wyraźnie rozważono możliwość uwzględniania wymagań dotyczących dostępności w specyfikacji technicznej w przypadku procedur zamówień publicznych;
- istnieją znaczne różnice pomiędzy Państwami Członkowskimi w zakresie sposobu opracowywania ich własnych rozwiązań.

W związku z powyższym rynek dostępnych produktów i usług ICT znajduje się ciągle we wstępnej fazie rozwoju: jest on w dużym stopniu podzielony według granic narodowych oraz cierpi z powodu braku zharmonizowanego prawodawstwa i odpowiednich norm technicznych. Czynniki te nie ułatwiają funkcjonowania jednolitego rynku i stanowią dodatkowe obciążenie dla sektora, który musi dostosowywać się do niejednolitych wymogów w różnych Państwach Członkowskich.

Coraz częściej uświadamiamy sobie jednak, że docelowymi konsumentami tych rozwiązań już nie są jedynie osoby niepełnosprawne lub, w pewnych przypadkach, osoby starsze, lecz całe społeczeństwo. Stajemy się przez to świadkami początków zmian na tym rynku, również ważniejsze podmioty przemysłu w Europie zaczynają się tym sektorem interesować. Upłynie jednak jeszcze trochę czasu zanim będzie można rzeczywiście odczuć wpływ ich zaangażowania.

Podobna sytuacja występuje w sektorze telekomunikacyjnym; stopień rozpowszechnienia produktów i usług telekomunikacyjnych jest tak wysoki, że nawet taka (obecnie relatywnie niewielka) nisza rynkowa stanowi ważny element przewagi konkurencyjnej i wzrostu przyciągając tym samym uwagę większych podmiotów działających na rynku.

Podsumowując, eDostępność oraz związane z nią produkty i usługi technologii wspomagających stanowią dziś jeden z celów średnioterminowych ważniejszych dostawców technologii nie tylko w Europie ale także w innych częściach świata.

4. ASPEKTY PRAWNE I STRATEGICZNE

Niejednokrotnie Rada wspierała działania na szczeblu UE np. wzywając Państwa Członkowskie i Komisję do „*wykorzystania potencjału jaki społeczeństwo informacyjne stanowi dla osób niepełnosprawnych oraz, w szczególności, do przyczynienia się do zniesienia barier natury technicznej i innej, aby umożliwić tym osobom efektywny udział w gospodarce oraz społeczeństwie opartych na wiedzy*[6]*”*. Parlament Europejski również poparł działania tego typu[7].

W szczególności, w europejskich strategiach i prawodawstwie uznano, że zatrudnienie i praca mają zasadnicze znaczenie jeśli chodzi o zapewnienie wszystkim równych szans, przyczynianie się do pełnego uczestnictwa obywateli w życiu gospodarczym, kulturalnym i społecznym oraz do realizacji ich potencjału. Oczywiście szerszy dostęp do wysokiej jakości, dostępnych produktów i usług ICT odgrywa znaczącą rolę, zwiększy bowiem szanse na znalezienie pracy, przyczyni się do poprawy integracji społecznej oraz pozwoli ludziom żyć dłużej w sposób niezależny.

Instytucje europejskie przy wielu okazjach wyrażały potrzebę udziału wszystkich Europejczyków w społeczeństwie informacyjnym. Komisja w ramach dwóch planów działania *eEuropa* podjęła inicjatywy w celu stworzenia bardziej dostępnego społeczeństwa informacyjnego. Plan działania z 2002 r. zawiera odrębne działanie dotyczące powyższych kwestii. Zaleca on przyjęcie wytycznych w sprawie inicjatywy dostępności sieci (ang. Web Accessibility Inititiative (WAI))[8], rozwijanie ogólnoeuropejskiego programu szkoleniowego w zakresie projektowania uniwersalnego (ang. European Design for All (DFA)), a także zaleca działania w kierunku rozwijania norm w zakresie technologii wspomagających oraz projektowania uniwersalnego. Celem planu działania eEuropa 2005 jest uwzględnienie

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6 Rezolucja Rady z dnia 2-3 grudnia 2002 r. w sprawie „eDostępności dla ludzi niepełnosprawnych”, http://www.socialdialogue.net/docs/cha_key/consilium_2002_14892en2.pdf

7 Rezolucja PE w sprawie „eEuropa 2002: dostępność publicznych stron internetowych i ich zawartości” (2002 (0325))

8 „eEuropa 2002: dostępność publicznych stron internetowych i ich zawartości” COM(2001) 529 wersja ostateczna, http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0529en01.pdf

eIntegracji we wszystkich liniach działania. Ponadto proponuje on wprowadzenie wymogów związanych z dostępnością ICT w dziedzinie zamówień publicznych.

Rada ds. telekomunikacji poparła te działania oraz wyraziła potrzebę poprawienia eDostępności w Europie[9]. Ponadto deklaracja ministrów[10] w sprawie eIntegracji zaproponowała podjęcie wszelkich niezbędnych działań na rzecz otwartego, opartego na wiedzy i dostępnego dla wszystkich społeczeństwa integracyjnego.

Co więcej Rada ds. zatrudnienia i spraw społecznych w swej rezolucji z 2003 r. w sprawie eDostępności[11] wezwała Państwa Członkowskie do zwalczania technicznych, prawnych i innych barier uniemożliwiających osobom niepełnosprawnym efektywny udział w społeczeństwie i gospodarce opartych na wiedzy.

Zgodnie z powyższym Parlament Europejski w swej rezolucji z 2002 r. w sprawie dostępności sieci[12] *„podkreśla potrzebę unikania wszelkich form wykluczenia z IS oraz wzywa do integracji osób niepełnosprawnych i starszych*". Ponadto w innej rezolucji jest mowa o wykorzystaniu języka migowego w telekomunikacji w Europie[13].

Zasadniczo, art. 13 Traktatu ustanawiającego Wspólnotę Europejską przewiduje podjęcie środków niezbędnych w celu zwalczania wszelkiej dyskryminacji między innymi ze względu na niepełnosprawność.

Na podstawie wspomnianego artykułu dyrektywa Rady 2000/78/WE z dnia 27 listopada 2000 r.[14] (w art. 1) wyraźnie stawia za cel: *„wyznaczenie ogólnych ram dla walki z dyskryminacją ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w odniesieniu do zatrudnienia i pracy"*. W szczególności dyrektywa stanowi, że *„należy przyjąć właściwe, to znaczy skuteczne i praktyczne środki w celu przystosowania miejsca pracy z uwzględnieniem niepełnosprawności, na przykład przystosowując pomieszczenia lub wyposażenie (...)"*.

Ponadto wiele dyrektyw europejskich związanych ze społeczeństwem informacyjnym zawiera klauzule dotyczące integracji osób niepełnosprawnych i starszych. Są to między innymi dyrektywy w sprawie łączności elektronicznej, w szczególności dyrektywa ramowa[15] i dyrektywa w sprawie usług powszechnych[16], dyrektywa w sprawie urządzeń radiowych i końcowych urządzeń telekomunikacyjnych[17], dyrektywa w sprawie zamówień publicznych[18] oraz dyrektywa w sprawie równego traktowania w zakresie zatrudnienia i pracy[19].

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9 Rezolucja Rady w sprawie planu działania eEuropa 2002: dostępność publicznych stron internetowych i ich zawartości, Dz.U. C 86 z 10.4.2002.

10 Deklaracja ministrów w sprawie eIntegracji z dnia 11 kwietnia 2003 r. http://www.eu2003.gr/en/articles/2003/4/11/2502/

11 Rezolucja Rady 14892/02.

12 Rezolucja PE w sprawie „eEuropa 2002: dostępność publicznych stron internetowych i ich zawartości" (2002 (0325)).

13 Rezolucja PE w sprawie języka migowego – rezolucja B4/ 0985/98.

14 Dostępna na stronie: http://europa.eu.int/comm/employment_social/fundamental_rights/pdf/legisln/2000_78_en.pdf

15 Dyrektywa 2002/21/WE.

16 Dyrektywa 2002/22/WE.

17 Dyrektywa 1999/5/WE.

18 Dyrektywy 2004/17/WE i 2004/18/WE.

19 Dyrektywa 2000/78/WE.

Jednym z czterech obszarów działania planu działania Komisji[20] opublikowanego w grudniu 2003 r. w sprawie dalszych działań związanych z Europejskim Rokiem Osób Niepełnosprawnych jest dostęp do nowych technologii oraz ich wykorzystanie. Opisuje on działania podjęte w celu zwiększenia dostępu do społeczeństwa informacyjnego przy wykorzystaniu instrumentów istniejących na poziomie UE.

Działania podejmowane na poziomie UE mają wartość dodaną, ponieważ niektóre Państwa Członkowskie w celu zaradzenia wspomnianym problemom opracowują na poziomie krajowym prawodawstwo, przepisy, normy oraz wytyczne. Działania te sprawiają, że istnieją podobne aczkolwiek różniące się wymogi związane z eDostępnością produktów i usług. Stanowi to wysokie zagrożenie dla przemysłu europejskiego, który może zostać zmuszony do funkcjonowania na podzielonym rynku co w konsekwencji wpłynie to na utratę konkurencyjności i efektywności.

Zagrożenie dla konsumentów jest jeszcze większe, w szczególności dla osób niepełnosprawnych lub starszych: podzielony rynek oznacza droższe, mniej znane i niekompatybilne produkty oraz większe trudności przy dostępie do informacji i ich rozpowszechniania między krajami, itp.

Działania UE uwzględniają również doświadczenia międzynarodowe, jak np. środki przyjęte w USA i Kanadzie, z którymi to krajami Komisja podjęła dialog, zwłaszcza jeśli chodzi o stosowanie przepisów prawnych jako silnej dźwigni finansowej w kontekście zamówień publicznych.

W związku z powyższym określono podstawowe warunki dla inicjatyw, które należy podjąć na poziomie UE. Taką opinię wyraziła zdecydowana większość osób, które wzięły udział we wspomnianej publicznej konsultacji (84 %).

5. BIEZACE DZIALANIA NA POZIOMIE UE

Niektóre działania są już realizowane na poziomie UE. Będą one doskonalone i kontynuowane.

Wymogi i normy związane z dostępnością

Normy są narzędziem strategicznym dla przemysłu oraz dla sektora publicznego, a także kluczowym katalizatorem nowych możliwości rynkowych. Mimo że produkcja i wdrażanie norm odbywają się w sposób dobrowolny, stanowią one ważne narzędzie wspierające działania strategiczne. Europejskie normy dotyczące eDostępności przyczynią się do lepszego funkcjonowania jednolitego europejskiego rynku, a więc do rozwoju nowych rynków, konkurencyjności i zatrudnienia. Komisja będzie zatem nadal zapewniać wsparcie finansowe na realizację konkretnych działań proponowanych przez europejskie organizacje normalizacyjne (ESO) w ramach europejskiego planu działania w sprawie normalizacji lub też upoważni ESO do określania norm[21].

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[20] Europejski plan działania w sprawie równych szans dla osób z niepełnosprawnych, COM(2003) 650 wersja ostateczna.

[21] Proces ten reguluje dyrektywa 98/34. http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_204/l_20419980721en00370048.pdf

Wymogi związane z dostępnością określone przez normy muszą odpowiadać potrzebom sektora, projektantów i dostawców produktów i usług tak, aby nie stały na przeszkodzie kreatywności lub innowacji. Równocześnie muszą one odpowiadać potrzebom użytkownika. Zaangażowanie użytkowników w opracowywanie norm ma więc zasadnicze znaczenie. Należy zatem zachować równowagę pomiędzy interesem sektora a interesem publicznym. Normy powinny być łatwe do wprowadzenia w życie oraz jasno określone w prawodawstwie, przepisach oraz innych instrumentach wspierających dostępność. Bezpłatny dostęp do norm lub dostęp za niewielką opłatą ułatwi ich przyjmowanie, w szczególności przez MŚP, które dysponują ograniczonymi środkami na ich kupno oraz przez użytkowników pragnących się z nimi zapoznać.

Należy zapewnić, jednocześnie promując współdziałanie, aby opatentowane technologie nieposiadające rozsądnych i niedyskryminujących licencji (RAND) nie stały się standardowymi rozwiązaniami.

Projektowanie uniwersalne (DFA)

Metodologia DFA określa projektowanie produktów i usług w taki sposób, aby były one dostępne dla jak największej liczby użytkowników[22]. DFA zajmuje już powszechnie uznaną pozycję, jednak nie jest jeszcze powszechnie stosowane. Konieczne jest zatem ciągłe podnoszenie świadomości oraz promowanie DFA w Europie. W tym celu Komisja ustanowiła sieć centrów doskonałości, znaną jako EDEAN[23], która skupia ponad stu członków.

DFA nie tylko pozwala na **większe uwzględnienie wymogów związanych z dostępnością przy projektowaniu produktów lub usług**, ale także prowadzi do znacznych **oszczędności dzięki unikaniu wysokich kosztów związanych z koniecznością przeprojektowania lub wprowadzania modyfikacji technicznych** już po zrealizowaniu projektu.

Opracowano podstawową strukturę programu szkoleniowego DFA dla inżynierów i projektantów a także przeprowadzono kilka pilotażowych kursów w Państwach Członkowskich. Jego szersze wykorzystywanie w szkolnictwie pomaturalnym i zawodowym pozwoli doprowadzić w przyszłości do dostępnego IS[24]. Obecność specjalisty w dziedzinie DFA w ważniejszych organizacjach mogłaby natomiast sprawić, że eDostępność zyskałaby na profesjonalizmie.

Dostępność sieci

Na mocy komunikatu Komisji z 2001 r.[25] w sprawie dostępności publicznych stron internetowych, oraz rezolucji Rady i Parlamentu z 2002 r. Państwa Członkowskie

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22 Trzy główne strategie DFA są następujące: 1) projekt stosowny dla większości użytkowników bez potrzeby wprowadzania zmian, 2) projekt pozwalający na łatwe dostosowanie do różnych użytkowników (np. przy użyciu wymienialnych interfejsów), 3) projekt pozwalający na bezproblemowe podłączenie urządzeń wspierających.

23 Strona internetowa EDEAN (European Design for All e-Accessibility Network), http://www.e-accessibility.org/

24 DFA curriculum report of IDCnet project (Sprawozdanie projektu IDCnet na temat programu szkoleniowego DFA).

25 COM(2001) 529 wersja ostateczna.

zobowiązały się zapewnić zgodnie z międzynarodowymi wytycznymi[26]dostępność publicznych stron internetowych.

Za pośrednictwem grupy ekspertów w dziedzinie eDostępności, Komisja oraz Państwa Członkowskie mogą monitorować podejmowane działania, między innymi dzięki metodom[27] i procedurom oceny, analizie porównawczej, gromadzeniu danych oraz określeniu „najlepszych praktyk". **Dostępność sieci jest katalizatorem** dostępnych usług online leżących w interesie publicznym. W celu usprawnienia tego procesu, ważne jest, aby wspierać rozwój narzędzi do tworzenia stron internetowych, które uwzględniają zagadnienia dostępności[28].

Potrzeba systemów certyfikacji dostępności wynika z faktu, że w niektórych Państwach Członkowskich obowiązuje prawodawstwo regulujące dostępność oraz istnieje potrzeba oceny zgodności. Warsztaty Europejskiego Komitetu Normalizacyjnego (CEN)[29] rozważają obecnie odpowiednie rozwiązania.

Analiza porównawcza i monitorowanie

Niektóre Państwa Członkowskie wprowadzają do krajowego prawodawstwa kryteria analizy porównawczej w odniesieniu do dostępności i monitorowania. Na szczeblu UE Rada i Parlament Europejski zwróciły się z wnioskiem o monitorowanie dostępności stron internetowych. Parlament wystąpił również z wnioskiem o monitorowanie napisów i opisów głosowych w przypadku telewizji cyfrowej.

Aby móc kontynuować rozwój odpowiednich europejskich strategii eDostępności **konieczne jest by w poszczególnych Państwach Członkowskich istniały porównywalne dane europejskie**. Komisja oprze się na rozpoczętych europejskich działaniach z zakresu monitorowania, uwzględniając zrewidowaną strategię lizbońską.

Komisja prowadzi dialog z urzędami statystycznymi w celu opracowania i doskonalenia odpowiednich wskaźników, w szczególności w odniesieniu do uwzględnienia kwestii związanych z dostępnością w już istniejących wskaźnikach.

Badania naukowe

Badania i rozwój technologiczny (BRT) stanowią podstawowy element wysiłków podjętych na rzecz dostępnego IS. Od 1991 r. blisko 200 europejskich projektów BRT, stanowiących około 200 mln EUR współfinansowania WE[30], przyczyniło się już do poprawy dostępności dzięki większej wiedzy na temat problemów związanych z dostępnością oraz potrzebnych rozwiązań.

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26 W3C/WAI/WCAG1.0 Web Content Accessibility Guidelines 1.0 (Wytyczne (1.0) dotyczące dostępności zawartości stron internetowych). Wersja 2 jest w przygotowaniu. Dotyczyć ona będzie rozwoju technologii internetowych, który dokonał się od czasu opublikowania pierwszej wersji oraz ułatwi analizę zgodności.

27 Grupa Web Accessibility Benchmarking (WAB) cluster.

28 W3C/WAI/ATAG Authoring Tools Accessibility Guidelines (ATAG) (wytyczne dla twórców oprogramowania do tworzenia stron internetowych w zakresie dostępności).

29 http://www.cenorm.be/cenorm/businessdomains/businessdomains/isss/activity/ws-wac.asp

30 Przykłady projektów są dostępne np. na stronach: http://www.cordis.lu/ist/so/einclusion/home.html oraz http://www.cordis.lu/ist/directorate_f/einclusion/previous-research.htm

Na konkretnych przykładach wykazano możliwe rozwiązania, jak np. zdalnie dostępne usługi dla osób starszych (w tym usługi alarmowe i pomoc w nagłych wypadkach). Opracowano rozwiązania w celu lepszego dostępu osób niewidomych lub niedowidzących do informacji cyfrowej (tekst, rysunki, obrazy trójwymiarowe, kodowana muzyka, programy telewizyjne). Przetestowano systemy ułatwiające osobom z upośledzeniem ruchu poruszanie się, operowanie przedmiotami i ich kontrolowanie oraz usługi mające zwiększyć możliwości porozumiewania się osób niesłyszących, w tym język migowy i czytanie z ust. Inne przykłady to: wprowadzenie środowiska komputerowego ułatwiającego zintegrowaną edukację dzieciom niepełnosprawnym lub zatrudnianie dorosłych osób niepełnosprawnych oraz udział w kształtowaniu polityk (eEuropa, czyli dostępność sieci, projektowanie uniwersalne).

Wiele rozwiązań będących wynikiem projektów wspólnotowych znalazło skuteczne zastosowanie przy opracowywaniu produktów wprowadzonych do obrotu. W innych przypadkach zdobyta wiedza przyczyniła się do zwiększenia dostępności produktów i usług ICT.

Ze względu na fakt, że technologie nadal szybko się rozwijają i oferują nowe rozwiązania techniczne, trzeba inwestować w badania, aby wykorzystać znaczące możliwości jakie oferują one osobom niepełnosprawnym i starszym. Obecny wniosek dotyczący siódmego programu ramowego uwzględnia **potrzebę kontynuowania, a nawet rozszerzenia zakresu BRT na eDostępność** w celu dalszego rozwoju europejskiego sektora technologii wspomagających[31] oraz aby dostępność stała się standardową kwestią dla sektora tradycyjnego.

6. ZWIĘKSZANIE EDOSTĘPNOŚCI PRODUKTÓW I USŁUG ICT W EUROPIE – TRZY NOWE ŚRODKI DZIAŁANIA

Oprócz promowania bieżących działań wspomnianych powyżej Komisja wesprze stosowanie trzech środków działania jeszcze niewykorzystywanych na szeroką skalę w Europie, mianowicie wymogi związane z dostępnością w przypadku zamówień publicznych, certyfikację dostępności oraz lepsze wykorzystanie obowiązujących przepisów.

Dwa lata po opublikowaniu niniejszego komunikatu, Komisja oceni wyniki tych działań. Zgodnie z zasadą lepszego stanowienia prawa[32] Komisja wymienia opinie z Państwami Członkowskimi i, w zależności od ogólnej oceny wpływu, może rozważyć możliwość podjęcia dodatkowych działań, również natury prawnej, jeśli uzna to za konieczne.

1. Zamówienia publiczne

Ogółem zamówienia publiczne w Europie stanowią 16 % produktu krajowego brutto. Organy publiczne wszystkich szczebli mogą wymagać spełnienia kryterium dostępności w odniesieniu do towarów i usług, których zakupu dokonują. W rzeczywistości europejskie dyrektywy w sprawie zamówień publicznych wyraźnie określają możliwość uwzględnienia wymogów związanych z DFA i dostępnością w warunkach przetargu (specyfikacji technicznej).

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[31] Sprawozdanie DG EMPL, Dostęp do technologii wspierających w UE (Access to Assistive Technology in the EU), E-V/5-03-003-EN-C.

[32] Biała Księga Komisji na temat europejskiego systemu rządów, COM(2001) 428 wersja ostateczna.

Podejście takie stanowi jasne zobowiązanie do realizowania **polityki integracji sprzyjającej udostępnianiu produktów i usług większej liczbie użytkowników, obywateli i pracowników**. Polityka ta zachęca firmy przemysłowe do uznania dostępności za nieodłączną charakterystykę ich produktów oraz tworzy większy rynek dla dostępnych ICT. Takie rezultaty zaobserwowano w USA[33], gdzie prawodawstwo wymaga, by kryteria związane z dostępnością były uwzględnione w federalnych zamówieniach publicznych.

90 % respondentów biorących udział w konsultacji przy użyciu Internetu opowiedziało się za zasadą, zgodnie z którą agencje publiczne muszą wymagać by wszystkie produkty i usługi ICT, których dokonują zakupu spełniały wymogi związane z dostępnością. Niektóre z Państw Członkowskich już uwzględniają wymogi związane z dostępnością w przypadku zamówień publicznych. Ustanowienie wspólnych wymogów związanych z dostępnością na poziomie UE może wpłynąć na zmniejszenie podziału rynku oraz wesprzeć współdziałanie.

Istnieje wyraźna potrzeba uspójnienia wymogów związanych z dostępnością w odniesieniu do zamówień publicznych w Europie. W tym celu Komisja zamierza udzielić mandatu europejskim organizacjom normalizacyjnym w celu opracowania europejskich wymogów związanych z dostępnością w odniesieniu do zamówień publicznych na produkty i usługi w dziedzinie ICT. Obecnie mandat przedłożono Państwom Członkowskim w celu konsultacji. Przewiduje się, że zostanie on udzielony europejskim organizacjom normalizacyjnym przed końcem 2005 r.

Komisja wesprze dyskusję na ten temat z Państwami Członkowskimi w ramach grupy ekspertów w dziedzinie eDostępności[34]. Będzie ona nadal gromadzić wyniki działań podejmowanych w Europie oraz wspierać międzynarodowy dialog, w szczególności z USA w ramach Transatlantyckiego Partnerstwa Gospodarczego (TEP) w zakresie harmonizacji wymogów związanych z eDostępnością w przypadku zamówień publicznych.

2. Certyfikacja

Przy zakupie produktów ICT nie zawsze wiadomo jakie wymogi spełniają te produkty. Jest to szczególnie ważne przy zakupie dostępnych ICT. Niektóre normy określające sposoby jak można zapewnić by produkty i usługi były dostępne istnieją lub są opracowywane. Obecnie jednak nie ma żadnych niezawodnych sposobów oceny zgodności produktów z normami związanymi z dostępnością. Odpowiednie systemy certyfikacji w odniesieniu do dostępności produktów, procesów organizacyjnych oraz specjalistów (oparte na europejskim znaku certyfikacji KeyMark[35] i normach europejskich) będą wskazówkami dla konsumentów i klientów pragnących korzystać z dostępnych produktów i usług oraz będą stanowić wyraz zasłużonego uznania dla producentów i osób świadczących usługi za ich starania. Ponadto systemy certyfikacji ułatwią monitorowanie zgodności z przepisami związanymi z dostępnością.

Rada w swej rezolucji w sprawie eDostępności ze stycznia 2003 r. wezwała do stworzenia „znaku eDostępności" dla towarów i usług. Deklaracja ministrów z 2002 r. w sprawie

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33 Artykuł 508 „Rehabilitation Act " zmieniony przez „Workforce Investment Act" z 1998 r.

34 Grupa ekspertów w dziedzinie eDostępności skupia ekspertów z Państw Członkowskich, którzy wspierają realizację planu działania eEuropa.

35 http://www.cenorm.be/conf_assess/keymark/keymarktext.htm

eIntegracji stwierdza, że *„europejski znak dostępności do zawartości sieci świadczący o zgodności z wytycznymi W3C WAI*[36] *może przyczynić się do uniknięcia podziału rynku”.*

Komisja przeanalizuje wraz z głównymi zainteresowanymi stronami **możliwości rozwijania, wprowadzenia i stosowania systemów certyfikacji w odniesieniu do dostępnych produktów i usług**, a także definicje kontroli kryteriów i metod oceny. Możliwość samocertyfikacji lub certyfikacji przez osobę trzecią również zostanie przeanalizowana, a skuteczność różnych rozwiązań zostanie porównana[37]. Komisja rozpocznie badania w tej kwestii w ostatnim kwartale 2005 r.[38]

3. Lepsze stosowanie obowiązującego prawodawstwa

Kilka dyrektyw zawiera przepisy, które mogą być wykorzystane do wprowadzenia w życie eDostępności (np. dyrektywa w sprawie równego traktowania w zakresie zatrudnienia i pracy[39], dyrektywa w sprawie urządzeń radiowych i końcowych urządzeń telekomunikacyjnych i dyrektywa w sprawie zamówień publicznych). Ważna jest współpraca z Państwami Członkowskimi mająca na celu wypracowanie praktycznego sposobu stosowania tych dyrektyw, aby rozwijać eDostępność.

W szczególności zrealizowanie propozycji Inclusive Communications Group (INCOM)[40] pozwoliłoby na rozwiązanie niektórych problemów obecnie istniejących w Europie, jak np.: zapewnienie użytkownikom niepełnosprawnym dzięki jednemu europejskiemu numerowi 112 dostępu do służb ratunkowych, zharmonizowanie częstotliwości bezprzewodowych systemów wspierających, zapewnienie między Państwami Członkowskimi komunikacji tekstowej i migowej w czasie rzeczywistym, ułatwienie zakupu przez organy publiczne towarów dostępnych. Należy rozważyć potencjalne trudności we wprowadzaniu w życie obowiązującego prawodawstwa.

Komisja, w ramach dialogu dotyczącego polityki audiowizualnej, będzie wspierać wspólne lub współdziałające rozwiązania w tej dziedzinie np. ułatwienie dostępu do programów telewizji cyfrowej. Takie wspólne rozwiązania pozwolą na wykorzystanie ekonomii skali

„Potencjał eDostępności” istniejącego prawodawstwa europejskiego musi zostać w pełni wykorzystany. W 2005 r. Komisja rozpocznie badania[41] w celu określenia najlepszych praktyk i ustanowienia dialogu z Państwami Członkowskimi i głównymi zainteresowanymi stronami za pośrednictwem odpowiednich grup odpowiedzialnych za wdrożenie wspomnianych dyrektyw.

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36 World Wide Web Consortium (W3C) Web Accessibility Initiative (WAI)

37 Konsultacja przy użyciu Internetu wykazała silne poparcie (ponad 72 % respondentów) dla certyfikacji i znakowania dostępnych produktów i usług ICT. Odnotowano wyraźne różnice pomiędzy różnymi grupami docelowymi (jedynie 61,4 % *„producentów, dostawców lub sprzedawców produktów i usług związanych z eDostępnością”* wyraziło opinię pozytywną). Ponadto, wśród osób opowiadających się za certyfikacją i znakowaniem produktów *„osoby niepełnosprawne”* i *„organy publiczne”* wyraźnie opowiadają się za rozwiązaniami obowiązkowymi, natomiast *„producenci, dostawcy lub sprzedawcy produktów i usług związanych z eDostępnością”* preferują rozwiązania mające charakter dobrowolny. Opinie pozostałych grup plasują się pomiędzy opiniami grup wspomnianych powyżej.

38 Patrz sekcja Kontrola i wnioski.

39 Dyrektywa Rady 2000/78/WE z dnia 27 listopada 2000 r. zakazuje dyskryminacji osób niepełnosprawnych, między innymi w pracy oraz przewiduje się wprowadzenie racjonalnych usprawnień, również w zakresie ICT.

40 Grupa utworzona w 2003 r., składająca się z przedstawicieli Państw Członkowskich, operatorów telekomunikacyjnych, organizacji użytkowników oraz organów normalizacyjnych.

41 Patrz sekcja Kontrola i wnioski.

7. WNIOSKI I KONTROLA

Niniejszy komunikat oraz wyniki konsultacji przy użyciu Internetu wykazują i potwierdzają zdecydowanie Komisji Europejskiej w zakresie kwestii związanych z eDostępnością oraz rozwiązań, które pozwolą zrozumieć Państwom Członkowskim, że istnieje pilna potrzeba wspólnego wypracowania spójnej strategii w dziedzinie eDostępności, które zachęcą sektor do opracowania dostępnych rozwiązań w odniesieniu do produktów i usług ICT, oraz które ukażą niepełnosprawnym użytkownikom aktywne zaangażowanie Komisji na rzecz zwiększenia dostępności w społeczeństwie informacyjnym.

W ciągu najbliższych dwóch lat (2005-2007) Komisja będzie nadal podnosić świadomość społeczną, promować wykorzystanie proponowanych instrumentów, gromadzić dane oraz konsultować się z zainteresowanymi stronami w celu podjęcia świadomych decyzji w dziedzinie eDostępności.

W tym celu, Komisja zamierz przeprowadzić w ostatnim kwartale 2005 r. badania na temat *„Oceny postępu jaki dokonał się w zakresie eDostępności w Europie"* w celu określenia i oceny działań strategicznych zmierzających do zwiększenia eDostępności w Europie. Początkowe wyniki badania będą dostępne na początku 2007 r.

Dwa lata po opublikowaniu niniejszego komunikatu zostanie przeprowadzona kontrola sytuacji w dziedzinie eDostępności. Polegać ona będzie na ocenie wyników działań zaproponowanych w niniejszym dokumencie, zgodnie z zasadą lepszego stanowienia prawa[42]. W zależności od wyników ogólnej oceny wpływu Komisja może rozważyć dodatkowe działania, również natury prawnej, jeśli uzna to za konieczne. Te prace w dziedzinie eDostępności z kolei wniosą wkład do już zapowiedzianej na 2008 r. europejskiej inicjatywy na rzecz eIntegracji[43].

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42 Biała Księga Komisji na temat europejskiego systemu rządów, COM(2001) 428 wersja ostateczna.

43 COM(2005) 229 „i2010 - Europejskie społeczeństwo informacyjne na rzecz wzrostu i zatrudnienia".

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

(Informacje)

INFORMACJE INSTYTUCJI, ORGANÓW I JEDNOSTEK ORGANIZACYJNYCH UNII EUROPEJSKIEJ

TRYBUNAŁ SPRAWIEDLIWOŚCI UNII EUROPEJSKIEJ

Poniższy tekst zastępuje notę informacyjną opublikowaną w Dz.U. C 297 z dnia 5 grudnia 2009 r., s. 1, w związku z dodaniem punktu 25 i zmianą punktu 40.

NOTA INFORMACYJNA

dotycząca składania przez sądy krajowe wniosków o wydanie orzeczeń w trybie prejudycjalnym

(2011/C 160/01)

I – **Informacje ogólne**

1. System odesłań prejudycjalnych stanowi podstawowy mechanizm prawa Unii Europejskiej, którego celem jest umożliwienie sądom krajowym zapewnienia jego jednolitej wykładni i stosowania we wszystkich państwach członkowskich.

2. Trybunał Sprawiedliwości Unii Europejskiej jest właściwy do orzekania w trybie prejudycjalnym w przedmiocie wykładni prawa Unii Europejskiej i ważności aktów wydanych przez instytucje, organy lub jednostki organizacyjne Unii. Ta ogólna właściwość została mu powierzona na mocy art. 19 ust. 3 lit. b) Traktatu o Unii Europejskiej (Dz.U. 2008, C 115, s. 13, zwanego dalej „TUE") oraz art. 267 Traktatu o funkcjonowaniu Unii Europejskiej (Dz.U. 2008, C 115, s. 47, zwanego dalej „TFUE").

3. Zgodnie z art. 256 ust. 3 TFUE Sąd jest właściwy do rozpoznawania pytań prejudycjalnych przedkładanych na mocy art. 267, w poszczególnych dziedzinach określonych w statucie. Ponieważ statut nie został dostosowany w tym zakresie, Trybunał Sprawiedliwości, zwany dalej „Trybunałem", zachowuje wyłączną właściwość do orzekania w trybie prejudycjalnym.

4. Mimo że art. 267 TFUE przyznaje Trybunałowi właściwość ogólną, poszczególne postanowienia przewidują jednakże wyjątki od niej lub jej ograniczenia. Mowa tu w szczególności o art. 275 i 276 TFUE oraz o art. 10 Protokołu (nr 36) w sprawie postanowień przejściowych traktatu z Lizbony (Dz.U. 2008, C 115, s. 322).

5. Ponieważ procedura prejudycjalna opiera się na współpracy między Trybunałem a sądami krajowymi, w celu zapewnienia jej efektywności potrzebne wydaje się udostępnienie sądom krajowym poniższych wskazówek.

6. Celem tych praktycznych wskazówek, pozbawionych jakiejkolwiek mocy wiążącej, jest dostarczenie sądom krajowym wytycznych dotyczących zasadności kierowania odesłań prejudycjalnych oraz, w razie konieczności, udzielenie tym sądom pomocy w formułowaniu i przedstawianiu pytań przedkładanych Trybunałowi.

Rola Trybunału w procedurze prejudycjalnej

7. Rola Trybunału w procedurze prejudycjalnej polega na dokonywaniu wykładni prawa Unii lub orzekaniu w przedmiocie jego ważności, nie zaś na stosowaniu tego prawa do stanu faktycznego leżącego u podstaw postępowania przed sądem krajowym, gdyż to zadanie należy do właściwości sądu krajowego. Do Trybunału nie należy orzekanie ani w przedmiocie kwestii faktycznych podniesionych w ramach sporu przed sądem krajowym, ani w przedmiocie różnic w opiniach na temat wykładni lub stosowania przepisów prawa krajowego.

8. Trybunał orzeka w przedmiocie wykładni lub ważności prawa Unii, dokładając wysiłków, by udzielona przez niego odpowiedź była pomocna w rozwiązaniu sporu, lecz do sądu krajowego należy wyciągnięcie z niej odpowiednich wniosków, w tym - w razie potrzeby – podjęcie decyzji o niestosowaniu danego przepisu prawa krajowego.

Decyzja o przedłożeniu pytania Trybunałowi

Autor pytania

9. Zgodnie z art. 267 TFUE, każdy sąd państwa członkowskiego mający orzekać w postępowaniu, które ma zostać zakończone wydaniem orzeczenia sądowego, może co do zasady skierować do Trybunału pytanie prejudycjalne [1]. Pojęcie sądu jest interpretowane przez Trybunał jako autonomiczne pojęcie prawa Unii.

10. Inicjatywa w zakresie zwrócenia się do Trybunału z wnioskiem o wydanie orzeczenia w trybie prejudycjalnym należy wyłącznie do sądu krajowego, niezależnie od tego, czy strony postępowania przed sądem krajowym się o to zwróciły.

Wniosek o dokonanie wykładni

11. Każdy sąd może skierować do Trybunału pytanie dotyczące wykładni przepisu prawa Unii, jeżeli jego zdaniem odpowiedź na nie jest niezbędna do rozstrzygnięcia zawisłego przed nim sporu.

12. Natomiast sąd, którego orzeczenia nie podlegają zaskarżeniu według prawa wewnętrznego jest co do zasady zobowiązany skierować do Trybunału takie pytanie, chyba, że Trybunał orzekał już w tej kwestii (a jakikolwiek nowy kontekst nie rodzi poważnych wątpliwości co do możliwości stosowania jego wcześniejszego orzecznictwa) lub właściwa wykładnia danego przepisu prawa jest oczywista.

13. A zatem sąd, którego orzeczenia podlegają zaskarżeniu, może, zwłaszcza jeśli uzna, że orzecznictwo Trybunału daje wystarczające wyjaśnienie, samodzielnie zdecydować o właściwej wykładni prawa Unii i jego zastosowaniu do ustalonego przez ten sąd stanu faktycznego. Niemniej, odesłanie prejudycjalne może okazać się szczególnie wskazane, na odpowiednim etapie postępowania, w przypadku wystąpienia nowego zagadnienia interpretacyjnego o znaczeniu ogólnym dla jednolitego stosowania prawa Unii we wszystkich państwach członkowskich lub w przypadku, gdy istniejące orzecznictwo wydaje się nie mieć zastosowania do nowych okoliczności faktycznych.

14. Do sądu krajowego należy wyjaśnienie powodów, dla których dokonanie wykładni, o którą się zwraca, jest niezbędne do wydania przez niego wyroku.

Wniosek o dokonanie oceny ważności

15. O ile sądy krajowe mogą odrzucać podnoszone w postępowaniach przed nimi zarzuty nieważności, to stwierdzenie nieważności aktu instytucji, organu lub jednostki organizacyjnej Unii należy do wyłącznej właściwości Trybunału.

16. Każdy sąd krajowy, który poweźmie wątpliwości co do ważności takiego aktu musi zatem skierować do Trybunału pytanie, wskazując powody, dla których uważa, że może on być dotknięty nieważnością.

[1] Zgodnie z art. 10 ust. 1-3 protokołu nr 36 uprawnienia przyznane Trybunałowi Sprawiedliwości w odniesieniu do aktów przyjętych przed wejściem w życie traktatu z Lizbony (Dz.U. 2007, C 306, s. 1), na mocy tytułu VI TUE, w dziedzinie współpracy policyjnej i sądowej w sprawach karnych, i niezmienione od tego czasu, pozostają jednakże bez zmian przez okres maksymalnie pięciu lat od daty wejścia w życie traktatu z Lizbony (1 grudnia 2009 r.). W tym okresie jedynie sądy tych państw członkowskich, które uznały właściwość Trybunału mogą kierować do niego wnioski o wydanie orzeczeń w trybie prejudycjalnym w odniesieniu do takich aktów, przy czym każde państwo członkowskie wskazuje, czy możliwość zwrócenia się do Trybunału obejmuje wszystkie sądy, czy jest zastrzeżona dla sądów, których orzeczenia nie podlegają zaskarżeniu.

17. Jednakże, jeśli sąd krajowy ma poważne wątpliwości co do ważności aktu instytucji, organu lub jednostki organizacyjnej Unii, na podstawie którego został przyjęty akt prawa krajowego, może w drodze wyjątku zawiesić tymczasowo stosowanie tego aktu prawa krajowego lub podjąć inne środki tymczasowe w odniesieniu do tego aktu. Musi on zatem skierować do Trybunału pytanie dotyczące ważności, wskazując powody, dla których uważa, że akt ten jest dotknięty nieważnością.

Etap postępowania, na którym należy przedłożyć pytanie prejudycjalne

18. Sąd krajowy może skierować do Trybunału pytanie prejudycjalne natychmiast po stwierdzeniu, że orzeczenie w przedmiocie zagadnienia lub zagadnień interpretacyjnych albo ważności jest niezbędne do wydania przez niego wyroku; sąd ten najlepiej może ocenić, na jakim etapie postępowania należy skierować takie pytanie.

19. Pożądane jest jednak, aby decyzja o przekazaniu pytania prejudycjalnego została podjęta na takim etapie postępowania, na którym sąd krajowy jest w stanie określić faktyczne i prawne ramy problemu, tak aby Trybunał dysponował wszelkimi danymi niezbędnymi do zbadania, w stosowanym przypadku, czy prawo Unii ma zastosowanie do postępowania przed sądem krajowym. Względy sprawności postępowania przemawiałyby również za tym, aby pytanie prejudycjalne było przekazywane dopiero po wysłuchaniu obydwu stron.

Forma odesłania prejudycjalnego

20. Orzeczenie, na podstawie którego sąd krajowy przedkłada Trybunałowi pytanie prejudycjalne może zostać wydane w dowolnej formie przewidzianej przez prawo krajowe dla kwestii incydentalnych. Należy jednak mieć na uwadze fakt, że dokument ten stanowi podstawę postępowania przed Trybunałem i że Trybunał musi tym samym dysponować danymi pozwalającymi mu udzielić sądowi krajowemu użytecznej odpowiedzi. Poza tym, wniosek o wydanie orzeczenia w trybie prejudycjalnym jest jedynym dokumentem przekazywanym podmiotom uprawnionym do przedkładania Trybunałowi uwag, zwłaszcza państwom członkowskim i instytucjom, oraz przekładanym na inne języki.

21. Ze względu na konieczność dokonania przekładu wniosku, powinien on być zredagowany w sposób prosty, jasny i precyzyjny oraz nie zawierać zbędnych danych.

22. Do przedstawienia we właściwy sposób ram wniosku o wydanie orzeczenia w trybie prejudycjalnym wystarcza często dokument nieprzekraczający dziesięciu stron. Przy zachowaniu wymogu lapidarności, postanowienie odsyłające musi jednakże być wystarczająco kompletne i zawierać wszelkie istotne informacje pozwalające Trybunałowi oraz podmiotom uprawnionym do przedkładania uwag właściwie zrozumieć ramy faktyczne i prawne postępowania przed sądem krajowym. W szczególności, postanowienie odsyłające powinno:

— zawierać zwięzłe przedstawienie przedmiotu sporu oraz ustaleń co do istotnych okoliczności faktycznych lub co najmniej wyjaśniać założenia faktyczne, na których oparte zostało pytanie prejudycjalne;

— przytaczać brzmienie mających zastosowanie krajowych przepisów oraz wskazywać, w razie potrzeby, istotne dla sprawy orzecznictwo krajowe, podając w każdym przypadku dokładne odniesienia (np.: stronę konkretnego dziennika urzędowego lub zbioru orzeczeń; ewentualnie odniesienia do zasobów internetowych);

— wskazywać możliwie najdokładniej istotne dla sprawy przepisy prawa Unii;

— podawać powody, dla których sąd krajowy zwraca się z pytaniem o wykładnię lub ważność określonych przepisów prawa Unii oraz związek między tymi przepisami a ustawodawstwem krajowym mającym zastosowanie do sporu przed sądem krajowym;

— zawierać, w razie potrzeby, streszczenie istoty głównych argumentów stron postępowania przed sądem krajowym.

W celu ułatwienia lektury wniosku i możliwości powoływania się na niego, wskazane jest, aby poszczególne punkty lub ustępy postanowienia odsyłającego były ponumerowane.

23. Wreszcie, sąd krajowy może, jeśli uzna, że leży to w jego możliwościach, lapidarnie przedstawić swoje stanowisko co do odpowiedzi, która ma zostać udzielona na pytania skierowane w trybie prejudycjalnym.

24. Samo pytanie lub pytania prejudycjalne muszą być zawarte w odrębnej i jasno oznaczonej części postanowienia odsyłającego, zazwyczaj na jego początku lub końcu. Muszą być zrozumiałe bez konieczności odwoływania się do uzasadnienia wniosku, które jednakże przedstawia kontekst niezbędny do przeprowadzenia właściwej oceny.

25. W toku postępowania prejudycjalnego Trybunał posługuje się co do zasady informacjami zawartymi w odesłaniu prejudycjalnym, w tym danymi dotyczącymi tożsamości lub innymi danymi osobowymi. Do sądu odsyłającego należy więc utajnienie, jeżeli uzna to za niezbędne, we wniosku o wydanie orzeczenia w trybie prejudycjalnym, tożsamości lub innych danych odnoszących się do osoby lub osób, których dotyczy toczące się przed nim postępowanie.

Skutki odesłania prejudycjalnego dla postępowania przed sądem krajowym

26. Skierowanie wniosku o wydanie orzeczenia w trybie prejudycjalnym powoduje zawieszenie postępowania przed sądem krajowym do czasu wydania przez Trybunał orzeczenia.

27. Sąd krajowy zachowuje niemniej uprawnienie do stosowania różnego rodzaju środków zabezpieczających, zwłaszcza w przypadku wniosku o dokonanie oceny ważności (zob. pkt 17 powyżej).

Koszty postępowania i pomoc w zakresie kosztów postępowania

28. Postępowanie prejudycjalne przed Trybunałem jest bezpłatne, a Trybunał nie rozstrzyga o kosztach stron postępowania przed sądem krajowym; rozstrzyganie o tych kosztach należy do sądu krajowego.

29. Jeżeli strona nie dysponuje wystarczającymi zasobami, sąd krajowy może, o ile zezwalają na to przepisy krajowe, przyznać jej pomoc w zakresie kosztów postępowania na pokrycie wydatków poniesionych w postępowaniu przed Trybunałem, zwłaszcza związanych z reprezentacją. Sam Trybunał również może przyznać taką pomoc w przypadku, gdy strona nie korzysta równocześnie zakresie pomocy w zakresie kosztów postępowania na poziomie krajowym lub jeżeli taka pomoc nie pokrywa wydatków poniesionych w postępowaniu przed Trybunałem, lub pokrywa je jedynie częściowo.

Wymiana korespondencji między sądem krajowym a Trybunałem

30. Postanowienie odsyłające i dokumenty z nim związane (w szczególności, w stosownym przypadku, akta sprawy, ewentualnie ich kopia) muszą zostać wysłane przez sąd krajowy przesyłką poleconą bezpośrednio do Trybunału (na adres: „Sekretariat Trybunału Sprawiedliwości, L-2925 Luksemburg", tel. +352 4303-1).

31. Sekretariat Trybunału pozostaje w kontakcie z sądem krajowym aż do chwili ogłoszenia orzeczenia, przekazując mu odpisy dokumentów procesowych.

32. Trybunał przekazuje orzeczenie sądowi krajowemu. Trybunał pozostaje zobowiązany za przekazywanie mu przez ten sąd informacji o dalszym przebiegu toczącego się przed nim postępowania oraz za przesłanie mu, w stosownym przypadku, odpisu wyroku sądu krajowego kończącego postępowanie w sprawie.

II – **Pilny tryb prejudycjalny (PPU)**

33. Niniejsza część noty dostarcza praktycznych wytycznych odnoszących się do pilnego trybu prejudycjalnego mającego zastosowanie do odesłań dotyczących przestrzeni wolności, bezpieczeństwa i sprawiedliwości. Omawiany tryb został uregulowany w art. 23a Protokołu (nr 3) w sprawie Statutu Trybunału Sprawiedliwości Unii Europejskiej (Dz.U. 2008, C 115, s. 210) i w art. 104b regulaminu postępowania przed Trybunałem. Możliwość zwracania się o zastosowanie tego trybu jest rozwiązaniem istniejącym obok możliwości zwracania się o zastosowanie trybu przyspieszonego zgodnie z art. 23a wspomnianego protokołu i art. 104a regulaminu postępowania.

Przesłanki zastosowania pilnego trybu prejudycjalnego

34. Pilny tryb prejudycjalny może zostać zastosowany wyłącznie w odniesieniu do dziedzin objętych tytułem V części trzeciej TFUE, regulującej zagadnienia dotyczące przestrzeni wolności, bezpieczeństwa i sprawiedliwości.

35. O zastosowaniu omawianego trybu decyduje Trybunał. Co do zasady, decyzja taka jest podejmowana wyłącznie na podstawie uzasadnionego wniosku sądu krajowego. W wyjątkowych okolicznościach Trybunał może z urzędu zdecydować o poddaniu odesłania rozpoznaniu w pilnym trybie prejudycjalnym, jeżeli wydaje się to konieczne.

36. Pilny tryb prejudycjalny upraszcza poszczególne etapy postępowania przed Trybunałem, ale jego zastosowanie wiąże się zarówno poważnymi ograniczeniami zarówno dla Trybunału, jak i dla stron i innych zainteresowanych podmiotów, które uczestniczą w postępowaniu, w szczególności dla państw członkowskich.

37. O zastosowanie tego trybu można więc wnosić wyłącznie w okolicznościach wskazujących jednoznacznie na konieczność wydania przez Trybunał rozstrzygnięcia w przedmiocie odesłania w jak najkrótszym terminie. Choć nie jest możliwe wyliczenie niniejszym w wyczerpujący sposób takich sytuacji przede wszystkim ze względu na zróżnicowany i rozwojowy charakter przepisów Unii regulujących zagadnienia przestrzeni wolności, bezpieczeństwa i sprawiedliwości, sąd krajowy mógłby, tytułem przykładu, rozważyć złożenie wniosku o zastosowanie pilnego trybu prejudycjalnego w następujących sytuacjach: w przewidzianym w art. 267 akapit czwarty TFUE przypadku osoby pozbawionej wolności, jeżeli odpowiedź na zadane pytanie jest rozstrzygająca dla oceny sytuacji prawnej tej osoby lub – w przypadku sporu dotyczącego władzy rodzicielskiej lub opieki nad dzieckiem – jeżeli właściwość sądu, do którego sprawę wniesiono zgodnie prawem Unii zależy od odpowiedzi udzielonej na pytanie prejudycjalne.

Wniosek o zastosowanie pilnego trybu prejudycjalnego

38. W celu umożliwienia Trybunałowi podjęcia szybkiej decyzji co do tego, czy należy zastosować pilny prejudycjalny, wniosek powinien wskazywać elementy stanu faktycznego i prawnego dowodzące tej pilności, a w szczególności zagrożenie wynikające z rozpoznania odesłania w zwykłym trybie prejudycjalnym.

39. W miarę możliwości sąd krajowy powinien przedstawić w sposób zwięzły swoje stanowisko w przedmiocie odpowiedzi, jakiej należy udzielić na zadane pytanie lub pytania. Takie wskazanie ułatwia zajęcie stanowiska przez strony i inne podmioty, które uczestniczą w postępowaniu, a także decyzję Trybunału, przyczyniając się tym samym do szybkiego przebiegu postępowania.

40. Wniosek o zastosowanie pilnego trybu prejudycjalnego powinien zostać złożony w formie wykluczającej wszelką dwuznaczność, pozwalającej sekretariatowi Trybunału natychmiast stwierdzić, że akta sprawy powinny zostać skierowane do rozpoznania w trybie szczególnym. W tym celu sąd odsyłający powinien dokonać w swoim wniosku wzmianki o art. 104b regulaminu postępowania, zamieszczając ją w łatwo rozpoznawalnym miejscu odesłania (na przykład w nagłówku lub w odrębnym dokumencie procesowym). W stosownym przypadku, również pismo towarzyszące sądu odsyłającego może odnosić się do tego wniosku.

41. Co się tyczy samego postanowienia odsyłającego, jego zwięzły charakter jest tym bardziej ważny w pilnych sytuacjach, że pomaga zapewnić szybkość postępowania.

Wymiana informacji między Trybunałem, sądem krajowym i stronami

42. Do celów komunikowania się z sądem krajowym i stronami postępowania przed nim, sądy krajowe, które składają wnioski o zastosowanie pilnego trybu prejudycjalnego powinny wskazać adres poczty elektronicznej, ewentualnie numer telefaksu, którego Trybunał mógłby używać oraz adresy poczty elektronicznej, ewentualnie numery telefaksu przedstawicieli stron sporu.

43. Kopia podpisanego postanowienia odsyłającego wraz z wnioskiem zastosowanie pilnego trybu prejudycjalnego może zostać przekazana Trybunałowi uprzednio za pośrednictwem poczty elektronicznej (ECJ-Registry@curia.europa.eu) lub telefaksu (+352 43 37 66). Postanowienie i wniosek mogą być rozpoznawane niezwłocznie po otrzymaniu takiej kopii. Oryginały dokumentów muszą jednakże zostać przekazane do sekretariatu Trybunału w jak najkrótszym terminie.

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.

I

(Akty ustawodawcze)

DYREKTYWY

DYREKTYWA PARLAMENTU EUROPEJSKIEGO I RADY 2010/64/UE

z dnia 20 października 2010 r.

w sprawie prawa do tłumaczenia ustnego i tłumaczenia pisemnego w postępowaniu karnym

PARLAMENT EUROPEJSKI I RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat o funkcjonowaniu Unii Europejskiej, w szczególności jego art. 82 ust. 2 akapit drugi lit. b),

uwzględniając inicjatywę Królestwa Belgii, Republiki Federalnej Niemiec, Republiki Estonii, Królestwa Hiszpanii, Republiki Francuskiej, Republiki Włoskiej, Wielkiego Księstwa Luksemburga, Republiki Węgierskiej, Republiki Austrii, Republiki Portugalskiej, Rumunii, Republiki Finlandii, oraz Królestwa Szwecji [1],

po przekazaniu projektu aktu ustawodawczego parlamentom narodowym,

stanowiąc zgodnie ze zwykłą procedurą ustawodawczą [2],

a także mając na uwadze, co następuje:

(1) Unia postawiła sobie za cel utrzymanie i rozwój przestrzeni wolności, bezpieczeństwa i sprawiedliwości. Zgodnie z konkluzjami prezydencji z posiedzenia Rady Europejskiej w Tampere w dniach 15 i 16 października 1999 r., a w szczególności z ich pkt 33, zasada wzajemnego uznawania wyroków i innych orzeczeń organów sądowych powinna stać się podstawą współpracy sądowej w sprawach cywilnych i karnych w Unii, ponieważ poprawa wzajemnego uznawania oraz niezbędne zbliżenie przepisów ułatwiłoby współpracę między właściwymi organami oraz sądową ochronę praw jednostki.

(2) W dniu 29 listopada 2000 r. Rada, zgodnie z konkluzjami z posiedzenia w Tampere, przyjęła program środków mających na celu wprowadzenie w życie zasady wzajemnego uznawania orzeczeń w sprawach karnych [3]. We wprowadzeniu do tego programu stwierdza się, że wzajemne uznawanie „ma na celu wzmocnienie współpracy między państwami członkowskimi, ale także zwiększenie ochrony praw jednostki".

(3) Wdrożenie zasady wzajemnego uznawania orzeczeń w sprawach karnych zakłada, że państwa członkowskie mają wzajemne zaufanie do swoich systemów wymiaru sprawiedliwości w sprawach karnych. Zakres wzajemnego uznawania w znacznym stopniu zależy od szeregu parametrów, w tym mechanizmów mających na celu zagwarantowanie praw podejrzanych lub oskarżonych oraz wspólnych minimalnych standardów niezbędnych dla ułatwienia stosowania zasady wzajemnego uznawania.

(4) Zasada wzajemnego uznawania orzeczeń w sprawach karnych może skutecznie funkcjonować jedynie w duchu zaufania, w którym nie tylko organy sądowe, ale wszyscy uczestnicy procesu karnego uważają orzeczenia organów sądowych innego państwa członkowskiego za równoważne ze swoimi własnymi, co wymaga nie tylko zaufania do tego, że przepisy innego państwa członkowskiego są odpowiednie, ale także zaufania co do ich prawidłowego stosowania.

(5) W art. 6 europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności (zwanej dalej „EKPC") oraz w art. 47 Karty praw podstawowych Unii Europejskiej (zwanej dalej „Kartą") zapisane jest prawo do rzetelnego procesu sądowego. Artykuł 48 ust. 2 Karty gwarantuje poszanowanie prawa do obrony. Niniejsza dyrektywa nie narusza tych praw i powinna zostać wdrożona odpowiednio.

[1] Dz.U. C 69 z 18.3.2010, s. 1.

[2] Stanowisko Parlamentu Europejskiego z dnia 16 czerwca 2010 r. (dotychczas nieopublikowane w Dzienniku Urzędowym) i decyzja Rady z dnia 7 października 2010 r.

[3] Dz.U. C 12 z 15.1.2001, s. 10.

(6) Mimo że wszystkie państwa członkowskie są stroną EKPC, z doświadczenia wynika, że sam ten fakt nie zawsze jest gwarancją wystarczającego stopnia zaufania do systemów wymiaru sprawiedliwości w sprawach karnych innych państw członkowskich.

(7) Zwiększenie wzajemnego zaufania wymaga bardziej spójnego wdrażania praw i gwarancji określonych w art. 6 EKPC. Wymaga ono również – poprzez niniejszą dyrektywę oraz inne środki – dalszego rozwoju w ramach Unii minimalnych standardów określonych w EKPC oraz w Karcie.

(8) Artykuł 82 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej przewiduje możliwość ustanowienia norm minimalnych stosowanych w państwach członkowskich w celu ułatwienia wzajemnego uznawania wyroków i orzeczeń sądowych, jak również współpracy policyjnej i wymiarów sprawiedliwości w sprawach karnych o wymiarze transgranicznym. Artykuł 82 ust. 2 akapit drugi lit. b) odwołuje się do „praw jednostek w postępowaniu karnym" jako jednego z obszarów, w którym można ustanowić normy minimalne.

(9) Wspólne minimalne zasady powinny doprowadzić do zwiększonego zaufania do systemów wymiaru sprawiedliwości w sprawach karnych wszystkich państw członkowskich, co z kolei powinno doprowadzić do skuteczniejszej współpracy sądowej opartej na wzajemnym zaufaniu. Takie wspólne minimalne zasady powinny być ustanowione w dziedzinie tłumaczeń ustnych i tłumaczeń pisemnych w postępowaniu karnym.

(10) W dniu 30 listopada 2009 r. Rada przyjęła rezolucję dotyczącą harmonogramu działań mających na celu umocnienie praw procesowych podejrzanych lub oskarżonych w postępowaniach karnych ([1]). Harmonogram działań zawierał wezwanie do stopniowego przyjmowania środków dotyczących prawa do tłumaczenia pisemnego i ustnego (środek A), prawa do informacji o prawach i informacji o zarzutach (środek B), prawa do porady prawnej i pomocy prawnej (środek C), prawa do kontaktu z krewnymi, pracodawcami i organami konsularnymi (środek D) oraz specjalnych zabezpieczeń dla podejrzanych lub oskarżonych wymagających szczególnego traktowania (środek E).

(11) W programie sztokholmskim, przyjętym w dniu 10 grudnia 2009 r., Rada Europejska z zadowoleniem przyjęła harmonogram działań i uznała go za część programu sztokholmskiego (pkt 2.4). Rada Europejska podkreśliła niepełny charakter tego harmonogramu, zwracając się do Komisji o zbadanie dalszych kwestii minimalnych praw proceduralnych podejrzanych i oskarżonych, a także o ocenę, czy należy zająć się innymi kwestiami, jak na przykład domniemaniem niewinności, aby wspierać lepszą współpracę w tym obszarze.

([1]) Dz.U. C 295 z 4.12.2009, s. 1.

(12) Niniejsza dyrektywa dotyczy środka A harmonogramu działań. Określa ona wspólne minimalne zasady, które mają być stosowane w dziedzinach tłumaczenia pisemnego i tłumaczenia ustnego w postępowaniu karnym, w celu zwiększenia wzajemnego zaufania między państwami członkowskimi.

(13) Niniejsza dyrektywa opiera się na wniosku Komisji dotyczącym decyzji ramowej Rady w sprawie prawa do tłumaczenia ustnego i tłumaczenia pisemnego w postępowaniu karnym z dnia 8 lipca 2009 r. oraz na wniosku Komisji dotyczącym dyrektywy Parlamentu Europejskiego i Rady w sprawie prawa do tłumaczenia ustnego i tłumaczenia pisemnego w postępowaniu karnym z dnia 9 marca 2010 r.

(14) Prawo osób, które nie mówią w języku postępowania karnego lub go nie rozumieją, do tłumaczenia ustnego i do tłumaczenia pisemnego jest zapisane w art. 6 EKPC, zgodnie z jego wykładnią zawartą w orzecznictwie Europejskiego Trybunału Praw Człowieka. Niniejsza dyrektywa ułatwia stosowanie tego prawa w praktyce. W tym celu niniejsza dyrektywa zmierza do zapewnienia podejrzanym lub oskarżonym prawa do tłumaczenia ustnego i tłumaczenia pisemnego w postępowaniu karnym, z myślą o zapewnieniu im prawa do rzetelnego procesu sądowego.

(15) Prawa przewidziane w niniejszej dyrektywie powinny także mieć zastosowanie, jako niezbędne środki towarzyszące, do wykonania europejskiego nakazu aresztowania ([2]) w granicach przewidzianych niniejszą dyrektywą. Wykonujące nakaz państwa członkowskie powinny zapewnić tłumaczenie ustne i tłumaczenie pisemne osobom objętym wnioskiem, które nie mówią w języku postępowania lub go nie rozumieją, a także ponieść koszty tych tłumaczeń.

(16) W niektórych państwach członkowskich organ inny niż sąd właściwy w sprawach karnych jest uprawniony do nakładania kar w odniesieniu do stosunkowo drobnych przestępstw. Taki przypadek może mieć miejsce, na przykład, w odniesieniu do przestępstw drogowych, które popełniane są na szeroką skalę i które mogą być wykryte w wyniku kontroli ruchu drogowego. W takich sytuacjach nieuzasadnione byłoby wymaganie od właściwego organu zapewnienia wszystkich praw określonych w niniejszej dyrektywie. W przypadku gdy prawo państwa członkowskiego przewiduje nakładanie kar w odniesieniu do drobnych przestępstw przez taki organ, a od nałożenia takiej kary przysługuje prawo do odwołania się do sądu właściwego w sprawach karnych, niniejsza dyrektywa powinna mieć zatem zastosowanie jedynie do postępowania przed sądem w wyniku takiego odwołania.

([2]) Decyzja ramowa Rady 2002/584/WSiSW z dnia 13 czerwca 2002 r. w sprawie europejskiego nakazu aresztowania i procedury wydawania osób między państwami członkowskimi (Dz.U. L 190 z 18.7.2002, s. 1).

(17) Niniejsza dyrektywa powinna zapewniać darmową i odpowiednią pomoc językową, umożliwiającą podejrzanym lub oskarżonym, którzy nie mówią w języku postępowania karnego lub go nie rozumieją, pełne wykonywanie swojego prawa do obrony oraz gwarantującą rzetelność postępowania.

(18) Tłumaczenie ustne dla podejrzanych lub oskarżonych powinno być zapewniane niezwłocznie. Jednakże upływ pewnego okresu czasu zanim tłumaczenie ustne zostanie zapewnione nie powinien stanowić naruszenia wymogu niezwłocznego zapewnienia tłumaczenia ustnego, o ile taki okres czasu jest uzasadniony w zaistniałych okolicznościach.

(19) Kontakty między podejrzanymi lub oskarżonymi a ich obrońcą należy tłumaczyć ustnie zgodnie z niniejszą dyrektywą. Podejrzani lub oskarżeni powinni mieć, między innymi, możliwość przedstawienia swojemu obrońcy swoich wersji wydarzeń, wskazania stwierdzeń, z którymi się nie zgadzają oraz zwrócenia uwagi swojego obrońcy na wszelkie fakty, które należy przytoczyć w ich obronie.

(20) Do celów przygotowania obrony kontakty między podejrzanymi lub oskarżonymi a ich obrońcą, związane bezpośrednio z jakimkolwiek przesłuchaniem lub składaniem wyjaśnień w trakcie postępowania, lub ze złożeniem odwołania lub innych wniosków proceduralnych, takich jak wniosek o zwolnienie za kaucją, powinny być tłumaczone ustnie, w przypadku gdy jest to konieczne w celu zagwarantowania rzetelności postępowania.

(21) Państwa członkowskie powinny zapewnić procedurę lub mechanizm sprawdzający, czy podejrzani lub oskarżeni mówią w języku postępowania karnego i czy go rozumieją oraz czy potrzebują pomocy tłumacza ustnego. Taka procedura lub mechanizm oznacza, że właściwe organy sprawdzają w każdy właściwy sposób, w tym konsultując się z podejrzanymi lub oskarżonymi, czy mówią oni w języku postępowania karnego i czy go rozumieją oraz czy potrzebują pomocy tłumacza ustnego.

(22) Zgodnie z niniejszą dyrektywą należy zapewnić tłumaczenie ustne i tłumaczenie pisemne w języku ojczystym podejrzanych lub oskarżonych lub w jakimkolwiek innym języku, którym mówią lub który rozumieją, aby pozwolić im w pełni wykonywać prawo do obrony, oraz w celu zagwarantowania rzetelności postępowania.

(23) Poszanowanie praw do tłumaczenia ustnego i tłumaczenia pisemnego określonych w niniejszej dyrektywie nie powinno naruszać żadnego innego prawa proceduralnego przewidzianego w prawie krajowym.

(24) Państwa członkowskie powinny zapewnić, aby można było skontrolować adekwatność zapewnionego tłumaczenia ustnego i tłumaczenia pisemnego w przypadku gdy właściwe organy otrzymały uwagi w danej sprawie.

(25) Podejrzani lub oskarżeni lub osoby objęte postępowaniem służącym wykonaniu europejskiego nakazu aresztowania powinny mieć prawo do zakwestionowania stwierdzenia braku potrzeby tłumaczenia ustnego, zgodnie z procedurami w prawie krajowym. Prawo to nie oznacza, że państwa członkowskie mają obowiązek ustanowienia odrębnego mechanizmu lub procedury skarg, za pomocą której można zakwestionować takie stwierdzenie, oraz nie powinno mieć wpływu na terminy mające zastosowanie do wykonania europejskiego nakazu aresztowania.

(26) W przypadku stwierdzenia, że jakość tłumaczenia ustnego jest niewystarczająca do zapewnienia prawa do rzetelnego procesu sądowego, właściwe organy powinny mieć możliwość zmiany ustanowionego tłumacza ustnego.

(27) U podstaw właściwego wymierzania sprawiedliwości leży obowiązek poświęcenia uwagi podejrzanym lub oskarżonym znajdującym się w potencjalnie niekorzystnym położeniu, w szczególności z powodu jakichkolwiek upośledzeń fizycznych wpływających na ich zdolność do skutecznego porozumiewania się. Prokuratura, organy ścigania i organy sądowe powinny zatem zapewnić, aby osoby te były w stanie skutecznie wykonywać prawa przewidziane w niniejszej dyrektywie, na przykład uwzględniając wszelkie potencjalne słabości mające wpływ na zdolność tych osób do śledzenia postępowania i do wyrażania się, oraz podejmując odpowiednie kroki w celu zapewnienia, aby prawa te zostały zagwarantowane.

(28) Wykorzystując wideokonferencję do celów tłumaczenia ustnego na odległość, właściwe organy powinny móc opierać się na narzędziach opracowywanych w kontekście europejskiej e-sprawiedliwości (na przykład na informacjach o sądach posiadających sprzęt do wideokonferencji lub instrukcje obsługi do niego).

(29) Niniejszą dyrektywę należy ocenić w świetle zdobytych doświadczeń praktycznych. W stosownych przypadkach należy ją zmienić, tak, aby ulepszyć ustanowione przez nią gwarancje.

(30) Zagwarantowanie rzetelności postępowania wymaga, aby istotne dokumenty, lub przynajmniej stosowne ich części, były przetłumaczone dla podejrzanych lub oskarżonych zgodnie z niniejszą dyrektywą. Niektóre dokumenty, takie jak wszelkie orzeczenia o pozbawieniu danej osoby wolności, każdy zarzut lub akt oskarżenia oraz każdy wyrok, powinny zawsze być uważane za istotne do tego celu i dlatego należy je przetłumaczyć. Właściwe organy państw członkowskich powinny podjąć decyzję – z własnej inicjatywy lub na wniosek podejrzanych lub oskarżonych lub ich obrońcy – jakie inne dokumenty są istotne dla zagwarantowania rzetelności postępowania i powinny zatem również zostać przetłumaczone.

(31) Państwa członkowskie powinny ułatwić dostęp do krajowych baz danych tłumaczy prawnych pisemnych i ustnych, w przypadku gdy takie bazy istnieją. W tym kontekście należy zwrócić szczególną uwagę na cel, jakim jest zapewnienie dostępu do istniejących baz danych za pośrednictwem portalu e-sprawiedliwość, jak zaplanowano w wieloletnim planie działania dotyczącym europejskiej e-sprawiedliwości 2009-2013 z dnia 27 listopada 2008 r. ([1]).

(32) Niniejsza dyrektywa powinna ustanawiać minimalne zasady. Państwa członkowskie powinny mieć możliwość rozszerzenia praw określonych w niniejszej dyrektywie, aby zapewnić wyższy poziom ochrony również w sytuacjach nieprzewidzianych wyraźnie w niniejszej dyrektywie. Poziom ochrony nigdy nie powinien być niższy niż poziom wynikający ze standardów EKPC lub Karty, zgodnie z ich wykładnią zawartą w orzecznictwie Europejskiego Trybunału Praw Człowieka lub Trybunału Sprawiedliwości Unii Europejskiej.

(33) Przepisy niniejszej dyrektywy, które odpowiadają prawom gwarantowanym na mocy EKPC oraz Karty powinny być interpretowane i wdrażane w sposób spójny z tymi prawami, zgodnie z ich wykładnią zawartą w stosownym orzecznictwie Europejskiego Trybunału Praw Człowieka i Trybunału Sprawiedliwości Unii Europejskiej.

(34) Ponieważ cel niniejszej dyrektywy, a mianowicie ustanowienie wspólnych minimalnych zasad, nie może być osiągnięty w sposób wystarczający przez państwa członkowskie, natomiast ze względu na jego rozmiary i skutki możliwe jest lepsze jego osiągnięcie na poziomie Unii, Unia może podjąć działania zgodne z zasadą pomocniczości określoną w art. 5 Traktatu o Unii Europejskiej. Zgodnie z zasadą proporcjonalności określoną w tym artykule, niniejsza dyrektywa nie wykracza poza to, co jest konieczne do osiągnięcia tego celu.

(35) Zgodnie z art. 3 Protokołu (nr 21) w sprawie stanowiska Zjednoczonego Królestwa i Irlandii w odniesieniu do przestrzeni wolności, bezpieczeństwa i sprawiedliwości, załączonego do Traktatu o Unii Europejskiej i do Traktatu o funkcjonowaniu Unii Europejskiej, te dwa państwa członkowskie powiadomiły o chęci uczestniczenia w przyjęciu i stosowaniu niniejszej dyrektywy.

(36) Zgodnie z art. 1 i 2 Protokołu (nr 22) w sprawie stanowiska Danii, załączonego do Traktatu o Unii Europejskiej i do Traktatu o funkcjonowaniu Unii Europejskiej, Dania nie uczestniczy w przyjęciu niniejszej dyrektywy i nie jest nią związana ani jej nie stosuje,

PRZYJMUJE NINIEJSZĄ DYREKTYWĘ:

Artykuł 1

Przedmiot i zakres

1. Niniejsza dyrektywa ustanawia zasady dotyczące prawa do tłumaczenia ustnego i tłumaczenia pisemnego w postępowaniu karnym oraz w postępowaniu służącym wykonaniu europejskiego nakazu aresztowania.

2. Prawo, o którym mowa w ust. 1, ma zastosowanie do osób od chwili, gdy właściwe organy danego państwa członkowskiego poinformują je, za pomocą oficjalnego powiadomienia lub w inny sposób, że są one podejrzane lub oskarżone o popełnienie przestępstwa, do czasu zakończenia postępowania rozumianego jako ostateczne ustalenie tego, czy popełniły one przestępstwo, w tym, w stosownych przypadkach, wydania wyroku lub rozpatrzenia wszelkich odwołań.

3. W przypadku gdy prawo państwa członkowskiego przewiduje nakładanie kar w odniesieniu do drobnych przestępstw przez organ inny niż sąd właściwy w sprawach karnych, a od nałożenia takiej kary można się odwołać do takiego sądu, niniejsza dyrektywa ma zastosowanie jedynie do postępowania przed tym sądem w wyniku takiego odwołania.

([1]) Dz.U. C 75 z 31.3.2009, s. 1.

4. Niniejsza dyrektywa nie ma wpływu na prawo krajowe dotyczące obecności obrońcy w którejkolwiek fazie postępowania karnego, ani też na prawo krajowe dotyczące prawa podejrzanego lub oskarżonego do dostępu do dokumentów w postępowaniu karnym.

Artykuł 2

Prawo do tłumaczenia ustnego

1. Państwa członkowskie zapewniają, aby podejrzanym lub oskarżonym, którzy nie mówią w języku danego postępowania karnego lub go nie rozumieją, zapewniono niezwłocznie tłumaczenie ustne podczas postępowania karnego przed organami śledczymi i sądowymi, w tym również podczas przesłuchania przez policję, wszystkich rozpraw sądowych oraz wszelkich niezbędnych posiedzeń.

2. Państwa członkowskie zapewniają, aby tam, gdzie to konieczne w celu zagwarantowania rzetelności postępowania, dostępne było tłumaczenie ustne kontaktów między podejrzanymi lub oskarżonymi a ich obrońcą, związanych bezpośrednio z jakimkolwiek przesłuchaniem lub składaniem wyjaśnień podczas postępowania lub ze złożeniem odwołania lub innych wniosków proceduralnych.

3. Prawo do tłumaczenia ustnego na mocy ust. 1 i 2 obejmuje również odpowiednią pomoc osobom z upośledzeniem słuchu lub mowy.

4. Państwa członkowskie zapewniają procedurę lub mechanizm sprawdzający, czy podejrzani lub oskarżeni mówią w języku postępowania karnego i czy go rozumieją oraz czy potrzebują pomocy tłumacza ustnego.

5. Państwa członkowskie zapewniają, aby zgodnie z procedurami w prawie krajowym podejrzani lub oskarżeni mieli prawo do zakwestionowania decyzji stwierdzającej brak potrzeby tłumaczenia ustnego, a kiedy tłumaczenie ustne zostało zapewnione – możliwość złożenia skargi, że jakość tłumaczenia ustnego jest niewystarczająca, aby zagwarantować rzetelność postępowania.

6. W stosownych przypadkach można skorzystać z takich technologii komunikacyjnych jak wideokonferencje, telefon lub Internet, chyba że fizyczna obecność tłumacza ustnego jest wymagana w celu zagwarantowania rzetelności postępowania.

7. W postępowaniu służącym wykonaniu europejskiego nakazu aresztowania wykonujące nakaz państwo członkowskie zapewnia, aby jego właściwe organy zapewniły osobom objętym takim postępowaniem, które nie mówią w języku postępowania lub go nie rozumieją, tłumaczenie ustne zgodnie z niniejszym artykułem.

8. Tłumaczenie ustne zapewnione na mocy niniejszego artykułu musi mieć jakość wystarczającą do zagwarantowania rzetelności postępowania, w szczególności poprzez zapewnienie, aby podejrzani lub oskarżeni zrozumieli zarzuty i dowody przeciwko nim oraz byli w stanie wykonywać swoje prawo do obrony.

Artykuł 3

Prawo do tłumaczenia pisemnego istotnych dokumentów

1. Państwa członkowskie zapewniają, aby podejrzanym lub oskarżonym, którzy nie rozumieją języka danego postępowania karnego, zapewniono w rozsądnym terminie tłumaczenie pisemne wszystkich dokumentów istotnych dla zapewnienia ich zdolności do wykonywania swojego prawa do obrony oraz do zagwarantowania rzetelności postępowania.

2. Istotne dokumenty obejmują wszelkie orzeczenia o pozbawieniu danej osoby wolności, każdy zarzut lub akt oskarżenia oraz każdy wyrok.

3. Właściwe organy decydują w każdej sprawie, czy jakiekolwiek inne dokumenty mają istotny charakter. Podejrzani lub oskarżeni, lub ich obrońca mogą przedstawić uzasadniony wniosek w tym zakresie.

4. Nie ma wymogu tłumaczenia fragmentów istotnych dokumentów, które nie mają znaczenia do celów umożliwienia zrozumienia przez podejrzanych lub oskarżonych zarzutów i dowodów przeciwko nim.

5. Państwa członkowskie zapewniają, aby zgodnie z procedurami w prawie krajowym podejrzani lub oskarżeni mieli prawo do zakwestionowania decyzji stwierdzającej brak potrzeby tłumaczenia dokumentów lub ich fragmentów, a kiedy tłumaczenie pisemne zostało zapewnione – możliwość złożenia skargi, że jakość tłumaczenia jest niewystarczająca, aby zagwarantować rzetelność postępowania.

6. W postępowaniu służącym wykonaniu europejskiego nakazu aresztowania wykonujące nakaz państwo członkowskie zapewnia, aby jego właściwe organy zapewniły każdej osobie objętej tym postępowaniem, która nie rozumie języka, w którym sporządzono europejski nakaz aresztowania lub na który przetłumaczono go w wydającym państwie członkowskim, tłumaczenie pisemne tego dokumentu.

7. W drodze wyjątku od zasad ogólnych ustanowionych w ust. 1, 2, 3 i 6, zamiast tłumaczenia pisemnego można przedstawić tłumaczenie ustne lub streszczenie ustne istotnych dokumentów, pod warunkiem że takie tłumaczenie ustne lub streszczenie ustne pozostaje bez uszczerbku dla rzetelności postępowania.

8. Każde zrzeczenie się prawa do tłumaczenia pisemnego dokumentów, o których mowa w niniejszym artykule, następuje pod warunkiem, że podejrzani lub oskarżeni otrzymali uprzednią poradę prawną lub w inny sposób uzyskali pełną wiedzę na temat konsekwencji takiego zrzeczenia się tego prawa oraz że zrzeczenie się było jednoznaczne i dobrowolne.

9. Tłumaczenie pisemne zapewnione na mocy niniejszego artykułu musi mieć jakość wystarczającą do zagwarantowania rzetelności postępowania, w szczególności poprzez zapewnienie, aby podejrzani lub oskarżeni rozumieli zarzuty i dowody przeciwko nim i byli w stanie wykonywać swoje prawo do obrony.

Artykuł 4

Koszty tłumaczenia ustnego i pisemnego

Państwa członkowskie ponoszą koszty tłumaczenia ustnego i pisemnego wynikające ze stosowania art. 2 i 3, niezależnie od wyniku postępowania.

Artykuł 5

Jakość tłumaczenia ustnego i pisemnego

1. Państwa członkowskie podejmują konkretne środki w celu zapewnienia, aby tłumaczenie ustne i tłumaczenie pisemne miało jakość wymaganą na mocy art. 2 ust. 8 i art. 3 ust. 9.

2. Aby wspierać adekwatność tłumaczenia ustnego i pisemnego oraz skuteczny dostęp do niego, państwa członkowskie podejmują starania w celu stworzenia rejestru lub rejestrów niezależnych tłumaczy pisemnych i tłumaczy ustnych, którzy posiadają odpowiednie kwalifikacje. Po utworzeniu taki rejestr lub rejestry są udostępniane, w stosownych przypadkach, obrońcy i stosownym organom.

3. Państwa członkowskie zapewniają, aby tłumacze ustni i tłumacze pisemni mieli obowiązek zachowania poufności w odniesieniu do tłumaczeń ustnych i tłumaczeń pisemnych dokonywanych na mocy niniejszej dyrektywy.

Artykuł 6

Szkolenia

Bez uszczerbku dla niezależności sądów oraz różnic w organizacji sądownictwa w Unii, państwa członkowskie powinny zwrócić się do podmiotów odpowiedzialnych za szkolenie sędziów, prokuratorów i pracowników wymiaru sprawiedliwości uczestniczących w postępowaniach karnych o zwracanie szczególnej uwagi na swoiste cechy porozumiewania się z udziałem tłumacza ustnego, tak by zapewnić jego sprawny i skuteczny przebieg.

Artykuł 7

Prowadzenie rejestru

Państwa członkowskie zapewniają, aby w przypadku przesłuchań podejrzanych lub oskarżonych lub składania przez nich wyjaśnień, prowadzonych przez organ śledczy lub sądowniczy z udziałem tłumacza ustnego zgodnie z art. 2, w przypadku zapewnienia tłumaczenia ustnego lub streszczenia ustnego istotnych dokumentów w obecności takiego organu zgodnie z art. 3 ust. 7, lub w przypadku gdy osoba zrzekła się prawa do tłumaczenia zgodnie z art. 3 ust. 8, zostanie odnotowane, że zdarzenia te miały miejsce, korzystając z procedury rejestracji, zgodnie z prawem danego państwa członkowskiego.

Artykuł 8

Niezmniejszanie poziomu ochrony

Żaden z przepisów niniejszej dyrektywy nie może być rozumiany jako ograniczający lub uchylający jakiekolwiek prawa i gwarancje proceduralne zapewnione na mocy Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności, Karty Praw Podstawowych Unii Europejskiej, innych stosownych przepisów prawa międzynarodowego lub prawa któregokolwiek państwa członkowskiego, które zapewnia wyższy poziom ochrony.

Artykuł 9

Transpozycja

1. Państwa członkowskie wprowadzają w życie przepisy ustawowe, wykonawcze i administracyjne niezbędne do zapewnienia zgodności z przepisami niniejszej dyrektywy do dnia 27 października 2013 r.

2. Państwa członkowskie przekazują Komisji tekst tych środków.

3. Środki przyjęte przez państwa członkowskie zawierają odniesienie do niniejszej dyrektywy lub odniesienie takie towarzyszy ich urzędowej publikacji. Metody dokonywania takiego odniesienia określane są przez państwa członkowskie.

Artykuł 10

Sprawozdanie

Do dnia 27 października 2014 r. Komisja przedstawia Parlamentowi Europejskiemu i Radzie sprawozdanie oceniające, w jakim zakresie państwa członkowskie podjęły niezbędne środki w celu zapewnienia zgodności z niniejszą dyrektywą, a sprawozdaniu temu w razie potrzeby towarzyszą wnioski ustawodawcze.

Artykuł 11

Wejście w życie

Niniejsza dyrektywa wchodzi w życie dwudziestego dnia po jej opublikowaniu w *Dzienniku Urzędowym Unii Europejskiej*.

Artykuł 12

Adresaci

Niniejsza dyrektywa skierowana jest do państw członkowskich zgodnie z Traktatami.

Sporządzono w Strasburgu dnia 20 października 2010 r.

W imieniu Parlamentu Europejskiego	*W imieniu Rady*
J. BUZEK	O. CHASTEL
Przewodniczący	*Przewodniczący*

DYREKTYWA 2006/54/WE PARLAMENTU EUROPEJSKIEGO I RADY

z dnia 5 lipca 2006 r.

w sprawie wprowadzenia w życie zasady równości szans oraz równego traktowania kobiet i mężczyzn w dziedzinie zatrudnienia i pracy (wersja przeredagowana)

PARLAMENT EUROPEJSKI I RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat ustanawiający Wspólnotę Europejską, w szczególności jego art. 141 ust. 3,

uwzględniając wniosek Komisji,

uwzględniając opinię Europejskiego Komitetu Ekonomiczno-Społecznego ([1]),

stanowiąc zgodnie z procedurą określoną w art. 251 Traktatu ([2]),

a także mając na uwadze, co następuje:

(1) Dyrektywa Rady 76/207/EWG z dnia 9 lutego 1976 r. w sprawie wprowadzenia w życie zasady równego traktowania kobiet i mężczyzn w zakresie dostępu do zatrudnienia, kształcenia i awansu zawodowego oraz warunków pracy ([3]) oraz dyrektywa Rady 86/378/EWG z dnia 24 lipca 1986 r. w sprawie wprowadzania w życie zasady równego traktowania kobiet i mężczyzn w systemach zabezpieczenia społecznego pracowników ([4]), ([4]), zostały w znacznym stopniu zmienione ([5]). Dyrektywa Rady 75/117/EWG z dnia 10 lutego 1975 r. w sprawie zbliżenia ustawodawstw Państw Członkowskich dotyczących stosowania zasady równości wynagrodzeń dla mężczyzn i kobiet ([6]) oraz dyrektywa Rady 97/80/WE z dnia 15 grudnia 1997 r. dotycząca ciężaru dowodu w sprawach dyskryminacji ze względu na płeć ([7]) również zawierają przepisy, których celem jest wprowadzenie w życie zasady równego traktowania kobiet i mężczyzn. Z uwagi na to, że wprowadza się dalsze zmiany do tych dyrektyw, należy je przeredagować w celu zachowania przejrzystości, tak aby w jednym tekście ująć główne przepisy istniejące w tej dziedzinie, a także niektóre rozwiązania wywodzące się z orzecznictwa Trybunału Sprawiedliwości Wspólnot Europejskich (zwanego dalej „Trybunałem Sprawiedliwości").

(2) Równość kobiet i mężczyzn jest podstawową zasadą prawa wspólnotowego, zgodnie z art. 2 i art. 3 ust. 2 Traktatu oraz orzecznictwem Trybunału Sprawiedliwości. Te postanowienia Traktatu określają zasadę równości kobiet i mężczyzn jako „zadanie" i „cel" Wspólnoty oraz nakładają pozytywny obowiązek promowania jej we wszystkich jej działaniach.

(3) Trybunał Sprawiedliwości orzekł, że zakres zasady równego traktowania kobiet i mężczyzn nie może ograniczać się do zakazu dyskryminacji ze względu na fakt, że dana osoba jest takiej czy innej płci. Zważywszy na cel i naturę praw, które ma chronić ta zasada, ma ona także zastosowanie do dyskryminacji wynikającej ze zmiany płci danej osoby.

(4) Artykuł 141 ust. 3 Traktatu przewiduje obecnie szczególną podstawę prawną dla przyjmowania środków wspólnotowych w celu zapewnienia stosowania zasady równości szans i równego traktowania w dziedzinie zatrudnienia i pracy, w tym zasady równego wynagradzania za jednakową pracę lub pracę o jednakowej wartości.

(5) Artykuły 21 i 23 Karty praw podstawowych Unii Europejskiej również zakazują wszelkiej dyskryminacji ze względu na płeć oraz chronią prawo do równego traktowania kobiet i mężczyzn we wszystkich dziedzinach, w tym w dziedzinie zatrudnienia, pracy i wynagrodzenia.

(6) Molestowanie oraz molestowanie seksualne są sprzeczne z zasadą równego traktowania kobiet i mężczyzn i stanowią dyskryminację ze względu na płeć do celów niniejszej dyrektywy. Te formy dyskryminacji występują nie tylko w miejscu pracy, ale również w związku z dostępem do zatrudnienia, szkolenia zawodowego i awansu zawodowego. Powinny one więc być zakazane i powinny podlegać skutecznym, proporcjonalnym i odstraszającym sankcjom.

(7) W tym kontekście pracodawcy oraz osoby odpowiedzialne za szkolenie zawodowe powinni być zachęcani do podejmowania środków zwalczających wszelkie formy dyskryminacji ze względu na płeć oraz, w szczególności, do podejmowania działań zapobiegających molestowaniu oraz molestowaniu seksualnemu w miejscu pracy oraz przy dostępie do zatrudnienia, szkolenia zawodowego i awansu zawodowego, zgodnie z prawem krajowym i praktyką.

(8) Zasada równego wynagradzania za jednakową pracę lub pracę o jednakowej wartości, określona w art. 141 Traktatu oraz konsekwentnie podtrzymywana przez orzecznictwo Trybunału Sprawiedliwości, stanowi ważny aspekt zasady równego traktowania kobiet i mężczyzn oraz istotną i nieodłączną część dorobku wspólnotowego, w tym

([1]) Dz.U. C 157 z 28.6.2005, str. 83.

([2]) Opinia Parlamentu Europejskiego z dnia 6 lipca 2005 r. (dotychczas nieopublikowana w Dzienniku Urzędowym), wspólne stanowisko Rady z dnia 10 marca 2006 r. (Dz.U. C 126 E z 30.5.2006, str. 33) oraz stanowisko Parlamentu Europejskiego z dnia 1 czerwca 2006 r. (dotychczas nieopublikowane w Dzienniku Urzędowym).

([3]) Dz.U. L 39 z 14.2.1976, str. 40. Dyrektywa zmieniona dyrektywą 2002/73/WE Parlamentu Europejskiego i Rady (Dz.U. L 269 z 5.10.2002, str. 15).

([4]) Dz.U. L 225 z 12.8.1986, str. 40. Dyrektywa zmieniona dyrektywą 96/97/WE (Dz.U. L 46 z 17.2.1997, str. 20).

([5]) Patrz: załącznik I część A.

([6]) Dz.U. L 45 z 19.2.1975, str. 19.

([7]) Dz.U. L 14 z 20.1.1998, str. 6. Dyrektywa zmieniona dyrektywą 98/52/WE (Dz.U. L 205 z 22.7.1998, str. 66).

orzecznictwa Trybunału Sprawiedliwości dotyczącego dyskryminacji ze względu na płeć. Dlatego też właściwym jest przyjęcie dalszych przepisów w celu wprowadzenia jej w życie.

(9) Zgodnie z utrwalonym orzecznictwem Trybunału Sprawiedliwości, aby ocenić, czy pracownicy wykonują taką samą pracę lub pracę o jednakowej wartości, powinno się stwierdzić, uwzględniając szereg czynników, w tym charakter pracy i szkolenia oraz warunki pracy, czy pracowników tych można uznać za znajdujących się w porównywalnej sytuacji.

(10) Trybunał Sprawiedliwości stwierdził, że w pewnych warunkach zasada równego wynagradzania nie ogranicza się do sytuacji, w których kobiety i mężczyźni pracują dla tego samego pracodawcy.

(11) Państwa Członkowskie we współpracy z partnerami społecznymi powinny nadal zajmować się problemem utrzymujących się różnic wynagrodzeń kobiet i mężczyzn oraz segregacji płci na rynku pracy za pomocą środków, takich jak elastyczne uregulowania w zakresie czasu pracy umożliwiające zarówno mężczyznom, jak i kobietom skuteczniejsze godzenie życia rodzinnego z zawodowym. Mogłoby to również obejmować odpowiednie uregulowania w zakresie urlopu rodzicielskiego, z którego mogliby skorzystać oboje rodzice, jak również tworzenie dostępnych i niedrogich struktur opieki nad dziećmi i osobami zależnymi.

(12) Powinno się przyjąć szczególne środki w celu zapewnienia wprowadzenia w życie zasady równego traktowania w odniesieniu do systemów zabezpieczenia społecznego pracowników oraz wyraźniejszego określenia jej zakresu.

(13) Trybunał Sprawiedliwości w swoim wyroku z dnia 17 maja 1990 r. w sprawie C-262/88 ([1]) orzekł, że wszystkie formy emerytur pracowniczych stanowią element wynagrodzenia w rozumieniu art. 141 Traktatu.

(14) Pomimo że pojęcie wynagrodzenia w rozumieniu art. 141 Traktatu nie obejmuje świadczeń z tytułu zabezpieczenia społecznego, nie ulega obecnie wątpliwości, iż systemy emerytalne urzędników państwowych wchodzą w zakres zasady równego wynagradzania, jeżeli świadczenia należne w ramach tego systemu wypłacane są pracownikowi z tytułu stosunku pracy z pracodawcą państwowym, niezależnie od faktu, że system taki stanowi część powszechnego ustawowego systemu zabezpieczenia społecznego. Zgodnie z wyrokami Trybunału Sprawiedliwości w sprawach C-7/93 ([2]) oraz C-351/00 ([3]) warunek ten jest spełniony, jeżeli system emerytalny dotyczy szczególnej kategorii pracowników, a świadczenia wypłacane w ramach tego systemu są bezpośrednio zależne od okresu zatrudnienia i są obliczane na podstawie ostatniego wynagrodzenia urzędnika państwowego. Mając na względzie przejrzystość regulacji, właściwe jest zatem przyjęcie odpowiednich przepisów w tym zakresie.

(15) Trybunał Sprawiedliwości potwierdził, że w sytuacji gdy składki pracowników płci męskiej i żeńskiej w systemie emerytalnym o zdefiniowanym świadczeniu są objęte zakresem art. 141 Traktatu, wszelka nierówność w wysokości składek opłacanych przez pracodawców w systemie o zdefiniowanym świadczeniu, która wynika ze stosowania czynników aktuarialnych różnicujących ze względu na płeć, nie może podlegać ocenie w świetle tego przepisu.

(16) Przykładowo, w przypadku systemów o zdefiniowanym świadczeniu pewne elementy, takie jak przeliczenie kapitału części emerytury okresowej na środki pieniężne, przeniesienie uprawnień emerytalnych, emerytura zwrotna wypłacana osobie będącej na utrzymaniu w zamian za zrzeczenie się części emerytury lub zredukowanie świadczenia w przypadku pracownika, który decyduje się na wcześniejsze przejście na emeryturę, mogą być różne, jeżeli różnice kwotowe są wynikiem stosowania czynników aktuarialnych różnicujących ze względu na płeć, w czasie gdy wdrażane jest finansowanie systemu.

(17) Powszechnie uznaje się, że świadczeń wypłacanych w ramach systemów zabezpieczenia społecznego pracowników nie traktuje się jako wynagrodzenia w takim zakresie, w jakim odnoszą się one do okresów zatrudnienia przed dniem 17 maja 1990 r., z wyjątkiem przypadków pracowników lub innych osób zgłaszających roszczenia w tej kwestii, którzy wszczęli postępowania sądowe lub zgłosili równorzędne roszczenie, zgodnie z obowiązującym w tym czasie prawem krajowym. Z tego względu konieczne jest odpowiednie ograniczenie wprowadzania w życie zasady równego traktowania.

(18) Trybunał Sprawiedliwości konsekwentnie utrzymuje, że Protokół w sprawie Barber ([4]) nie wpływa na prawo przystąpienia do pracowniczego programu emerytalnego i że ograniczenie w czasie skutków wyroku w sprawie C-262/88 nie ma zastosowania do prawa do przystąpienia do pracowniczego programu emerytalnego. Trybunał Sprawiedliwości orzekł także, że przepisy krajowe dotyczące terminów wnoszenia powództwa na podstawie prawa krajowego mogą być wykorzystane przeciwko pracownikom, którzy potwierdzają swoje prawo przystąpienia do pracowniczego programu emerytalnego, pod warunkiem że nie są one mniej korzystne dla tego rodzaju powództwa niż w przypadku podobnego powództwa o charakterze krajowym i że nie sprawiają one, że korzystanie z praw przyznanych przez prawo wspólnotowe staje się w praktyce niemożliwe. Trybunał Sprawiedliwości wskazał również, że możliwość wystąpienia przez pracownika z roszczeniem o ustalenie z mocą wsteczną prawa do przystąpienia do pracowniczego programu emerytalnego nie zwalnia pracownika z obowiązku opłacania składek za przedmiotowy okres członkostwa.

(19) Zapewnienie równego dostępu do zatrudnienia i prowadzącego do niego szkolenia zawodowego ma decydujące znaczenie dla stosowania zasady równego traktowania kobiet i mężczyzn w dziedzinie zatrudnienia i pracy. Dlatego też wszelkie wyjątki od tej zasady powinny być ograniczone do tych rodzajów działalności zawodowej, które wymuszają zatrudnienie osoby danej płci ze względu na ich charakter lub warunki, w jakich są wykonywane, o ile realizowany cel jest uzasadniony i zgodny z zasadą proporcjonalności.

([1]) C-262/88: *Barber* przeciwko *Guardian Royal Exchange Assurance Group* (1990 ECR I-1889).

([2]) C-7/93: *Bestuur van het Algemeen Burgerlijk Pensioenfonds* przeciwko *G. A. Beune* (1994 ECR I-4471).

([3]) C-351/00: *Pirko Niemi* (2002 ECR I-7007).

([4]) Protokół nr 17 w sprawie art. 141 Traktatu ustanawiającego Wspólnotę Europejską (1992).

(20) Niniejsza dyrektywa nie narusza wolności zrzeszania się, w tym prawa do tworzenia związków oraz do wstępowania do związków w celu ochrony własnych interesów. Środki w rozumieniu art. 141 ust. 4 Traktatu mogą obejmować członkostwo lub kontynuowanie działalności organizacji lub związków, których głównym celem jest promowanie w praktyce zasady równego traktowania kobiet i mężczyzn.

(21) Zakaz dyskryminacji powinien pozostawać bez uszczerbku dla utrzymywania lub przyjmowania środków mających zapobiegać lub naprawiać niekorzystną sytuację grupy osób danej płci. Środki takie dopuszczają istnienie organizacji osób danej płci, jeżeli ich głównym celem jest wspieranie szczególnych potrzeb tych osób i promowanie równości kobiet i mężczyzn.

(22) Zgodnie z art. 141 ust. 4 Traktatu w celu zapewnienia pełnej równości w praktyce między kobietami a mężczyznami w życiu zawodowym zasada równego traktowania nie stanowi przeszkody dla Państw Członkowskich w utrzymaniu lub przyjmowaniu środków przewidujących szczególne korzyści w celu ułatwienia osobom płci niedostatecznie reprezentowanej wykonywania działalności zawodowej lub w celu zapobiegania niekorzystnym sytuacjom w karierze zawodowej i ich naprawiania. Z uwagi na obecną sytuację oraz mając na względzie deklarację nr 28 do Traktatu z Amsterdamu, Państwa Członkowskie powinny mieć na celu przede wszystkim poprawę sytuacji kobiet w życiu zawodowym.

(23) Z orzecznictwa Trybunału Sprawiedliwości wynika wyraźnie, że nieprzychylne traktowanie kobiety w związku z ciążą lub macierzyństwem stanowi bezpośrednią dyskryminację ze względu na płeć. Tego rodzaju traktowanie powinno zatem zostać w wyraźny sposób uwzględnione w niniejszej dyrektywie.

(24) Trybunał Sprawiedliwości zawsze spójnie uznawał – w zakresie zasady równego traktowania – uprawnienie do ochrony kondycji biologicznej kobiety w okresie ciąży i macierzyństwa, jak również wprowadzenia środków ochrony macierzyństwa jako sposobu osiągnięcia rzeczywistej równości. Niniejsza dyrektywa powinna zatem pozostawać bez uszczerbku dla dyrektywy Rady 92/85/EWG z dnia 19 października 1992 r. w sprawie wprowadzenia środków służących wspieraniu poprawy w miejscu pracy bezpieczeństwa i zdrowia pracownic w ciąży, pracownic, które niedawno rodziły, i pracownic karmiących piersią ([1]). Niniejsza dyrektywa powinna także pozostawać bez uszczerbku dla dyrektywy Rady 96/34/WE z dnia 3 czerwca 1996 r. w sprawie Porozumienia ramowego dotyczącego urlopu rodzicielskiego zawartego przez UNICE, CEEP i ETUC ([2]).

(25) Dla zachowania przejrzystości właściwe jest także przyjęcie wyraźnych przepisów w celu ochrony praw pracowniczych kobiet przebywających na urlopie macierzyńskim, a w szczególności ich prawa do powrotu na to samo lub równorzędne stanowisko, prawa do niepogarszania ich warunków z powodu skorzystania z tego urlopu oraz do korzystania z każdej poprawy warunków pracy, do której byłyby uprawnione w trakcie swojej nieobecności.

(26) W rezolucji Rady i ministrów ds. zatrudnienia i polityki społecznej, zebranych w ramach Rady, z dnia 29 czerwca 2000 r. w sprawie zrównoważonego udziału kobiet i mężczyzn w życiu rodzinnym i zawodowym ([3]) Państwa Członkowskie zostały zachęcone do zbadania zakresu, w jakim ich odpowiednie systemy prawne przyznają pracującym mężczyznom indywidualne i niezbywalne prawo do urlopu ojcowskiego, przy jednoczesnym zachowaniu ich praw związanych z zatrudnieniem.

(27) Podobne okoliczności mają zastosowanie do przyznawania przez Państwa Członkowskie kobietom i mężczyznom indywidualnego i niezbywalnego prawa do urlopu adopcyjnego. Do Państw Członkowskich należy decyzja, czy przyznać takie prawo do urlopu ojcowskiego i/lub adopcyjnego, a także ustalanie warunków, innych niż zwolnienie i powrót do pracy, które są poza zakresem zastosowania niniejszej dyrektywy.

(28) Skuteczne wprowadzenie w życie zasady równego traktowania wymaga wprowadzenia odpowiednich procedur w Państwach Członkowskich.

(29) Zapewnienie odpowiednich procedur sądowych lub administracyjnych w celu egzekwowania zobowiązań wynikających z niniejszej dyrektywy ma zasadnicze znaczenie dla skutecznego wprowadzenia w życie zasady równego traktowania.

(30) Przyjęcie przepisów dotyczących ciężaru dowodu odgrywa znaczącą rolę w zapewnieniu, aby zasada równego traktowania była skutecznie egzekwowana. Jak orzekł Trybunał Sprawiedliwości, należy przyjąć przepisy w celu zagwarantowania przeniesienia ciężaru dowodu na pozwanego, jeżeli w sprawie istnieje domniemanie faktyczne wskazujące na wystąpienie dyskryminacji, z wyjątkiem postępowań, w których zadaniem sądu lub innego właściwego organu krajowego jest zbadanie okoliczności faktycznych. Należy jednak zaznaczyć, że ocena faktów, z których można domniemywać, że doszło do bezpośredniej lub pośredniej dyskryminacji, pozostaje w gestii właściwych organów krajowych, zgodnie z prawem lub zwyczajem krajowym. Ponadto do Państw Członkowskich należy wprowadzenie, na jakimkolwiek właściwym stadium postępowania, zasad dowodowych, które są korzystniejsze dla powoda.

(31) W celu osiągnięcia dalszej poprawy poziomu ochrony proponowanego przez niniejszą dyrektywę stowarzyszenia, organizacje i inne osoby prawne powinny być również upoważnione do brania udziału w postępowaniu sądowym, zgodnie z decyzją Państw Członkowskich, bądź w imieniu skarżącego, bądź na jego rzecz i za jego zgodą, bez uszczerbku dla przepisów procedury krajowej dotyczących przedstawicielstwa i obrony.

(32) Uwzględniając zasadniczy charakter prawa do skutecznej ochrony prawnej właściwe jest zapewnienie, aby pracownicy w dalszym ciągu korzystali z takiej ochrony nawet po zakończeniu stosunku pracy, który jest przedmiotem zaskarżenia ze względu na rzekome naruszenie zasady

([1]) Dz.U L 348 z 28.11.1992, str. 1.

([2]) Dz.U. L 145 z 19.6.1996, str. 4. Dyrektywa zmieniona dyrektywą 97/75/WE (Dz.U. L 10 z 16.1.1998, str. 24).

([3]) Dz.U. C 218 z 31.7.2000, str. 5.

równego traktowania. Pracownik występujący w obronie lub zeznający na korzyść osoby chronionej na podstawie niniejszej dyrektywy powinien mieć prawo do takiej samej ochrony.

(33) Trybunał Sprawiedliwości wyraźnie stwierdził, że zasada równego traktowania, aby mogła być skuteczna, wymaga, by zadośćuczynienie przyznawane za jakiekolwiek naruszenie było odpowiednie w stosunku do poniesionej szkody. Właściwe jest zatem wykluczenie wszelkiej uprzednio ustalonej górnej granicy dla takiego zadośćuczynienia z wyjątkiem przypadków, w których pracodawca może udowodnić, że jedyną szkodą, jaką starający się o pracę poniósł w wyniku dyskryminacji w rozumieniu niniejszej dyrektywy, była odmowa rozpatrzenia jego podania o pracę.

(34) W celu poszerzenia skutecznego wprowadzania w życie zasady równego traktowania Państwa Członkowskie powinny promować dialog między partnerami społecznymi, jak również, w ramach praktyki krajowej, z organizacjami pozarządowymi.

(35) Państwa Członkowskie powinny wprowadzić skuteczne, proporcjonalne i odstraszające sankcje stosowane w przypadku nieprzestrzegania zobowiązań wynikających z niniejszej dyrektywy.

(36) Ponieważ cele niniejszej dyrektywy nie mogą być w wystarczający sposób osiągnięte przez Państwa Członkowskie, a w związku z tym mogą zostać lepiej osiągnięte na poziomie Wspólnoty, Wspólnota może przyjmować środki zgodnie z zasadą pomocniczości określoną w art. 5 Traktatu. Zgodnie z zasadą proporcjonalności, przewidzianą w tym artykule, niniejsza dyrektywa nie wykracza poza to, co jest konieczne do osiągnięcia zamierzonych celów.

(37) W celu lepszego zrozumienia różnego traktowania kobiet i mężczyzn w dziedzinie zatrudnienia i pracy powinno się kontynuować opracowywanie, analizowanie i udostępnianie na odpowiednich szczeblach porównawczych danych statystycznych w podziale według płci.

(38) Równe traktowanie kobiet i mężczyzn w dziedzinie zatrudnienia i pracy nie może być ograniczone do środków ustawodawczych. Unia Europejska i Państwa Członkowskie powinny natomiast kontynuować wspieranie podnoszenia świadomości społecznej w zakresie dyskryminacji płacowej i zmiany postaw społecznych, obejmujące w możliwie największym zakresie wszystkie zainteresowane strony zarówno na płaszczyźnie publicznej, jak i prywatnej. Dialog pomiędzy partnerami społecznymi mógłby odegrać istotną rolę w tym procesie.

(39) Obowiązek transponowania niniejszej dyrektywy do prawa krajowego powinien ograniczać się do tych przepisów, które stanowią istotną zmianę w porównaniu z wcześniejszymi dyrektywami. Obowiązek transponowania przepisów, które nie zostały zmienione w sposób istotny, wynika z wcześniejszych dyrektyw.

(40) Niniejsza dyrektywa powinna pozostawać bez uszczerbku dla obowiązków Państw Członkowskich dotyczących terminów transpozycji do prawa krajowego i stosowania dyrektyw wymienionych w załączniku I część B.

(41) Zgodnie z pkt 34 Porozumienia międzyinstytucjonalnego w sprawie lepszego stanowienia prawa [1] zachęca się Państwa Członkowskie do sporządzania, dla ich własnych celów i w interesie Wspólnoty, własnych tabel, które w możliwie najlepszym zakresie odzwierciedlają korelacje między niniejszą dyrektywą a środkami transpozycji oraz do podawania ich do wiadomości publicznej,

PRZYJMUJĄ NINIEJSZĄ DYREKTYWĘ:

TYTUŁ I

PRZEPISY OGÓLNE

Artykuł 1

Cel

Celem niniejszej dyrektywy jest wprowadzenie w życie zasady równości szans oraz równego traktowania kobiet i mężczyzn w dziedzinie zatrudnienia i pracy.

W tym celu zawiera ona przepisy dotyczące wprowadzenia w życie zasady równego traktowania w odniesieniu do:

a) dostępu do zatrudnienia, w tym do awansu zawodowego i szkolenia zawodowego;

b) warunków pracy, w tym wynagrodzenia;

c) systemów zabezpieczenia społecznego pracowników.

Niniejsza dyrektywa zawiera również przepisy, których celem jest zapewnienie, aby wprowadzenie w życie wyżej wymienionych zasad było bardziej skuteczne poprzez ustanowienie właściwych procedur.

Artykuł 2

Definicje

1. Do celów niniejszej dyrektywy stosuje się następujące definicje:

a) „dyskryminacja bezpośrednia": sytuacja, w której dana osoba traktowana jest mniej korzystnie ze względu na płeć niż jest, była lub byłaby traktowana inna osoba w porównywalnej sytuacji;

b) „dyskryminacja pośrednia": sytuacja, w której z pozoru neutralny przepis, kryterium lub praktyka stawiałaby osoby danej płci w szczególnie niekorzystnym położeniu w porównaniu do osób innej płci, chyba że dany przepis, kryterium lub praktyka są obiektywnie uzasadnione zgodnym z prawem celem, a środki osiągnięcia tego celu są właściwe i niezbędne;

c) „molestowanie": sytuacja, w której ma miejsce niepożądane zachowanie związane z płcią osoby, którego celem lub skutkiem jest naruszenie godności osoby i stworzenie atmosfery zastraszenia, wrogości, poniżenia, upokorzenia lub obrazy;

[1] Dz.U. C 321 z 31.12.2003, str. 1.

d) „molestowanie seksualne": sytuacja, w której ma miejsce jakakolwiek forma niepożądanego zachowania werbalnego, niewerbalnego lub fizycznego o charakterze seksualnym, którego celem lub skutkiem jest naruszenie godności osoby, w szczególności przy stwarzaniu atmosfery zastraszenia, wrogości, poniżenia, upokorzenia lub obrazy;

e) „wynagrodzenie": zwykła podstawowa lub minimalna płaca lub uposażenie oraz wszystkie inne korzyści w gotówce lub w naturze, otrzymywane przez pracownika bezpośrednio lub pośrednio od pracodawcy z racji zatrudnienia;

f) „systemy zabezpieczenia społecznego pracowników": systemy nieobjęte dyrektywą 79/7/EWG z dnia 19 grudnia 1978 r. w sprawie stopniowego wprowadzania w życie zasady równego traktowania kobiet i mężczyzn w dziedzinie zabezpieczenia społecznego ([1]), które mają na celu zapewnienie pracownikom najemnym i osobom prowadzącym działalność na własny rachunek, w przedsiębiorstwie, grupie przedsiębiorstw, gałęzi gospodarki lub należącym do grupy zawodowej, świadczeń, których celem jest uzupełnienie ustawowych systemów zabezpieczenia społecznego lub ich zastąpienie, niezależnie od tego, czy przystąpienie do nich jest obowiązkowe czy dobrowolne.

2. Do celów niniejszej dyrektywy dyskryminacja obejmuje:

a) molestowanie oraz molestowanie seksualne, jak również wszelkie mniej korzystne traktowanie wynikające z odrzucenia lub podporządkowania się takiemu zachowaniu przez osobę, której ono dotyczy;

b) polecenie dyskryminowania osoby ze względu na płeć;

c) wszelkie mniej korzystne traktowanie kobiety związane z ciążą lub urlopem macierzyńskim w rozumieniu dyrektywy 92/85/EWG.

Artykuł 3

Działania pozytywne

W celu zapewnienia w praktyce pełnej równości kobiet i mężczyzn w życiu zawodowym Państwa Członkowskie mogą utrzymywać lub przyjmować środki w rozumieniu art. 141 ust. 4 Traktatu.

([1]) Dz.U. L 6 z 10.1.1979, str. 24.

TYTUŁ II

PRZEPISY SZCZEGÓLNE

ROZDZIAŁ 1

Równe wynagradzanie

Artykuł 4

Zakaz dyskryminacji

Bezpośrednia lub pośrednia dyskryminacja ze względu na płeć w odniesieniu do wszelkich aspektów i warunków wynagrodzenia za taką samą pracę lub pracę o jednakowej wartości musi zostać wyeliminowana.

W szczególności, w przypadku gdy ustalanie wynagrodzenia odbywa się w oparciu o system zaszeregowania pracowników, za jego podstawę przyjmuje się te same kryteria w odniesieniu do kobiet i mężczyzn oraz sporządza się go w taki sposób, aby wykluczyć jakąkolwiek dyskryminację ze względu na płeć.

ROZDZIAŁ 2

Równe traktowanie w systemach zabezpieczenia społecznego pracowników

Artykuł 5

Zakaz dyskryminacji

Bez uszczerbku dla art. 4, w systemach zabezpieczenia społecznego pracowników nie może występować jakakolwiek bezpośrednia lub pośrednia dyskryminacja ze względu na płeć, w szczególności w stosunku do:

a) zakresu zastosowania takich systemów i warunków przystępowania do nich;

b) obowiązku opłacania i obliczania wysokości składek;

c) obliczania wysokości świadczeń, w tym świadczeń dodatkowych należnych małżonkowi lub osobie będącej na utrzymaniu, oraz warunków dotyczących okresu wypłaty świadczeń i zachowania prawa do nich.

Artykuł 6

Zakres osobowy

Niniejszy rozdział stosuje się do osób czynnych zawodowo, w tym osób prowadzących działalność na własny rachunek, do pracowników, których praca została przerwana z powodu choroby, macierzyństwa, wypadku lub przymusowego bezrobocia oraz do osób poszukujących pracy, jak i do pracowników emerytowanych oraz pracowników niepełnosprawnych oraz do uprawnionych po nich osób zgodnie z prawem krajowym i/lub praktyką krajową.

Artykuł 7

Zakres przedmiotowy

1 Niniejszy rozdział stosuje się do:

a) systemów zabezpieczenia społecznego pracowników zapewniających ochronę przed następującymi rodzajami ryzyka:

i) chorobą;

ii) inwalidztwem;

iii) starością, w tym wcześniejszym przejściem na emeryturę;

iv) wypadkami przy pracy i chorobami zawodowymi;

v) bezrobociem;

b) systemów zabezpieczenia społecznego pracowników przewidujących inne świadczenia socjalne, pieniężne lub rzeczowe, a zwłaszcza świadczenia w razie śmierci żywiciela rodziny i zasiłki rodzinne, jeżeli świadczenia te stanowią świadczenia wypłacane przez pracodawcę pracownikowi z tytułu zatrudniania tego ostatniego.

2. Niniejszy rozdział stosuje się również do systemów zabezpieczenia społecznego szczególnych kategorii pracowników, takich jak urzędnicy państwowi, jeżeli świadczenia należne w ramach systemu zabezpieczenia społecznego wypłacane są z tytułu stosunku pracy z pracodawcą państwowym. Fakt, że system taki stanowi część powszechnego ustawowego systemu zabezpieczenia społecznego, pozostaje bez uszczerbku dla tej kwestii.

Artykuł 8

Wyłączenia z zakresu przedmiotowego

1. Niniejszego rozdziału nie stosuje się do:

a) indywidualnych umów osób prowadzących działalność na własny rachunek;

b) systemów obejmujących tylko jedną osobę w przypadku osób prowadzących działalność na własny rachunek;

c) umów ubezpieczenia, których stroną nie jest pracodawca, w przypadku pracowników najemnych;

d) fakultatywnych przepisów systemów zabezpieczenia społecznego pracowników, które adresowane są indywidualnie w celu zapewnienia im:

i) świadczeń uzupełniających; albo

ii) możliwości wyboru daty, od której udzielane będą zwykłe świadczenia dla osób prowadzących działalność na własny rachunek lub wyboru między kilkoma świadczeniami;

e) systemów zabezpieczenia społecznego pracowników w zakresie, w jakim są one finansowane ze składek wpłacanych dobrowolnie przez samych pracowników.

2. Niniejszy rozdział nie stanowi przeszkody dla pracodawców w przyznaniu osobom, które osiągnęły już wiek emerytalny konieczny do przyznania im emerytury w ramach zabezpieczenia społecznego pracowników, lecz nie osiągnęły jeszcze wieku emerytalnego koniecznego do otrzymania emerytury ustawowej, dodatku do emerytury, którego celem jest wyrównanie lub częściowe wyrównanie całkowitej kwoty świadczenia wypłacanego tym osobom w stosunku do kwoty wypłacanej osobom płci przeciwnej w identycznej sytuacji, które osiągnęły już ustawowy wiek emerytalny, do czasu gdy osoby korzystające z dodatku osiągną ustawowy wiek emerytalny.

Artykuł 9

Przykłady dyskryminacji

1. Do przepisów sprzecznych z zasadą równego traktowania należą przepisy, które posługują się pojęciem płci bezpośrednio lub pośrednio, jeżeli chodzi o:

a) określenie osób, które mogą być objęte systemem zabezpieczenia społecznego pracowników;

b) ustalenie obowiązkowego lub dobrowolnego charakteru uczestnictwa w systemie zabezpieczenia społecznego pracowników;

c) ustanowienie różnych reguł dotyczących wieku przystąpienia do systemu lub minimalnego okresu zatrudnienia lub członkostwa w systemie, który jest niezbędny do uzyskania wynikających z niego świadczeń;

d) ustanowienie różnych reguł – z wyjątkiem przypadków przewidzianych w lit. h) oraz j) – w odniesieniu do zwrotu składek w sytuacji, gdy pracownik występuje z systemu bez spełnienia warunków umożliwiających mu uzyskanie odroczonego prawa do świadczeń długookresowych;

e) ustalenie różnych warunków przyznania świadczeń lub ograniczenie takich świadczeń do pracowników jednej płci;

f) ustanowienie różnego wieku emerytalnego;

g) zawieszenie zachowania lub nabycia praw w okresach urlopu macierzyńskiego lub urlopu ze względów rodzinnych, przysługujących ustawowo lub na podstawie umowy i za które wynagrodzenie jest wypłacane przez pracodawcę;

h) określenie różnej wysokości świadczeń, chyba że w koniecznym zakresie trzeba wziąć pod uwagę elementy rachunku kalkulacyjnego, które są różne dla każdej płci w przypadku systemów o zdefiniowanej składce; w przypadku systemów o zdefiniowanym świadczeniu niektóre elementy mogą się między sobą różnić, jeżeli różnice kwotowe są wynikiem stosowania czynników aktuarialnych różnicujących ze względu na płeć w czasie gdy wdrażane jest finansowanie funduszu;

i) ustalanie różnych wysokości składek pracowników;

j) ustalanie różnych wysokości składek pracodawców, z wyjątkiem:

   i) systemów o zdefiniowanej składce, jeżeli ich celem jest wyrównywanie wysokości ostatecznego świadczenia lub jego częściowe wyrównanie w odniesieniu do obu płci;

   ii) systemów o zdefiniowanym świadczeniu, w których składki pracodawcy mają na celu zapewnienie współmierności funduszy koniecznych do pokrycia kosztów zdefiniowanych świadczeń;

k) określenie różnych zasad lub zasad stosujących się tylko do pracowników określonej płci – z wyjątkiem przypadków przewidzianych w lit. h) oraz j) – w odniesieniu do zagwarantowania lub zachowania prawa do świadczeń odroczonych, kiedy pracownik występuje z systemu.

2. Jeżeli przyznanie świadczeń objętych niniejszym rozdziałem pozostawione jest do uznania organów zarządzających systemem, organy te zapewniają zgodność z zasadą równego traktowania.

Artykuł 10

Wprowadzenie w życie w odniesieniu do osób prowadzących działalność na własny rachunek

1. Państwa Członkowskie podejmują niezbędne działania w celu zapewnienia, aby przepisy dotyczące systemów zabezpieczenia społecznego pracowników, które odnoszą się do osób prowadzących działalność na własny rachunek i które są sprzeczne z zasadą równego traktowania, zostały zmienione najpóźniej do dnia 1 stycznia 1993 r., a w przypadku Państw Członkowskich, których przystąpienie miało miejsce po tej dacie, do dnia, w którym dyrektywa 86/378/EWG zaczęła być stosowana na ich terytorium.

2. Przepisy niniejszego rozdziału nie wykluczają, aby prawa i obowiązki dotyczące okresu podlegania systemowi zabezpieczenia społecznego pracowników odnoszącemu się do osób prowadzących działalność na własny rachunek, istniejące przed zmianą tego systemu, podlegały w dalszym ciągu przepisom obowiązującym w tym okresie.

Artykuł 11

Możliwość odroczenia w przypadku osób prowadzących działalność na własny rachunek

W odniesieniu do systemów zabezpieczenia społecznego pracowników, odnoszących się do osób prowadzących działalność na własny rachunek, Państwa Członkowskie mogą odroczyć obowiązkowe stosowanie zasady równego traktowania w odniesieniu do:

a) ustalenia wieku emerytalnego dla celów przyznania rent starczych lub emerytur oraz mogących z tego wypływać skutków w odniesieniu do innych świadczeń, do ich wyboru:

   i) do czasu, kiedy zasada równego traktowania zostanie wprowadzona w systemach ustawowych; albo

   ii) najpóźniej do czasu, gdy zasada równego traktowania zostanie określona przez dyrektywę;

b) rent w przypadku śmierci żywiciela rodziny do czasu, gdy prawo wspólnotowe wprowadzi zasadę równego traktowania w ustawowych systemach zabezpieczenia społecznego w tym zakresie;

c) stosowania art. 9 ust. 1 lit. i) w odniesieniu do wykorzystania elementów rachunków kalkulacyjnych, do dnia 1 stycznia 1999 r., a w przypadku Państw Członkowskich, których przystąpienie miało miejsce po tej dacie, do dnia, w którym dyrektywa 86/378/EWG zaczęła być stosowana na ich terytorium.

Artykuł 12

Działanie wsteczne

1. Jakiekolwiek środki wykonawcze w odniesieniu do niniejszego rozdziału, dotyczące pracowników, obejmują wszystkie świadczenia w ramach systemów zabezpieczenia społecznego pracowników wynikające z okresów zatrudnienia po dniu 17 maja 1990 r. i mają zastosowanie z mocą wsteczną do tej daty, z wyjątkiem pracowników lub innych osób zgłaszających roszczenia w tej kwestii, którzy przed tą datą wszczęli postępowanie sądowe lub zgłosili równorzędne roszczenie, zgodnie z prawem krajowym. W takim przypadku środki wykonawcze mają zastosowanie z mocą wsteczną do dnia 8 kwietnia 1976 r. oraz obejmują wszelkie świadczenia wynikające z okresów zatrudnienia następujących po tej dacie. W przypadku Państw Członkowskich, które przystąpiły do Wspólnoty po dniu 8 kwietnia 1976 r. a przed 17 maja 1990 r., data ta zostanie zastąpiona datą rozpoczęcia stosowania art. 141 Traktatu na ich terytorium.

2. Ustęp 1 zdanie drugie nie stanowi przeszkody dla stosowania przepisów krajowych odnoszących się do przedawnienia roszczeń wobec pracowników lub innych osób zgłaszających roszczenia w tej kwestii, którzy wszczęli postępowanie sądowe lub zgłosili równorzędne roszczenie, zgodnie z mającym zastosowanie prawem krajowym przed dniem 17 maja 1990 r., pod warunkiem że nie są one mniej korzystne dla tego rodzaju roszczeń niż dla podobnych roszczeń krajowych oraz nie uniemożliwiają w praktyce wykonania praw przyznanych przez prawo wspólnotowe.

3. Dla Państw Członkowskich, których przystąpienie miało miejsce po dniu 17 maja 1990 r. i które w dniu 1 stycznia 1994 r. były Umawiającą się Stroną Porozumienia w sprawie Europejskiego Obszaru Gospodarczego, datę 17 maja 1990 r., określoną w ust. 1 zdanie pierwsze, zastępuje się datą 1 stycznia 1994 r.

4. W przypadku innych Państw Członkowskich, których przystąpienie miało miejsce po dniu 17 maja 1990 r., datę 17 maja 1990 r. określoną w ust. 1 i 2, zastępuje się datą rozpoczęcia stosowania art. 141 Traktatu na ich terytorium.

Artykuł 13

Elastyczny wiek emerytalny

W przypadku gdy kobiety i mężczyźni mogą występować z roszczeniem elastycznego ustalenia wieku emerytalnego na tych samych warunkach, nie uważa się tego za sprzeczne z niniejszym rozdziałem.

ROZDZIAŁ 3

Równe traktowanie w zakresie dostępu do zatrudnienia, szkolenia zawodowego i awansu zawodowego oraz warunków pracy

Artykuł 14

Zakaz dyskryminacji

1. Zakazuje się wszelkiej bezpośredniej i pośredniej dyskryminacji ze względu na płeć w sektorze prywatnym i publicznym, w tym w instytucjach publicznych, w odniesieniu do:

a) warunków dostępu do zatrudnienia, do prowadzenia działalności na własny rachunek oraz wykonywania zawodu, w tym kryteriów selekcji i warunków rekrutacji, niezależnie od rodzaju działalności i na wszystkich szczeblach hierarchii zawodowej, włącznie z awansem zawodowym;

b) dostępu do wszystkich rodzajów i szczebli doradztwa zawodowego, szkolenia zawodowego, doskonalenia i przekwalifikowywania pracowników, w tym praktycznego doświadczenia zawodowego;

c) warunków zatrudnienia i pracy, w tym zwolnień, a także wynagrodzenia, jak przewidziano w art. 141 Traktatu;

d) członkostwa i uczestniczenia w organizacji pracowników lub pracodawców bądź w jakiejkolwiek organizacji, której członkowie wykonują określony zawód, łącznie z korzyściami, jakie dają tego typu organizacje.

2. W odniesieniu do dostępu do zatrudnienia, w tym do prowadzącego do niego szkolenia, Państwa Członkowskie mogą postanowić, że odmienne traktowanie ze względu na cechy związane z płcią nie stanowi dyskryminacji, jeżeli ze względu na rodzaj danej działalności zawodowej lub warunki jej wykonywania cecha taka jest prawdziwym i determinującym wymogiem zawodowym, pod warunkiem że cel takiego odmiennego traktowania jest zgodny z prawem, a wymóg jest proporcjonalny.

Artykuł 15

Powrót z urlopu macierzyńskiego

Kobieta przebywająca na urlopie macierzyńskim jest uprawniona, po jego zakończeniu, do powrotu do swojej pracy lub na równorzędne stanowisko na warunkach nie mniej dla niej korzystnych i do korzystania z jakiejkolwiek poprawy warunków pracy, do której byłaby uprawniona w trakcie swojej nieobecności.

Artykuł 16

Urlop ojcowski i adopcyjny

Niniejsza dyrektywa pozostaje bez uszczerbku dla prawa Państw Członkowskich do uznawania odrębnych praw do urlopu ojcowskiego i/lub adopcyjnego. Państwa Członkowskie, które uznają takie prawa, podejmują niezbędne środki w celu ochrony pracujących kobiet i mężczyzn przed zwolnieniem z powodu wykonywania tych praw i zapewniają, aby po zakończeniu takiego urlopu byli oni uprawnieni do powrotu do swojej pracy lub na równorzędne stanowisko na warunkach nie mniej dla nich korzystnych, oraz do korzystania z jakiejkolwiek poprawy warunków pracy, do której byliby oni uprawnieni w trakcie swojej nieobecności.

TYTUŁ III

PRZEPISY HORYZONTALNE

ROZDZIAŁ 1

Środki prawne i wykonanie

Sekcja 1

Środki prawne

Artykuł 17

Ochrona praw

1. Państwa Członkowskie zapewniają, aby wszystkie osoby, które uważają się za pokrzywdzone w swoich prawach poprzez niestosowanie do nich zasady równego traktowania, mogły dochodzić swoich roszczeń, wynikających z niniejszej dyrektywy, przed sądem po ewentualnym zwróceniu się do innych właściwych organów, jak również, o ile Państwa te uznają to za właściwe, po wykorzystaniu procedury pojednawczej, nawet wówczas gdy zakończeniu uległ stosunek, w ramach którego dyskryminacja miała mieć miejsce.

2. Państwa Członkowskie zapewniają, aby stowarzyszenia, organizacje lub inne osoby prawne, które zgodnie z kryteriami określonymi w ustawodawstwie krajowym mają interes prawny w zapewnieniu przestrzegania przepisów niniejszej dyrektywy, mogły brać udział w postępowaniach sądowych lub administracyjnych mających na celu realizację uprawnień wynikających z niniejszej dyrektywy w imieniu tych osób albo na ich rzecz za ich zgodą.

3. Ustępy 1 i 2 pozostają bez uszczerbku dla krajowych przepisów dotyczących terminów dochodzenia roszczeń z tytułu zasady równego traktowania.

Artykuł 18

Zadośćuczynienie lub odszkodowanie

Państwa Członkowskie wprowadzają do swoich krajowych porządków prawnych środki niezbędne do zapewnienia faktycznego i skutecznego zadośćuczynienia lub odszkodowania z tytułu krzywdy lub szkody doznanej przez osobę w wyniku dyskryminacji płciowej, zgodnie z przepisami Państw Członkowskich, przy czym musi się to odbywać w sposób odstraszający i proporcjonalny do poniesionej szkody. Maksymalna wysokość takiego zadośćuczynienia lub odszkodowania może być ustalona jedynie w przypadkach, w których pracodawca może dowieść, że szkoda doznana przez starającego się o pracę, powstała w wyniku dyskryminacji w rozumieniu niniejszej dyrektywy, polega jedynie na tym, że nastąpiła odmowa uwzględnienia jego podania o pracę.

Sekcja 2

Ciężar dowodu

Artykuł 19

Ciężar dowodu

1. Państwa Członkowskie podejmą takie działania, które są niezbędne, zgodnie z ich krajowymi systemami sądowymi, w celu zapewnienia, aby – jeżeli osoby, które uznają się za poszkodowane z powodu niezastosowania do nich zasady równego traktowania, uprawdopodobnią przed sądem lub innym właściwym organem okoliczności pozwalające domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji – do pozwanego należało udowodnienie, że nie nastąpiło naruszenie zasady równego traktowania.

2. Ustęp 1 nie stanowi przeszkody, aby Państwa Członkowskie wprowadziły reguły dowodowe korzystniejsze dla powoda.

3. Państwa Członkowskie mogą odstąpić od stosowania ust. 1 do postępowań, w których ustalenie stanu faktycznego należy do sądu lub innego właściwego organu.

4. Ustępy 1, 2 i 3 stosuje się również do:

a) sytuacji objętych art. 141 Traktatu oraz – w zakresie, w jakim dotyczy to dyskryminacji ze względu na płeć – objętych przepisami dyrektyw 92/85/EWG i 96/34/WE;

b) każdego postępowania cywilnego lub administracyjnego, dotyczącego sektora publicznego lub prywatnego, które przewiduje środki zadośćuczynienia zgodnie z prawem krajowym, stosownie do kwestii, o których mowa w lit. a), z wyjątkiem postępowań pozasądowych o charakterze dobrowolnym albo przewidzianych w prawie krajowym.

5. Niniejszego artykułu nie stosuje się do postępowań karnych, chyba że Państwa Członkowskie postanowią inaczej.

ROZDZIAŁ 2

Promocja równego traktowania – dialog

Artykuł 20

Organy ds. równości

1. Państwa Członkowskie wskazują i podejmują niezbędne ustalenia dotyczące utworzenia organu lub organów do spraw promowania, analizowania, monitorowania i wspierania równego traktowania wszystkich osób bez dyskryminacji ze względu na płeć. Organy te mogą stanowić część agencji odpowiedzialnych na szczeblu krajowym za ochronę praw człowieka lub ochronę praw jednostki.

2. Państwa Członkowskie zapewniają, aby do kompetencji tych organów należały:

a) bez uszczerbku dla praw ofiar oraz stowarzyszeń, organizacji i innych osób prawnych, o których mowa w art. 17 ust. 2, świadczenie niezależnej pomocy ofiarom dyskryminacji we wnoszeniu skarg w sprawach o dyskryminację;

b) prowadzenie niezależnych badań dotyczących dyskryminacji;

c) publikowanie niezależnych sprawozdań i wydawanie zaleceń na temat wszystkich problemów związanych z taką dyskryminacją;

d) na odpowiednim szczeblu wymiana dostępnych informacji z właściwymi organami europejskimi, takimi jak przyszły Europejski Instytut ds. Równości Płci.

Artykuł 21

Dialog społeczny

1. Zgodnie z krajową tradycją i krajową praktyką Państwa Członkowskie podejmują odpowiednie działania promujące dialog społeczny pomiędzy partnerami społecznymi w celu wspierania równego traktowania, w tym, na przykład, poprzez monitorowanie praktyk w miejscu pracy oraz przy dostępie do zatrudnienia, szkolenia zawodowego i awansu zawodowego, a także poprzez monitorowanie układów zbiorowych, kodeksy postępowania, badania lub wymianę doświadczeń i dobrych praktyk.

2. Zgodne z krajową tradycją i krajową praktyką Państwa Członkowskie zachęcają partnerów społecznych, nie naruszając ich autonomii, do promowania równości kobiet i mężczyzn oraz elastycznego czasu pracy w celu ułatwienia godzenia życia prywatnego i zawodowego, a także do zawierania na właściwym poziomie porozumień ustanawiających zasady niedyskryminacji w dziedzinach określonych w art. 1, które wchodzą w zakres rokowań zbiorowych. Porozumienia te muszą być zgodne z przepisami niniejszej dyrektywy oraz właściwymi krajowymi przepisami wykonawczymi.

3. Państwa Członkowskie, zgodnie z prawem krajowym, układami zbiorowymi lub praktyką, zachęcają pracodawców do promowania równego traktowania kobiet i mężczyzn w planowy i systematyczny sposób w miejscu pracy, w zakresie dostępu do zatrudnienia, szkolenia zawodowego i awansu zawodowego.

4. W tym celu pracodawcy są wspierani w zapewnianiu pracownikom lub ich przedstawicielom, w odpowiednio regularnych odstępach czasu, właściwych informacji dotyczących równego traktowania kobiet i mężczyzn w przedsiębiorstwie.

Informacje takie mogą obejmować przegląd danych dotyczących proporcji pomiędzy kobietami i mężczyznami na różnych szczeblach organizacji, ich wynagrodzenia i różnic w wynagrodzeniach oraz możliwych środków poprawy sytuacji we współpracy z przedstawicielami pracowników.

Artykuł 22

Dialog z organizacjami pozarządowymi

Państwa Członkowskie zachęcają do dialogu z właściwymi organizacjami pozarządowymi, które mają, zgodnie z ich prawem krajowym i praktyką, interes prawny w przyczynianiu

się do zwalczania dyskryminacji ze względu na płeć, w celu promowania zasady równego traktowania.

ROZDZIAŁ 3

Ogólne przepisy horyzontalne

Artykuł 23

Zgodność

Państwa Członkowskie podejmują wszelkie niezbędne środki w celu zapewnienia, aby:

a) wszelkie przepisy ustawowe, wykonawcze i administracyjne sprzeczne z zasadą równego traktowania zostały uchylone;

b) przepisy sprzeczne z zasadą równego traktowania zawarte w indywidualnych lub zbiorowych umowach lub porozumieniach, regulaminach przedsiębiorstw lub zasadach dotyczących wolnych zawodów i organizacji pracowników i pracodawców, a także wszelkie inne ustalenia zostały lub mogły zostać uznane za nieważne lub zostały zmienione;

c) systemy zabezpieczenia społecznego pracowników zawierające takie przepisy nie mogły zostać zatwierdzone lub przedłużone w drodze środków administracyjnych.

Artykuł 24

Ochrona przed represjami

Państwa Członkowskie wprowadzają do swoich krajowych systemów prawnych takie środki, które są konieczne do ochrony pracowników, w tym pracowników będących przedstawicielami pracowników, przewidzianych przez ustawodawstwo lub praktykę krajową, przed zwolnieniem lub innym niekorzystnym traktowaniem przez pracodawcę w odpowiedzi na skargę wniesioną w przedsiębiorstwie lub jakiekolwiek postępowanie sądowe mającą na celu zapewnienie zgodności z zasadą równego traktowania.

Artykuł 25

Sankcje

Państwa Członkowskie ustanawiają przepisy dotyczące sankcji stosowanych wobec naruszeń przepisów krajowych przyjętych na podstawie niniejszej dyrektywy i podejmują wszelkie niezbędne środki dla zapewnienia ich stosowania. Sankcje, które mogą obejmować wypłacenie odszkodowania ofierze, muszą być skuteczne, proporcjonalne i odstraszające. Państwa Członkowskie powiadomią o tych przepisach Komisję najpóźniej do dnia 5 października 2005 r. i powiadamiają ją niezwłocznie o wszelkich ich kolejnych zmianach.

Artykuł 26

Zapobieganie dyskryminacji

Państwa Członkowskie zachęcają, zgodnie z prawem krajowym, układami zbiorowymi lub praktyką, pracodawców oraz osoby odpowiedzialne za dostęp do szkolenia zawodowego do podejmowania skutecznych środków służących zapobieganiu wszelkim formom dyskryminacji ze względu na płeć, w szczególności molestowaniu oraz molestowaniu seksualnemu w miejscu pracy, w dostępie do zatrudnienia, szkoleniu zawodowym i awansie zawodowym.

Artykuł 27

Minimalne wymogi

1. Państwa Członkowskie mogą wprowadzać lub utrzymywać przepisy bardziej korzystne dla zapewnienia ochrony zasady równego traktowania od przepisów ustanowionych w niniejszej dyrektywie.

2. Wprowadzenie w życie niniejszej dyrektywy nie może w żadnych okolicznościach stanowić wystarczającej podstawy do obniżenia poziomu ochrony pracowników w dziedzinach, do których ma ona zastosowanie, bez uszczerbku dla prawa Państw Członkowskich do reagowania na zmiany sytuacji poprzez wprowadzenie przepisów ustawowych, wykonawczych i administracyjnych, które różnią się od przepisów obowiązujących w chwili notyfikacji niniejszej dyrektywy, pod warunkiem że przepisy niniejszej dyrektywy są przestrzegane.

Artykuł 28

Stosunek do przepisów wspólnotowych i krajowych

1. Niniejsza dyrektywa pozostaje bez uszczerbku dla przepisów dotyczących ochrony kobiet, w szczególności w okresie ciąży i macierzyństwa.

2. Niniejsza dyrektywa pozostaje bez uszczerbku dla przepisów dyrektywy 96/34/WE oraz dyrektywy 92/85/EWG.

Artykuł 29

Uwzględnianie problematyki płci w przepisach, politykach i działaniach

Przy formułowaniu i wprowadzaniu w życie przepisów ustawowych, wykonawczych i administracyjnych, polityk i działań w dziedzinach określonych w niniejszej dyrektywie Państwa Członkowskie aktywnie uwzględniają cel, jakim jest równość kobiet i mężczyzn.

Artykuł 30

Rozpowszechnianie informacji

Państwa Członkowskie zapewniają, aby środki podjęte zgodnie z niniejszą dyrektywą oraz przepisy już obowiązujące zostały podane do wiadomości wszystkich zainteresowanych osób, za pomocą wszelkich odpowiednich środków i, tam gdzie jest to stosowne, w miejscu pracy.

TYTUŁ IV

PRZEPISY KOŃCOWE

Artykuł 31

Sprawozdania

1. Do dnia 15 lutego 2011 r. Państwa Członkowskie przekażązują Komisji wszystkie informacje niezbędne jej do sporządzenia sprawozdania dla Parlamentu Europejskiego i Rady w sprawie stosowania niniejszej dyrektywy.

2. Bez uszczerbku dla ust. 1 Państwa Członkowskie przekazują Komisji co cztery lata teksty wszelkich środków przyjętych zgodnie z art. 141 ust. 4 Traktatu, a także sprawozdania w sprawie tych środków i wprowadzania ich w życie. Na podstawie tych informacji Komisja przyjmuje i publikuje co cztery lata sprawozdanie zawierające ocenę porównawczą wszystkich środków w świetle deklaracji nr 28 załączonej do Aktu końcowego Traktatu z Amsterdamu.

3. Państwa Członkowskie dokonują oceny dziedzin działalności zawodowej, o których mowa w art. 14 ust. 2, w celu podjęcia decyzji, w świetle rozwoju sytuacji społecznej, czy utrzymanie przedmiotowych wyłączeń jest uzasadnione. O wynikach tej oceny powiadamiają okresowo Komisję, nie rzadziej jednak niż co 8 lat.

Artykuł 32

Przegląd

Najpóźniej do 15 lutego 2013 r. Komisja dokona przeglądu funkcjonowania niniejszej dyrektywy oraz, w razie potrzeby, zaproponuje wprowadzenie zmian, które uzna za niezbędne.

Artykuł 33

Wykonanie

Państwa Członkowskie wprowadzają w życie przepisy ustawowe, wykonawcze i administracyjne niezbędne do wykonania niniejszej dyrektywy nie później niż dnia 15 sierpnia 2008 r. lub zapewniają, aby do tej daty przedstawiciele pracodawców i pracowników wprowadzili odpowiednie przepisy w drodze porozumienia. Jeżeli jest to konieczne ze względu na szczególne trudności, jakie napotykają Państwa Członkowskie, mogą one uzyskać dodatkowo jeden rok na wykonanie niniejszej dyrektywy. Państwa Członkowskie podejmują wszelkie niezbędne kroki umożliwiające im zagwarantowanie osiągnięcia wyników określonych w niniejszej dyrektywie. Państwa Członkowskie niezwłocznie przekazują Komisji teksty tych przepisów.

Przepisy przyjmowane przez Państwa Członkowskie zawierają odniesienie do niniejszej dyrektywy lub odniesienie takie towarzyszy ich urzędowej publikacji. Przepisy te zawierają również stwierdzenie, że odniesienia w istniejących przepisach ustawowych, wykonawczych i administracyjnych do dyrektyw uchylonych niniejszą dyrektywą należy traktować jako odniesienia do niniejszej dyrektywy. Państwa Członkowskie określają metody dokonywania takich odniesień oraz sposób, w jaki stwierdzenie to zostanie sformułowane.

Obowiązek transpozycji niniejszej dyrektywy do prawa krajowego ogranicza się do tych przepisów, które wprowadzają istotne zmiany w stosunku do wcześniejszych dyrektyw. Obowiązek transpozycji przepisów niezmienionych w istotny sposób wynika z wcześniejszych dyrektyw.

Państwa Członkowskie przekazują Komisji teksty podstawowych przepisów prawa krajowego przyjętych w dziedzinach objętych niniejszą dyrektywą.

Artykuł 34

Uchylenie

1. Ze skutkiem od dnia 15 sierpnia 2009 r. uchyla się dyrektywy 75/117/EWG, 76/207/EWG, 86/378/EWG i 97/80/WE, bez uszczerbku dla obowiązków Państw Członkowskich dotyczących terminów transpozycji do prawa krajowego i stosowania dyrektyw wymienionych w załączniku I część B.

2. Odniesienia do uchylonych dyrektyw traktuje się jako odniesienia do niniejszej dyrektywy i odczytuje zgodnie z tabelą korelacji zamieszczoną w załączniku II.

Artykuł 35

Wejście w życie

Niniejsza dyrektywa wchodzi w życie dwudziestego dnia po jej opublikowaniu w *Dzienniku Urzędowym Unii Europejskiej*.

Artykuł 36

Adresaci

Niniejsza dyrektywa skierowana jest do Państw Członkowskich.

Sporządzono w Strasburgu, dnia 5 lipca 2006 r.

W imieniu Parlamentu Europejskiego	*W imieniu Rady*
J. BORRELL FONTELLES	P. LEHTOMÄKI
Przewodniczący	*Przewodniczący*

ZAŁĄCZNIK I

CZĘŚĆ A

Uchylone dyrektywy wraz z ich kolejnymi zmianami

Dyrektywa Rady 75/117/EWG	Dz.U. L 45 z 19.2.1975, str. 19
Dyrektywa Rady 76/207/EWG	Dz.U. L 39 z 14.2.1976, str. 40
Dyrektywa 2002/73/WE Parlamentu Europejskiego i Rady	Dz.U. L 269 z 5.10.2002, str. 15
Dyrektywa Rady 86/378/EWG	Dz.U. L 225 z 12.8.1986, str. 40
Dyrektywa Rady 96/97/WE	Dz.U. L 46 z 17.2.1997, str. 20
Dyrektywa Rady 97/80/WE	Dz.U. L 14 z 20.1.1998, str. 6
Dyrektywa Rady 98/52/WE	Dz.U. L 205 z 22.7.1998, str. 66

CZĘŚĆ B

Wykaz terminów transpozycji do prawa krajowego i dat stosowania

(określony w art. 34 ust. 1)

Dyrektywa	Termin transpozycji	Data stosowania
Dyrektywa 75/117/EWG	19.2.1976	
Dyrektywa 76/207/EWG	14.8.1978	
Dyrektywa 86/378/EWG	1.1.1993	
Dyrektywa 96/97/WE	1.7.1997	17.5.1990 w odniesieniu do pracowników, z wyjątkiem pracowników lub osób występujących w ich imieniu, którzy przed tym dniem wszczęli postępowania sądowe lub zgłosili równorzędne roszczenie, zgodnie z prawem krajowym. Artykuł 8 dyrektywy 86/378/EWG – najpóźniej 1.1.1993. Artykuł 6 ust. 1 lit. i) tiret pierwsze dyrektywy 86/378/EWG – najpóźniej 1.1.1999.
Dyrektywa 97/80/WE	1.1.2001	W odniesieniu do Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej – 22.7.2001.
Dyrektywa 98/52/WE	22.7.2001	
Dyrektywa 2002/73/WE	5.10.2005	

ZAŁĄCZNIK II

Tabela korelacji

Dyrektywa 75/117/EWG	Dyrektywa 76/207/EWG	Dyrektywa 86/378/EWG	Dyrektywa 97/80/WE	Niniejsza dyrektywa
—	Artykuł 1 ust. 1	Artykuł 1	Artykuł 1	Artykuł 1
—	Artykuł 1 ust. 2	—	—	—
—	Artykuł 2 ust. 2 tiret pierwsze	—	—	Artykuł 2 ust. 1 lit. a)
—	Artykuł 2 ust. 2 tiret drugie	—	Artykuł 2 ust. 2	Artykuł 2 ust. 1 lit. b)
—	Artykuł 2 ust. 2 tiret trzecie i czwarte	—	—	Artykuł 2 ust. 1 lit. c) i d)
—	—	—	—	Artykuł 2 ust. 1 lit. e)
—	—	Artykuł 2 ust. 1	—	Artykuł 2 ust.1 lit. f)
—	Artykuł 2 ust. 3 i 4 oraz art. 2 ust. 7 akapit trzeci	—	—	Artykuł 2 ust. 2
—	Artykuł 2 ust. 8	—	—	Artykuł 3
Artykuł 1	—	—	—	Artykuł 4
—	—	Artykuł 5 ust. 1	—	Artykuł 5
—	—	Artykuł 3	—	Artykuł 6
—	—	Artykuł 4	—	Artykuł 7 ust. 1
—	—	—	—	Artykuł 7 ust. 2
—	—	Artykuł 2 ust. 2	—	Artykuł 8 ust. 1
—	—	Artykuł 2 ust. 3	—	Artykuł 8 ust. 2
—	—	Artykuł 6	—	Artykuł 9
—	—	Artykuł 8	—	Artykuł 10
—	—	Artykuł 9	—	Artykuł 11
—	—	(Artykuł 2 dyrektywy 96/97/WE)	—	Artykuł 12
—	—	Artykuł 9a	—	Artykuł 13
—	Artykuł 2 ust. 1 i art. 3 ust. 1	—	Artykuł 2 ust. 1	Artykuł 14 ust. 1
—	Artykuł 2 ust. 6	—	—	Artykuł 14 ust. 2
—	Artykuł 2 ust. 7 akapit drugi	—	—	Artykuł 15
—	Artykuł 2 ust. 7 akapit czwarty zdanie drugie i trzecie	—	—	Artykuł 16
Artykuł 2	Artykuł 6 ust. 1	Artykuł 10	—	Artykuł 17 ust. 1
—	Artykuł 6 ust. 3	—	—	Artykuł 17 ust. 2
—	Artykuł 6 ust. 4	—	—	Artykuł 17 ust. 3

Dyrektywa 75/117/EWG	Dyrektywa 76/207/EWG	Dyrektywa 86/378/EWG	Dyrektywa 97/80/WE	Niniejsza dyrektywa
—	Artykuł 6 ust. 2	—	—	Artykuł 18
—	—	—	Artykuły 3 i 4	Artykuł 19
—	Artykuł 8a	—	—	Artykuł 20
—	Artykuł 8b	—	—	Artykuł 21
—	Artykuł 8c	—	—	Artykuł 22
Artykuły 3 i 6	Artykuł 3 ust. 2 lit. a)	—	—	Artykuł 23 lit. a)
Artykuł 4	Artykuł 3 ust. 2 lit. b)	Artykuł 7 lit. a)	—	Artykuł 23 lit. b)
—	—	Artykuł 7 lit. b)	—	Artykuł 23 lit. c)
Artykuł 5	Artykuł 7	Artykuł 11	—	Artykuł 24
Artykuł 6	—	—	—	—
—	Artykuł 8d	—	—	Artykuł 25
—	Artykuł 2 ust. 5	—	—	Artykuł 26
—	Artykuł 8e ust. 1	—	Artykuł 4 ust. 2	Artykuł 27 ust. 1
—	Artykuł 8e ust. 2	—	Artykuł 6	Artykuł 27 ust. 2
—	Artykuł 2 ust. 7 akapit pierwszy	Artykuł 5 ust. 2	—	Artykuł 28 ust. 1
—	Artykuł 2 ust. 7 akapit czwarty zdanie pierwsze	—	—	Artykuł 28 ust. 2
—	Artykuł 1 ust. 1a	—	—	Artykuł 29
Artykuł 7	Artykuł 8	—	Artykuł 5	Artykuł 30
Artykuł 9	Artykuł 10	Artykuł 12 ust. 2	Artykuł 7 akapit czwarty	Artykuł 31 ust. 1 i 2
—	Artykuł 9 ust. 2	—	—	Artykuł 31 ust. 3
—	—	—	—	Artykuł 32
Artykuł 8	Artykuł 9 ust. 1 akapit pierwszy oraz art. 9 ust. 2 i 3	Artykuł 12 ust. 1	Artykuł 7 akapity pierwszy, drugi i trzeci	Artykuł 33
—	Artykuł 9 ust. 1 akapit drugi	—	—	—
—	—	—	—	Artykuł 34
—	—	—	—	Artykuł 35
—	—	—	—	Artykuł 36
—	—	Załącznik	—	—

DYREKTYWA RADY 2004/113/WE

z dnia 13 grudnia 2004 r.

wprowadzająca w życie zasadę równego traktowania mężczyzn i kobiet w zakresie dostępu do towarów i usług oraz dostarczania towarów i usług

RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat ustanawiający Wspólnotę Europejską, w szczególności jego art. 13 ust. 1,

uwzględniając wniosek Komisji,

uwzględniając opinię Parlamentu Europejskiego [1],

uwzględniając opinię Komitetu Ekonomiczno-Społecznego [2],

uwzględniając opinię Komitetu Regionów [3],

a także mając na uwadze, co następuje:

(1) Zgodnie z art. 6 Traktatu o Unii Europejskiej, Unia Europejska opiera się na zasadach wolności, demokracji, poszanowania praw człowieka i podstawowych wolności oraz państwa prawnego, które są wspólne dla Państw Członkowskich, a także szanuje prawa podstawowe zagwarantowane w Europejskiej Konwencji o ochronie praw człowieka i podstawowych wolności oraz wynikające z tradycji konstytucyjnych wspólnych dla Państw Członkowskich, jako zasady ogólne prawa wspólnotowego.

(2) Prawo każdej osoby do równości wobec prawa i ochrony przed dyskryminacją stanowi powszechne prawo uznane Powszechną Deklaracją Praw Człowieka, Konwencją Narodów Zjednoczonych w sprawie zniesienia wszelkich form dyskryminacji kobiet, Międzynarodową Konwencją w sprawie zniesienia wszelkich form dyskryminacji rasowej, Paktami Narodów Zjednoczonych dotyczącymi Praw Obywatelskich i Politycznych oraz Praw Gospodarczych, Społecznych i Kulturalnych oraz Europejską Konwencją o ochronie praw człowieka i podstawowych wolności, których sygnatariuszami są wszystkie Państwa Członkowskie.

(3) Oprócz zakazu dyskryminacji ważne jest szanowanie innych podstawowych praw i wolności, wraz z ochroną prywatności i życia rodzinnego oraz działań wykonywanych w tym kontekście, a także wolności wyznania.

(4) Równość mężczyzn i kobiet jest podstawową zasadą Unii Europejskiej. Art. 21 i 23 Karty Praw Podstawowych Unii Europejskiej zakazują wszelkiej dyskryminacji opartej na płci i wymagają zapewnienia równości mężczyzn i kobiet we wszystkich dziedzinach.

(5) Art. 2 Traktatu ustanawiającego Wspólnotę Europejską stanowi, że popieranie takiej równości jest jednym z podstawowych zadań Wspólnoty. Podobnie, art. 3 ust. 2 Traktatu wymaga od Wspólnoty, aby zmierzała do zniesienia nierówności oraz wspierania równości mężczyzn i kobiet we wszystkich swoich działaniach.

(6) Komisja ogłosiła swój zamiar przedstawienia wniosku w sprawie dyrektywy dotyczącej dyskryminacji ze względu na płeć poza rynkiem pracy w swoim komunikacie w sprawie Agendy Polityki Społecznej. Taki wniosek jest w pełni spójny z decyzją Rady 2001/51/WE z dnia 20 grudnia 2000 r. ustanawiającą program odnoszący się do wspólnotowej strategii ramowej w sprawie równości płci (2001-2005) [4] obejmującej wszystkie polityki Wspólnoty i skierowanej na wspieranie równości mężczyzn i kobiet poprzez dostosowywanie tych polityk oraz praktycznych środków w celu poprawy pozycji mężczyzn i kobiet w społeczeństwie.

(7) Rada Europejska na posiedzeniu w Nicei, które odbyło się w dniach 7-9 grudnia wezwała Komisję do wzmocnienia praw związanych z równością poprzez przyjęcie wniosku dotyczącego dyrektywy w sprawie wspierania równości płci w dziedzinach innych niż życie zawodowe.

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[1] Opinia wydana 30 marca 2004 r., (dotychczas nieopublikowana w Dzienniku Urzędowym).

[2] Dz.U. C 241 z 28.9.2004, str. 44.

[3] Dz.U. C 121 z 30.4.2004, str. 27.

[4] Dz.U. L 17 z 19.1.2001, str. 22.

(8) Wspólnota przyjęła szereg instrumentów prawnych mających na celu zapobieganie i walkę z dyskryminacją ze względu na płeć na rynku pracy. Te instrumenty udowodniły znaczenie przepisów prawnych w walce z dyskryminacją.

(9) Dyskryminacja ze względu na płeć, w tym molestowanie oraz molestowanie seksualne mają miejsce również poza rynkiem pracy. Taka dyskryminacja może być również szkodliwa, stanowić przeszkodę dla pełnej i skutecznej integracji mężczyzn i kobiet w życiu gospodarczym i społecznym.

(10) Problemy te uwidaczniają się w szczególności w zakresie dostępu do towarów i usług. Zatem, powinno się zapobiegać i znosić dyskryminację ze względu na płeć w tym zakresie. Podobnie jak w przypadku dyrektywy Rady 2000/43/WE z dnia 29 czerwca 2000 r. wprowadzającej w życie zasadę równego traktowania osób bez względu na pochodzenie rasowe lub etniczne [1], cel ten może zostać lepiej osiągnięty w drodze przepisów wspólnotowych.

(11) Takie przepisy powinny zakazywać dyskryminacji ze względu na płeć w zakresie dostępu do towarów i usług oraz dostarczania towarów i usług. Za towary uważa się te w znaczeniu zgodnym z przepisami Traktatu ustanawiającego Wspólnotę Europejską odnoszącymi się do swobodnego przepływu towarów. Za usługi uważa się te w znaczeniu zgodnym z art. 50 tego Traktatu.

(12) W celu zapobiegania dyskryminacji ze względu na płeć niniejsza dyrektywa powinna mieć zastosowanie zarówno do dyskryminacji bezpośredniej jak i pośredniej. Bezpośrednia dyskryminacja ma miejsce jedynie w przypadku, kiedy jedna osoba traktowana jest mniej korzystnie ze względu na swoją płeć niż inna osoba w sytuacji porównywalnej. Zatem, na przykład, różnice między mężczyznami a kobietami w zakresie dostarczania usług zdrowotnych, które wynikają z fizycznych różnic między mężczyznami a kobietami nie odnoszą się do sytuacji porównywalnych i zatem nie stanowią dyskryminacji.

(13) Zakaz dyskryminacji powinien mieć zastosowanie do osób dostarczających towary i usługi, które są ogólnodostępne i które są oferowane poza obszarem życia prywatnego i rodzinnego oraz do transakcji dokonanych w tym kontekście. Nie powinien on mieć zastosowania do treści zawartych w środkach masowego przekazu lub ogłoszeniach ani do kształcenia publicznego lub prywatnego.

(14) Każda osoba korzysta ze swobody zawierania umów, włącznie ze swobodą wyboru partnera umownego do transakcji. Każdy, kto dostarcza towar lub usług, może mieć szereg subiektywnych powodów swojego wyboru partnera umownego. Jeżeli tylko wybór partnera nie jest oparty na płci partnera, niniejsza dyrektywa nie powinna stanowić przeszkody dla dokonania swobodnego wyboru partnera umownego.

(15) Istnieje już szereg instrumentów prawnych dotyczących wprowadzania w życie zasady równego traktowania mężczyzn i kobiet w dziedzinie zatrudnienia i wykonywania zawodu. Dlatego, niniejsza dyrektywa nie powinna mieć zastosowania w tym zakresie. Takie samo rozumowanie dotyczy kwestii związanych z prowadzeniem działalności na własny rachunek w zakresie uregulowanym przepisami prawnymi. Niniejsza dyrektywa powinna mieć zastosowanie jedynie do ubezpieczeń i emerytur, które są prywatne, dobrowolne i niezwiązane ze stosunkiem pracy.

(16) Możliwe do zaakceptowania są jedynie różnice w traktowaniu uzasadnione słusznym celem. Przykładem takiego słusznego celu może być ochrona ofiar przemocy na tle seksualnym (w takich przypadkach jak zakładanie schronisk dla przedstawicieli jednej płci), konieczność ochrony prywatności i przyzwoitości (w takich przypadkach jak udostępnianie zamieszkania przez osobę w części domu tej osoby), promowanie równości płci lub interesów mężczyzn lub kobiet (na przykład dobrowolne instytucje reprezentujące jedną płeć), swoboda zrzeszania się (w przypadkach członkostwa w prywatnych klubach jednej płci) i organizacja działań sportowych (na przykład wydarzenia sportowe dla przedstawicieli jednej płci). Niemniej jednak, wszelkie ograniczenia powinny być właściwe i niezbędne zgodnie z kryteriami wynikającymi z orzecznictwa Trybunału Sprawiedliwości Wspólnot Europejskich.

(17) Zasada równego traktowania w zakresie dostępu do towarów i usług nie wymaga, żeby ułatwienia dostępne dla mężczyzn i kobiet były zawsze oparte na wspólnych podstawach, jeżeli tylko nie są bardziej korzystne dla jednej z płci.

(18) Stosowanie czynników aktuarialnych związanych z płcią jest szeroko rozpowszechnione w przepisach ubezpieczeniowych i innych związanych z usługami finansowymi. W celu zapewnienia równego traktowania mężczyzn i kobiet stosowanie płci jako czynnika aktuarialnego nie powinno powodować różnic w odniesieniu do składek i świadczeń. W celu uniknięcia nagłego dostosowywania rynku wprowadzanie w życie tej zasady powinno mieć zastosowanie jedynie do nowych umów zawartych po dacie transpozycji niniejszej dyrektywy.

[1] Dz.U. L 180 z 19.7.2000, str. 22.

(19) Pewne kategorie ryzyka mogą być różne w zależności od płci. W niektórych przypadkach płeć stanowi jeden, lecz niekoniecznie jedyny czynnik decydujący przy ocenie ryzyka ubezpieczonego. Jeżeli chodzi o umowy ubezpieczające tego rodzaju ryzyka, Państwa Członkowskie mogą zdecydować o zezwoleniu na stosowanie wyjątków od zasady składek i świadczeń dla obu płci, jeżeli tylko mogą zapewnić, że dane aktuarialne i statystyczne, na podstawie których dokonano wyliczeń, są wiarygodne, regularnie uaktualniane i ogólnodostępne. Wyjątki są dozwolone jedynie w przypadkach, w których ustawodawstwo krajowe nie zastosowało jeszcze zasady równości płci. Po pięciu latach od transpozycji niniejszej dyrektywy Państwa Członkowskie powinny dokonać ponownej analizy uzasadnienia dla tych wyjątków, biorąc pod uwagę najbardziej aktualne dane aktuarialne i statystyczne oraz sprawozdanie Komisji sporządzone po trzech latach od transpozycji niniejszej dyrektywy.

(20) Mniej korzystne traktowanie kobiet ze względu na ciążę i macierzyństwo powinno być uznane za formę bezpośredniej dyskryminacji ze względu na płeć i w związku z tym powinno być zabronione w zakresie ubezpieczeń i innych związanych usług finansowych. Koszty związane z ryzykiem ciąży i macierzyństwa nie powinny zatem być przypisywane do członków jednej z płci.

(21) Osoby, które były dyskryminowane ze względu na płeć, powinny dysponować odpowiednimi środkami ochrony prawnej. W celu zapewnienia bardziej skutecznego poziomu bezpieczeństwa, stowarzyszenia, organizacje i inne osoby prawne powinny być również upoważnione do uczestniczenia w postępowaniu sądowym, zgodnie z ustaleniami Państw Członkowskich, w imieniu każdej ofiary albo w jej interesie, bez uszczerbku dla krajowych przepisów proceduralnych dotyczących przedstawicielstwa i obrony w sądzie.

(22) Zasady dotyczące ciężaru dowodu powinny zostać dostosowane w przypadkach, w których występuje domniemanie dyskryminacji w celu skutecznego zastosowania zasady równego traktowania; w przypadkach ujawnienia dowodu na istnienie takiej dyskryminacji ciężar dowodu powinien zostać przesunięty na osobę przeciwko której wysunięto zarzut.

(23) Skuteczne wprowadzanie w życie zasady równego traktowania wymaga odpowiedniej ochrony sądowej przed retorsjami.

(24) Mając na względzie wspieranie zasady równego traktowania, Państwa Członkowskie powinny zachęcać do dialogu z zainteresowanymi stronami, które, zgodnie z prawem i praktyką krajową mają uzasadniony prawnie interes w uczestniczeniu w zwalczaniu dyskryminacji ze względu na płeć w zakresie dostępu do towarów i usług oraz dostarczania towarów i usług.

(25) Ochrona przed dyskryminacją ze względu na płeć powinna być wzmocniona poprzez istnienie w każdym Państwie Członkowskim jednego lub organów właściwych w zakresie analizowania tych problemów, badania możliwych rozwiązań i świadczenia konkretnej pomocy ofiarom. Mogą być to te same organy, które są odpowiedzialne na poziomie krajowym za obronę praw człowieka lub ochronę praw jednostki lub wprowadzanie w życie zasady równego traktowania.

(26) Niniejsza dyrektywa ustanawia wymogi minimalne, pozostawiając Państwom Członkowskim możliwość przyjęcia lub utrzymania przepisów bardziej korzystnych. Wdrażanie niniejszej dyrektywy nie może posłużyć jako uzasadnienie dla wprowadzenia przepisów mniej korzystnych w stosunku do istniejących obecnie w poszczególnych Państwach Członkowskich.

(27) Państwa Członkowskie powinny wprowadzić skuteczne, proporcjonalne i odstraszające sankcje stosowane w przypadkach niewykonania zobowiązań wynikających z niniejszej dyrektywy.

(28) Ponieważ cele niniejszej Dyrektywy, a mianowicie zapewnienie we wszystkich Państwach Członkowskich wysokiego poziomu ochrony przed dyskryminacją, nie mogą być osiągnięte w wystarczający sposób przez Państwa Członkowskie, natomiast z uwagi na rozmiary lub skutki proponowanych działań możliwe jest lepsze ich osiągnięcie na poziomie Wspólnoty, Wspólnota może przyjąć środki, zgodnie z zasadą pomocniczości określoną w art. 5 Traktatu. Zgodnie z zasadą proporcjonalności określoną we wspomnianym artykule, niniejsza dyrektywa nie wykracza poza to, co jest konieczne dla osiągnięcia tych celów.

(29) Zgodnie z ust. 34 porozumienia międzyinstytucjonalnego w sprawie lepszego ustawodawstwa [1], zachęca się Państwa Członkowskie do sporządzania, dla potrzeb własnych, a także w interesie Wspólnoty, swoich tabel, które, na ile jest to możliwe, ilustrują korelację między dyrektywą a środkami transpozycji i do podawania ich do wiadomości publicznej.

[1] Dz.U. C 321 z 31.12.2003, str. 1.

PRZYJMUJE NINIEJSZĄ DYREKTYWĘ:

ROZDZIAŁ I

PRZEPISY OGÓLNE

Artykuł 1

Cel

Niniejsza dyrektywa ma na celu stworzenie ram do walki z dyskryminacją ze względu na płeć w zakresie dostępu do towarów i usług oraz dostarczania towarów i usług mając na względzie wprowadzenie w życie w Państwach Członkowskich zasady równego traktowania mężczyzn i kobiet.

Artykuł 2

Definicje

Do celów niniejszej dyrektywy, stosuje się następujące definicje:

a) bezpośrednia dyskryminacja: występuje w sytuacji, gdy jedna osoba traktowana jest mniej korzystnie ze względu na płeć niż jest, była lub byłaby traktowana inna osoba w porównywalnej sytuacji;

b) pośrednia dyskryminacja: występuje w sytuacji, gdy z pozoru neutralny przepis, kryterium lub praktyka stawiałyby osoby danej płci w szczególnie niekorzystnym położeniu w porównaniu do osób innej płci, chyba że dany przepis, kryterium lub praktyka są obiektywnie uzasadnione zgodnym z prawem celem, a środki służące osiąganiu tego celu są właściwe i niezbędne;

c) molestowanie: występuje w sytuacji, w której ma miejsce niepożądane zachowanie związane z płcią osoby, którego celem lub skutkiem jest naruszenie godności osoby i stworzenie onieśmielającej, wrogiej, poniżającej, upokarzającej lub agresywnej atmosfery;

d) molestowanie seksualne: występuje w sytuacji, w której ma miejsce niepożądane zachowanie, werbalne lub niewerbalne lub zachowanie fizyczne o charakterze seksualnym, którego celem lub skutkiem jest naruszenie godności osoby, w szczególności poprzez stwarzanie onieśmielającej, wrogiej, poniżającej, upokarzającej lub agresywnej atmosfery;

Artykuł 3

Zakres

1. W granicach uprawnień powierzonych Wspólnocie, niniejszą dyrektywę stosuje się do wszystkich osób, które dostarczają towary i usługi, które są ogólnodostępne niezależnie od zainteresowanej osoby, zarówno w sektorze publicznym jak i prywatnym, włącznie z instytucjami publicznymi, które oferowane są poza obszarem życia prywatnego i rodzinnego oraz do transakcji dokonywanych w tym kontekście.

2. Niniejsza dyrektywa nie narusza swobody jednostki do wyboru partnera umownego, jeżeli tylko wybór partnera umownego nie jest oparty na płci tej osoby.

3. Niniejszej dyrektywy nie stosuje się do treści zawartych w środkach masowego przekazu, w ogłoszeniach ani do kształcenia.

4. Niniejszej dyrektywy nie stosuje się, kwestii zatrudnienia i wykonywania zawodu. Niniejszej dyrektywy nie stosuje się do prowadzenia działalności na własny rachunek w zakresie, w jakim jest ono uregulowane w innych aktach prawnych Wspólnoty.

Artykuł 4

Zasada równego traktowania

1. Do celów niniejszej dyrektywy zasada równego traktowania mężczyzn i kobiet oznacza, że:

a) nie istnieje żadna bezpośrednia dyskryminacja ze względu na płeć, w tym mniej korzystne traktowanie kobiet ze względu na ciążę lub macierzyństwo;

b) nie istnieje żadna pośrednia dyskryminacja ze względu na płeć.

2. Niniejsza dyrektywa nie stanowi uszczerbku dla bardziej korzystnych przepisów dotyczących ochrony kobiet w zakresie ciąży i macierzyństwa.

3. Molestowanie oraz molestowanie seksualne w rozumieniu niniejszej dyrektywy uważa się za dyskryminację ze względu na płeć i dlatego jest ono zabronione. Sprzeciw wobec takich zachowań lub podporządkowanie się im przez daną osobę nie może stanowić podstawy dla decyzji odnoszącej się do tej osoby.

4. Polecenie nakazujące bezpośrednie lub pośrednie dyskryminowanie osób ze względu na płeć uważane jest za dyskryminację w rozumieniu niniejszej dyrektywy.

5. Niniejsza dyrektywa nie wyklucza różnic w traktowaniu, jeżeli dostarczanie towarów i usług wyłącznie lub głównie przedstawicielom jednej płci jest uzasadnione celem zgodnym z prawem, a środki dla osiągnięcia tego celu są właściwe i niezbędne.

Artykuł 5

Czynniki aktuarialne

1. Państwa Członkowskie zapewniają, że we wszystkich nowych umowach zawartych najpóźniej po 21 grudnia 2007 r. użycie płci jako czynnika w kalkulowaniu składek i świadczeń do celów ubezpieczenia i związanych usług finansowych nie powoduje różnic w składkach i odszkodowaniach poszczególnych osób.

2. Niezależnie od ust. 1 Państwa Członkowskie mogą zdecydować przed 21 grudnia 2007 r. o zezwoleniu na proporcjonalne różnice w składkach i świadczeniach poszczególnych osób, w przypadkach, w których użycie płci jest czynnikiem decydującym w ocenie ryzyka opartego na odpowiednich i dokładnych danych aktuarialnych i statystycznych. Odnośne Państwa Członkowskie informują Komisję i zapewniają, że dokładne dane dotyczące użycia płci jako decydującego czynnika aktuarialnego są gromadzone, publikowane i regularnie uaktualniane. Te Państwa Członkowskie dokonują przeglądu swoich decyzji pięć lat po 21 grudnia 2007 r., uwzględniając sprawozdanie Komisji, o którym mowa w art. 16 i przekazują wyniki tego przeglądu Komisji.

3. W żadnym wypadku, koszty związane z ciążą i macierzyństwem nie powodują różnic w składkach i świadczeniach poszczególnych osób.

Państwa Członkowskie mogą odroczyć wprowadzanie w życie środków niezbędnych do przestrzegania niniejszego ustępu najpóźniej do dwóch lat po 21 grudnia 2007 r. W takim przypadku, odnośne Państwa Członkowskie bezzwłocznie informują Komisję.

Artykuł 6

Działanie pozytywne

Dla zapewnienia całkowitej równości mężczyzn i kobiet i w praktyce, zasada równego traktowania nie stanowi przeszkody dla utrzymywania lub przyjmowania przez jakiekolwiek Państwo Członkowskie szczególnych środków mających zapobiegać lub wyrównywać niedogodności związane z płcią.

Artykuł 7

Wymogi minimalne

1. Państwa Członkowskie mogą przyjmować lub utrzymywać przepisy bardziej korzystne dla ochrony równego traktowania mężczyzn i kobiet niż przepisy przewidziane w niniejszej dyrektywie.

2. Wdrażanie niniejszej dyrektywy nie może być w żadnym wypadku powodem obniżenia poziomu ochrony przed dyskryminacją, który jest już przyznany przez Państwa Członkowskie w dziedzinach regulowanych niniejszą dyrektywą.

ROZDZIAŁ II

ŚRODKI PRAWNE ORAZ STOSOWANIE PRAWA

Artykuł 8

Ochrona praw

1. Państwa Członkowskie zapewniają, aby procedury sądowe i/lub administracyjne, jak również, o ile uznają to za właściwe, procedury pojednawcze, których celem jest doprowadzenie do wykonania zobowiązań wynikających z niniejszej dyrektywy, były dostępne dla wszystkich osób, które uważają, że ich prawa zostały naruszone w związku z nieprzestrzeganiem wobec nich zasady równego traktowania, nawet po ustaniu stosunków, w ramach których domniemywa się istnienie dyskryminacji.

2. Państwa Członkowskie wprowadzają do swoich krajowych systemów prawnych środki, niezbędne do zapewnienia rzeczywistej i skutecznej rekompensaty lub odszkodowania dla osób poszkodowanych w wyniku dyskryminacji w rozumieniu niniejszej dyrektywy, zgodnie z zasadami ustalonymi przez Państwa Członkowskie w zakresie, zniechęcające do dyskryminacji, a jednocześnie proporcjonalne do wyrządzonej szkody. Taka rekompensata lub odszkodowanie nie może być z góry ograniczone maksymalnym wymiarem.

3. Państwa Członkowskie zapewniają, że stowarzyszenia, organizacje i inne osoby prawne, które mają, zgodnie z kryteriami ustanowionymi w prawie krajowym, uzasadniony interes w zapewnieniu, aby przestrzegane były przepisy niniejszej dyrektywy, mogą wszczynać, w imieniu lub w interesie skarżącego, za jego zgodą, postępowanie sądowe i/lub administracyjne przewidziane dla wykonania obowiązków wynikających z niniejszej dyrektywy.

4. Ust. 1 i 3 nie stanowią uszczerbku dla krajowych przepisów dotyczących terminów do wszczynania postępowań odnośnie zasady równego traktowania.

Artykuł 9

Ciężar dowodu

1. Państwa Członkowskie podejmują niezbędne środki, zgodnie z ich krajowymi systemami sądowymi dla zapewnienia, aby ciężar dowodu, iż nie miało miejsca naruszenie zasady równego traktowania, spoczywał na stronie pozwanej, w sytuacji gdy osoby uważające się za poszkodowane w wyniku nieprzestrzegania wobec nich zasady równego traktowania, przedstawią przed sądem lub innym właściwym organem fakty pozwalające na domniemanie bezpośredniej i pośredniej dyskryminacji.

2. Ust. 1 nie stanowi przeszkody dla przyjęcia przez Państwa Członkowskie zasad dowodowych korzystniejszych dla strony skarżącej.

3. Ust. 1 nie ma zastosowania do postępowań karnych.

4. Przepisy ust. 1, 2 i 3 stosuje się również do każdego postępowania wszczętego zgodnie z art. 8 ust. 3.

5. Państwa Członkowskie nie mogą stosować przepisu ust. 1 do postępowań sądowych, w których ustalenie okoliczności faktycznych sprawy należy do sądu lub innego właściwego organu.

Artykuł 10

Ochrona przed retorsjami

Państwa Członkowskie wprowadzają do swoich wewnętrznych systemów prawnych środki niezbędne do ochrony osób przed wszelkiego rodzaju negatywnym traktowaniem lub konsekwencjami stanowiącymi reakcję na skargę lub wszczęcie postępowania sądowego zmierzające do zapewnienia przestrzegania zasady równego traktowania.

Artykuł 11

Dialog z zainteresowanymi stronami

W celu wspierania zasady równego traktowania, Państwa Członkowskie zachęcają do dialogu z zainteresowanymi stronami, które, zgodnie z prawem i praktyką krajową mają interes prawny w przyczynianiu się do walki z dyskryminacją ze względu na płeć w zakresie dostępu do towarów i usług oraz dostarczania towarów i usług.

ROZDZIAŁ III

ORGANY PROMUJĄCE RÓWNE TRAKTOWANIE

Artykuł 12

1. Państwa Członkowskie wyznaczają i dokonują niezbędnych ustaleń dla organu lub organów do spraw promowania, analizowania, monitorowania i wspierania równego traktowania wszystkich osób bez dyskryminacji bez względu na płeć. Organy te mogą wchodzić w skład agencji odpowiedzialnych na poziomie krajowym za obronę praw człowieka i przestrzeganie praw jednostek lub wprowadzanie w życie zasady równego traktowania.

2. Państwa Członkowskie zapewniają, że kompetencje organów, o których mowa w ust. 1, obejmują:

a) bez uszczerbku dla praw ofiar i stowarzyszeń, organizacji i innych osób prawnych określonych w art. 8 ust. 3, świadczenie niezależnej pomocy ofiarom dyskryminacji w dochodzeniu ich praw w zakresie dyskryminacji;

b) prowadzenie niezależnych badań dotyczących dyskryminacji;

c) publikowanie niezależnych sprawozdań i wydawanie zaleceń odnośnie problemów związanych z taką dyskryminacją.

ROZDZIAŁ IV

PRZEPISY KOŃCOWE

Artykuł 13

Zgodność

Państwa Członkowskie podejmują niezbędne środki w celu zapewnienia, że zasada równego traktowania jest respektowana w odniesieniu do dostępu do towarów i usług oraz dostarczania towarów i usług w zakresie objętym niniejszą dyrektywą, a w szczególności, że:

a) wszelkie przepisy ustawowe, wykonawcze i administracyjne sprzeczne z zasadą równego traktowania są uchylone;

b) wszelkie postanowienia umowne, regulaminy przedsiębiorstw, przepisy dotyczące stowarzyszeń prowadzących działalność zarobkową lub nieprowadzących takiej działalności sprzeczne z zasadą równego traktowania są nieważne lub mogą zostać uznane za nieważne bądź zmienione.

Artykuł 14

Sankcje

Państwa Członkowskie ustanawiają przepisy w sprawie sankcji stosowanych wobec naruszeń przepisów krajowych przyjętych zgodnie z niniejszą dyrektywą i podejmują wszelkie niezbędne działania dla zapewnienia ich wykonania. Ustanowione sankcje, które mogą obejmować obowiązek zapłaty odszkodowania na rzecz ofiary, muszą być skuteczne, proporcjonalne i odstraszające. Państwa Członkowskie powiadamiają o tych przepisach Komisję do 21 grudnia 2007 r. i powiadamiają ją bezzwłocznie o wszelkich późniejszych zmianach tych przepisów.

Artykuł 15

Upowszechnianie informacji

Państwa Członkowskie zapewniają, że przepisy przyjęte zgodnie z niniejszą dyrektywą, jak również odpowiednie przepisy pozostające w mocy, udostępniane są zainteresowanym osobom przy wykorzystaniu wszystkich stosownych środków na całym ich terytorium.

Artykuł 16

Sprawozdania

1. Państwa Członkowskie przekazują Komisji wszelkie dostępne informacje dotyczące stosowania niniejszej dyrektywy nie później niż 21 grudnia 2009 r., a następnie co pięć lat.

Komisja sporządza sprawozdanie podsumowujące, które zawiera przegląd istniejących praktyk Państw Członkowskich w związku z art. 5 w odniesieniu do użycia płci jako czynnika w obliczaniu składek i świadczeń. Komisja przedkłada to sprawozdanie Parlamentowi Europejskiemu i Radzie nie później niż 21 grudnia 2010 r.

Tam, gdzie stosowne, Komisja dołącza do swego sprawozdania wnioski dotyczące zmian niniejszej dyrektywy.

2. Sprawozdanie Komisji uwzględnia punkty widzenia zainteresowanych stron.

Artykuł 17

Transpozycja

1. Państwa Członkowskie wprowadzają w życie przepisy ustawowe, wykonawcze i administracyjne niezbędne do wykonania niniejszej dyrektywy nie później niż 21 grudnia 2007 r. Państwa te niezwłocznie przekazują Komisji treść tych przepisów.

Przepisy przyjęte przez Państwa Członkowskie zawierają odniesienie do niniejszej dyrektywy lub odniesienie takie towarzyszy ich urzędowej publikacji. Metody dokonywania takiego odniesienia określane są przez Państwa Członkowskie.

2. Państwa Członkowskie przekazują Komisji teksty podstawowych przepisów prawa krajowego, przyjętych w dziedzinie objętej niniejszą dyrektywą.

Artykuł 18

Wejście w życie

Niniejsza dyrektywa wchodzi w życie w dniu jej opublikowania w *Dzienniku Urzędowym Unii Europejskiej*.

Artykuł 19

Adresaci

Niniejsza dyrektywa skierowana jest do Państw Członkowskich.

Sporządzono w Brukseli, dnia 13 grudnia 2004 r.

W imieniu Rady

B. R. BOT

Przewodniczący

32000L0043

DYREKTYWA RADY 2000/43/WE
z dnia 29 czerwca 2000 r.
wprowadzająca w życie zasadę równego traktowania osób bez względu na pochodzenie rasowe lub etniczne

RADA UNII EUROPEJSKIEJ,

uwzględniając Traktat ustanawiający Wspólnotę Europejską, w szczególności jego art. 13,

uwzględniając wniosek Komisji [1],

uwzględniając opinię Parlamentu Europejskiego [2],

uwzględniając opinię Komitetu Ekonomiczno-Społecznego [3],

uwzględniając opinię Komitetu Regionów [4],

a także mając na uwadze, co następuje:

(1) Traktat o Unii Europejskiej wyznacza nowy etap w procesie tworzenia coraz ściślejszego związku między narodami Europy.

(2) Zgodnie z art. 6 Traktatu o Unii Europejskiej Unia Europejska opiera się na zasadach wolności, demokracji, poszanowania praw człowieka i podstawowych wolności oraz państwa prawnego, które są wspólne dla Państw Członkowskich, a także szanuje prawa podstawowe zagwarantowane w Europejskiej konwencji o ochronie praw człowieka i podstawowych wolności oraz wynikające z tradycji konstytucyjnych wspólnych dla Państw Członkowskich, jako zasady ogólne prawa wspólnotowego.

(3) Prawo każdej osoby do równości wobec prawa i ochrony przed dyskryminacją stanowi powszechne prawo uznane Powszechną Deklaracją Praw Człowieka, Konwencją Narodów Zjednoczonych w sprawie likwidacji wszelkich form dyskryminacji kobiet, Międzynarodową Konwencją w sprawie likwidacji wszelkich form dyskryminacji rasowej, Paktami Narodów Zjednoczonych: Praw Obywatelskich i Politycznych oraz Praw Gospodarczych, Społecznych i Kulturalnych oraz Europejską Konwencją o ochronie praw człowieka i podstawowych wolności, których sygnatariuszami są wszystkie Państwa Członkowskie.

(4) Istotne jest przestrzeganie tych podstawowych praw i wolności, włącznie z wolnością zrzeszania się. W kontekście dostępu do dóbr i usług oraz dostarczania dóbr i usług istotne jest również przestrzeganie ochrony życia prywatnego i rodzinnego, jak również realizowanych w tym zakresie transakcji.

(5) Parlament Europejski przyjął liczne rezolucje w sprawie walki z rasizmem w Unii Europejskiej.

(6) Unia Europejska odrzuca wszystkie teorie zmierzające do określenia istnienia odrębnych ras ludzkich. Użycie terminu „pochodzenie rasowe" w niniejszej dyrektywie nie oznacza wcale uznania tych teorii.

(7) W dniach 15 i 16 października 1999 r. Rada Europejska w Tampere wezwała Komisję do jak najszybszego przedstawienia propozycji wprowadzenia w życie art. 13 Traktatu WE w zakresie walki z rasizmem i ksenofobią.

(8) Wytyczne dla zatrudnienia w 2000 r., przyjęte przez Radę Europejską w Helsinkach w dniach 10 i 11 grudnia 1999 r., podkreślają potrzebę wspierania rynku pracy sprzyjającego społecznej integracji poprzez stworzenie spójnych polityk, których celem jest walka z dyskryminacją takich grup, jak mniejszości etniczne.

(9) Dyskryminacja ze względu na pochodzenie rasowe lub etniczne może utrudnić osiągnięcie celów Traktatu WE, w szczególności doprowadzenie do wysokiego poziomu zatrudnienia i opieki społecznej, wzrostu poziomu jakości życia, spójności gospodarczej i społecznej oraz solidarności. Może również zagrozić realizacji celu, jakim jest rozwój Unii Europejskiej jako przestrzeni wolności, bezpieczeństwa i sprawiedliwości.

(10) W grudniu 1995 r. Komisja przedstawiła komunikat w sprawie rasizmu, ksenofobii i antysemityzmu.

(11) Dnia 15 lipca 1996 r. Rada przyjęła Wspólne Działanie 96/443/WSiSW dotyczące akcji na rzecz zwalczania rasizmu i ksenofobii [5], dla której Państwa Członkowskie zobowiązują się zapewnić skuteczną współpracę sądową w zakresie przestępstw związanych z zachowaniami rasistowskimi lub ksenofobicznymi.

(12) W celu zapewnienia rozwoju demokratycznych i tolerancyjnych społeczeństw, umożliwiających uczestnictwo wszystkich osób, bez względu na pochodzenie rasowe lub etniczne, szczególna akcja dotycząca dyskryminacji ze względu na pochodzenie rasowe lub etniczne musi wykraczać poza działalność zarobkową oraz niezarobkową i powinna objąć takie dziedziny, jak edukacja, opieka społeczna włącznie z bezpieczeństwem socjalnym i opieką zdrowotną, ułatwieniami społecznymi, dostępem do dóbr i usług oraz ich dostarczaniem.

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(1) Dotychczas nieopublikowana w Dzienniku Urzędowym.
(2) Opinia wydana dnia 18.5.2000 r. (dotychczas nieopublikowana w Dzienniku Urzędowym).
(3) Opinia wydana dnia 12.4.2000 r. (dotychczas nieopublikowana w Dzienniku Urzędowym).
(4) Opinia wydana dnia 31.5.2000 r. (dotychczas nieopublikowana w Dzienniku Urzędowym).

(5) Dz.U. L 185 z 24.7.1996, str. 5.

(13) W tym celu wszelka bezpośrednia lub pośrednia dyskryminacja ze względu na pochodzenie rasowe lub etniczne w zakresie regulowanym niniejszą dyrektywą powinna być we Wspólnocie zakazana. Zakaz dyskryminacji powinien również mieć zastosowanie wobec obywateli państw trzecich, ale nie obejmuje on odmiennego traktowania ze względu na narodowość i nie pozostaje bez uszczerbku dla przepisów regulujących wjazd i pobyt obywateli państw trzecich oraz ich dostęp do zatrudnienia i pracy.

(14) We wprowadzaniu w życie zasady równego traktowania bez względu na pochodzenie rasowe lub etniczne Wspólnota dąży, zgodnie z art. 3 ust. 2 Traktatu WE, do likwidacji nierówności i wspierania równego traktowania mężczyzn i kobiet, w szczególności ze względu na to, że kobiety są często ofiarami różnego rodzaju dyskryminacji.

(15) Ocena faktów, które nasuwają przypuszczenie istnienia bezpośredniej i pośredniej dyskryminacji, należy do sądu krajowego lub innego właściwego organu, zgodnie zasadami prawa krajowego lub praktyką krajową. Zasady te mogą przewidywać w szczególności, że fakt występowania dyskryminacji pośredniej można udowodnić z wykorzystaniem wszelkich środków, również na podstawie danych statystycznych.

(16) Istotna jest ochrona wszystkich osób fizycznych przed dyskryminacją ze względu na pochodzenie rasowe lub etniczne. Państwa Członkowskie powinny również zapewnić, w zależności od potrzeb i zgodnie z tradycją i krajową praktyką, ochronę osób prawnych, jeżeli są one ofiarami dyskryminacji ze względu na pochodzenie rasowe lub etniczne swoich członków.

(17) Zakaz dyskryminacji powinien być przestrzegany bez względu na utrzymywanie lub przyjmowanie przepisów mających zapobiegać lub wyrównywać niekorzystną sytuację grupy osób danego pochodzenia rasowego lub etnicznego, a przepisy te mogą dopuszczać istnienie organizacji osób danego pochodzenia rasowego lub etnicznego, jeżeli ich głównym celem jest wspieranie szczególnych potrzeb tych osób.

(18) W bardzo niewielu okolicznościach różnice w traktowaniu mogą być uzasadnione, jeżeli charakterystyka związana z pochodzeniem rasowym lub etnicznym jest istotnym i determinującym wymogiem zawodowym, pod warunkiem że cel jest zgodny z prawem, a wymóg jest proporcjonalny. Okoliczności takie należy wymienić w informacjach dostarczanych przez Państwa Członkowskie Komisji.

(19) Osoby, które były dyskryminowane ze względu na pochodzenie rasowe lub etniczne, powinny dysponować odpowiednimi środkami ochrony prawnej. Dla zapewnienia bardziej skutecznego poziomu ochrony stowarzyszenia lub osoby prawne powinny mieć również możliwość wszczynania postępowań, na zasadach określonych przez Państwo Członkowskie, na rzecz ofiary lub ją wspierając, nie naruszając reguł procedury krajowej dotyczących przedstawicielstwa i obrony przed sądami.

(20) Skuteczne wprowadzanie w życie zasady równości wymaga odpowiedniej ochrony sądowej przed represjami.

(21) Dostosowanie przepisów dotyczących ciężaru dowodu wymaga, od momentu zaistnienia domniemania dyskryminacji i w przypadkach gdy fakt ten zostanie potwierdzony, skutecznego stosowania zasady równego traktowania, w której ciężar dowodu spoczywa na osobie, wobec której wysunięto zarzut.

(22) Państwa Członkowskie mogą nie stosować zasad dotyczących ciężaru dowodu do postępowań, w których ustalenie faktów należy do sądu lub właściwej instancji. Takie procedury są procedurami, w których powód nie musi udowadniać faktów, których ustalenie należy do sądu lub właściwej instancji.

(23) Państwa Członkowskie powinny wspierać dialog między partnerami społecznymi, jak również z organizacjami pozarządowymi odnoszący się do różnych form dyskryminacji i jej zwalczania.

(24) Ochrona przed dyskryminacją ze względu na pochodzenie rasowe i etniczne zostałaby wzmocniona, gdyby w każdym Państwie Członkowskim istniał jeden lub kilka organów, których zadaniem byłoby analizowanie tych problemów, badanie możliwych rozwiązań i świadczenie konkretnej pomocy ofiarom.

(25) Niniejsza dyrektywa ustanawia minimalne wymagania, co daje Państwom Członkowskim możliwość utrzymania i przyjęcia bardziej korzystnych przepisów. Wykonanie niniejszej dyrektywy nie może usprawiedliwiać regresu w stosunku do sytuacji istniejącej w każdym Państwie Członkowskim.

(26) Państwa Członkowskie powinny wprowadzić skuteczne, proporcjonalne i odstraszające sankcje stosowane w przypadkach nieprzestrzegania zobowiązań wynikających z niniejszej dyrektywy.

(27) Państwa Członkowskie mogą powierzać partnerom społecznym, na ich wspólny wniosek, wprowadzenie w życie niniejszej dyrektywy, w zakresie tego, co wynika z układów zbiorowych, pod warunkiem przyjęcia wszystkich niezbędnych przepisów umożliwiających im w każdej chwili osiągnięcie rezultatów określonych w niniejszej dyrektywie.

(28) Zgodnie z zasadą pomocniczości oraz zasadą proporcjonalności, określonymi w art. 5 Traktatu WE, cel niniejszej dyrektywy, to znaczy zapewnienie we wszystkich Państwach Członkowskich wyższego poziomu ochrony przed dyskryminacją, nie może być osiągnięty w sposób wystarczający przez Państwa Członkowskie, natomiast z uwagi na rozmiary lub skutki proponowanych działań możliwe jest lepsze jego osiągnięcie na poziomie Wspólnoty. Niniejsza dyrektywa nie wykracza poza to, co jest konieczne do osiągnięcia tych celów.

PRZYJMUJE NINIEJSZĄ DYREKTYWĘ:

ROZDZIAŁ I

PRZEPISY OGÓLNE

Artykuł 1

Cel

Niniejsza dyrektywa ma na celu wyznaczenie ram walki z dyskryminacją ze względu na pochodzenie rasowe lub etniczne oraz wprowadzenie w życie w Państwach Członkowskich zasady równego traktowania.

Artykuł 2

Pojęcie dyskryminacji

1. Do celów niniejszej dyrektywy zasada równego traktowania oznacza brak jakichkolwiek form bezpośredniej lub pośredniej dyskryminacji ze względu na pochodzenie rasowe lub etniczne.

2. Do celów ust. 1:

a) dyskryminacja bezpośrednia ma miejsce, gdy ze względu na pochodzenie rasowe lub etniczne osoba traktowana jest mniej przychylnie niż traktuje się, traktowano lub traktowano by inną osobę w podobnej sytuacji;

b) dyskryminacja pośrednia ma miejsce, gdy pozornie neutralny przepis, kryterium lub praktyka mogą doprowadzić do szczególnie niekorzystnej sytuacji dla osób danego pochodzenia rasowego lub etnicznego w stosunku do innych osób, chyba że taki przepis, kryterium lub praktyka są obiektywnie uzasadnione legalnym celem, a środki mające służyć osiągnięciu tego celu są odpowiednie i konieczne.

3. Molestowanie uważane jest za formę dyskryminacji w rozumieniu ust. 1, jeżeli ma miejsce niepożądane zachowanie związane z pochodzeniem rasowym lub etnicznym, a jego celem lub skutkiem jest naruszenie godności osoby i stworzenie onieśmielającej, wrogiej, poniżającej, upokarzającej lub uwłaczającej atmosfery. W tym znaczeniu pojęcie molestowania może być definiowane zgodnie z ustawodawstwem i krajową praktyką Państw Członkowskich.

4. Każde zachowanie polegające na zmuszaniu kogokolwiek do praktykowania wobec osób zachowań dyskryminacyjnych ze względu na pochodzenie rasowe lub etniczne uważane jest za dyskryminację w rozumieniu ust. 1.

Artykuł 3

Zakres

1. W granicach kompetencji powierzonych Wspólnocie niniejszą dyrektywę stosuje się do wszystkich osób, zarówno sektora publicznego, jak i prywatnego, włącznie z instytucjami publicznymi, w odniesieniu do:

a) warunków dostępu do zatrudnienia, do prowadzenia działalności na własny rachunek oraz uprawiania zawodu, włączając również kryteria selekcji i warunków rekrutacji, niezależnie od rodzaju działalności i na wszystkich szczeblach hierarchii zawodowej, również w odniesieniu do awansu zawodowego;

b) dostępu do wszystkich rodzajów i szczebli poradnictwa zawodowego, szkolenia zawodowego, doskonalenia i przekwalifikowania pracowników, łącznie ze zdobywaniem praktycznych doświadczeń;

c) warunków zatrudnienia i pracy, łącznie z warunkami zwalniania i wynagradzania;

d) wstępowania i działania w organizacjach pracowników lub pracodawców lub jakiejkolwiek organizacji, której członkowie wykonują określony zawód, łącznie z korzyściami jakie dają takie organizacje;

e) ochrony społecznej, łącznie z zabezpieczeniem społecznym i opieką zdrowotną;

f) świadczeń społecznych;

g) edukacji;

h) dostępu do dóbr i usług oraz dostarczania dóbr i usług publicznie dostępnych, włącznie z zakwaterowaniem.

2. Niniejsza dyrektywa nie obejmuje różnego traktowania ze względu na obywatelstwo i pozostaje ona bez uszczerbku dla przepisów i warunków dotyczących wjazdu i pobytu obywateli państw trzecich oraz bezpaństwowców na terytorium Państw Członkowskich i wszelkiego traktowania związanego ze statusem prawnym danych obywateli państw trzecich i bezpaństwowców.

Artykuł 4

Istotne i determinujące wymagania zawodowe

Nie naruszając art. 2 ust. 1 i 2, Państwa Członkowskie mogą uznać, że odmienne traktowanie ze względu na cechy związane z pochodzeniem rasowym lub etnicznym nie stanowi dyskryminacji, jeżeli ze względu na rodzaj działalności zawodowej lub warunki jej wykonywania dane cechy są istotnym i determinującym wymogiem zawodowym, pod warunkiem że cel jest prawnie uzasadniony, a wymóg jest proporcjonalny.

Artykuł 5

Działanie pozytywne

Dla zapewnienia całkowitej równości w praktyce zasada równego traktowania nie stanowi przeszkody w utrzymywaniu lub przyjmowaniu przez Państwo Członkowskie szczególnych środków mających zapobiegać lub wyrównywać niedogodności związane z pochodzeniem rasowym lub etnicznym.

Artykuł 6

Minimalne wymagania

1. Państwa Członkowskie mogą przyjmować lub utrzymywać przepisy bardziej korzystne dla zasady równego traktowania od przepisów ustanowionych w niniejszej dyrektywie.

2. Wykonanie niniejszej dyrektywy nie może być w żadnych okolicznościach powodem obniżenia poziomu ochrony przed dyskryminacją, który już zapewnia Państwo Członkowskie w zakresie regulowanym niniejszą dyrektywą.

ROZDZIAŁ II

ŚRODKI PRAWNE I WYKONANIE

Artykuł 7

Ochrona praw

1. Państwa Członkowskie zapewniają, że procedury sądowe i/lub administracyjne, włączając, o ile uznają to za właściwe, procedury pojednawcze, których celem jest doprowadzenie do przestrzegania obowiązków wynikających z niniejszej dyrektywy są dostępne dla wszystkich osób, które uważają się za pokrzywdzone nieprzestrzeganiem wobec nich zasady równego traktowania, nawet po zakończeniu kontaktów, w których przypuszczalnie miała miejsce dyskryminacja.

2. Państwa Członkowskie zapewniają, że stowarzyszenia, organizacje lub osoby prawne, które mają, zgodnie z kryteriami ustanowionymi w prawie krajowym uzasadniony interes w zapewnieniu, aby przestrzegane były przepisy niniejszej dyrektywy, mogą wszczynać, na rzecz skarżącego lub wspierając go, za jego zgodą, postępowanie sądowe i/lub administracyjne przewidziane w celu przestrzegania obowiązków wynikających z niniejszej dyrektywy.

3. Ustępy 1 i 2 pozostają bez uszczerbku dla krajowych reguł dotyczących przedawnienia roszczeń w odniesieniu do zasady równego traktowania.

Artykuł 8

Ciężar dowodu

1. Państwa Członkowskie podejmują takie środki, które są niezbędne, zgodnie z ich krajowymi systemami prawnymi, w celu zapewnienia, że gdy osoba, która uważa się za pokrzywdzoną nieprzestrzeganiem wobec niej zasady równego traktowania i przedstawia przed sądem lub właściwym organem fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji, to na stronie pozwanej ciąży udowodnienie, że zasada równego traktowania nie została naruszona.

2. Przepisy ust. 1 nie stanowią przeszkody dla ustanawiania przez Państwa Członkowskie zasad dowodowych korzystniejszych dla powoda.

3. Przepisów ust. 1 nie stosuje się do postępowań karnych.

4. Przepisy ust. 1, 2 i 3 stosuje się również do każdego postępowania wszczętego zgodnie z art. 7 ust. 2.

5. Państwa Członkowskie mogą nie stosować przepisów ust. 1 do postępowań, w których ustalenie faktów należy do sądu lub właściwego organu.

Artykuł 9

Ochrona przed represjami

Państwa Członkowskie wprowadzają do swoich wewnętrznych systemów prawnych środki niezbędne do ochrony osób przed wszelkiego rodzaju negatywnym traktowaniem lub skutkami w reakcji na skargę lub wystąpienie z powództwem do sądu z zamiarem doprowadzenia do przestrzegania zasady równego traktowania.

Artykuł 10

Rozpowszechnianie informacji

Państwa Członkowskie zapewniają, że przepisy przyjęte zgodnie z niniejszą dyrektywą, jak również odpowiednie przepisy pozostające w mocy, udostępniane są zainteresowanym osobom przy wykorzystaniu wszystkich stosownych środków na całym ich terytorium.

Artykuł 11

Dialog społeczny

1. Zgodnie ze swoją tradycją i krajową praktyką Państwa Członkowskie podejmują stosowne działania wspierające dialog między partnerami społecznymi w celu wspierania równego traktowania, włącznie ze sprawowaniem nadzoru w miejscu pracy, poprzez układy zbiorowe, kodeksy postępowania oraz badanie lub wymianę doświadczeń i dobrych zwyczajów.

2. W poszanowaniu swoich krajowych tradycji i praktyki, Państwa Członkowskie zachęcają partnerów społecznych, bez uszczerbku dla ich autonomii, do zawierania na odpowiednim poziomie umów określających zasady niedyskryminacji w zakresie określonym w art. 3, który objęty jest zakresem rokowań zbiorowych. Umowy takie powinny być zgodne z podstawowymi wymogami określonymi niniejszą dyrektywą oraz odpowiednimi krajowymi środkami wykonawczymi.

Artykuł 12

Dialog z organizacjami pozarządowymi

Państwa Członkowskie zachęcają do prowadzenia dialogu z właściwymi organizacjami pozarządowymi, które mają, zgodnie z krajową praktyką i ustawodawstwem, uzasadniony interes w uczestniczeniu w walce z dyskryminacją ze względu na pochodzenie rasowe lub etniczne, w celu wspierania zasady równego traktowania.

ROZDZIAŁ III

ORGANY WSPIERAJĄCE RÓWNE TRAKTOWANIE

Artykuł 13

1. Państwa Członkowskie wyznaczają organ lub organy mające wspierać równe traktowanie wszystkich osób bez dyskryminacji ze względu na pochodzenie rasowe lub etniczne. Mogą one wchodzić w skład organów zajmujących się na skalę krajową obroną praw człowieka lub ochroną praw jednostek.

2. Państwa Członkowskie zapewniają, że kompetencje tych organów obejmują:

— bez uszczerbku dla praw ofiar i stowarzyszeń, organizacji i innych osób prawnych określonych w art. 7 ust. 2, świadczenie niezależnej pomocy ofiarom dyskryminacji we wnoszeniu skarg dotyczących dyskryminacji,

— prowadzenie niezależnych badań nad dyskryminacją,

— publikowanie niezależnych sprawozdań i wydawanie zaleceń na temat wszystkich problemów związanych z tego rodzaju dyskryminacją.

ROZDZIAŁ IV

PRZEPISY KOŃCOWE

Artykuł 14

Zgodność

Państwa Członkowskie podejmują niezbędne środki w celu:

a) uchylenia przepisów ustawowych, wykonawczych i administracyjnych sprzecznych z zasadą równego traktowania;

b) unieważnienia bądź zmiany przepisów sprzecznych z zasadą równego traktowania występujących w umowach lub układach zbiorowych, regulaminach przedsiębiorstw, jak również w statutach stowarzyszeń prowadzących działalność zarobkową lub nie prowadzących takiej działalności, wolnych zawodów i organizacji pracowników i pracodawców.

Artykuł 15

Sankcje

Państwa Członkowskie ustanawiają zasady stosowania sankcji obowiązujących wobec naruszeń przepisów krajowych przyjętych na mocy niniejszej dyrektywy i podejmują wszelkie niezbędne środki dla zapewnienia ich stosowania. Sankcje, które mogą nakazywać wypłacenie odszkodowania ofierze, muszą być skuteczne, proporcjonalne i odstraszające. Do dnia 19 lipca 2003 r. Państwa Członkowskie powiadamiają o tych przepisach Komisję, a o wszystkich późniejszych ich zmianach tak szybko, jak to możliwe.

Artykuł 16

Wykonanie

Państwa Członkowskie do dnia 19 lipca 2003 r. przyjmą przepisy ustawowe, wykonawcze i administracyjne niezbędne do wykonania niniejszej dyrektywy lub mogą powierzyć partnerom społecznym, na ich wspólny wniosek, wykonanie niniejszej dyrektywy, w zakresie przepisów wynikających z układów zbiorowych. W tym wypadku Państwo Członkowskie zapewnia, że do dnia 19 lipca 2003 r. partnerzy społeczni wprowadzą w drodze umowy niezbędne przepisy, przy czym Państwo Członkowskie musi podjąć wszelkie niezbędne działania umożliwiające im w każdym czasie osiągnięcie rezultatów określonych w niniejszej dyrektywie. Państwa Członkowskie niezwłocznie powiadamiają o tym Komisję.

Przepisy przyjęte przez Państwa Członkowskie zawierają odniesienie do niniejszej dyrektywy lub odniesienie takie towarzyszy ich urzędowej publikacji. Metody dokonywania takiego odniesienia określane są przez Państwa Członkowskie.

Artykuł 17

Sprawozdanie

1. Do dnia 19 lipca 2005 r., a następnie raz na pięć lat Państwa Członkowskie przekazują Komisji wszelkie informacje niezbędne do sporządzenia przez Komisję, przeznaczonego dla Parlamentu Europejskiego i Rady, sprawozdania dotyczącego stosowania niniejszej dyrektywy.

2. Sprawozdanie Komisji uwzględnia odpowiednio opinię Europejskiego Centrum Monitorowania Rasizmu i Ksenofobii, jak również stanowisko partnerów społecznych i właściwych organizacji pozarządowych. Zgodnie z zasadą systematycznej rejestracji problemów równości szans kobiet i mężczyzn, sprawozdanie to zawiera, między innymi, ocenę wpływu podjętych działań w odniesieniu do mężczyzn i kobiet. W świetle uzyskanych informacji, w sprawozdaniu tym zawarte są, o ile zaistnieje taka potrzeba, propozycje zmian i uaktualniania niniejszej dyrektywy.

Artykuł 18

Wejście w życie

Niniejsza dyrektywa wchodzi w życie z dniem jej opublikowania w *Dzienniku Urzędowym Wspólnot Europejskich*.

Artykuł 19

Adresaci

Niniejsza dyrektywa skierowana jest do Państw Członkowskich.

Sporządzono w Luksemburgu, dnia 29 czerwca 2000 r.

W imieniu Rady

M. ARCANJO

Przewodniczący

WYROK TRYBUNAŁU (druga izba)

z dnia 19 kwietnia 2012 r.(*)

Dyrektywy 2000/43/WE, 2000/78/WE i 2006/54/WE – Równe traktowanie w zakresie zatrudnienia i pracy – Pracownik, który twierdzi, że spełnia warunki określone w ogłoszeniu o rekrutacji – Prawo tego pracownika do uzyskania informacji, czy pracodawca zatrudnił innego kandydata

W sprawie C-415/10

mającej za przedmiot wniosek o wydanie, na podstawie art. 267 TFUE, orzeczenia w trybie prejudycjalnym, złożony przez Bundesarbeitsgericht (Niemcy) postanowieniem z dnia 20 maja 2010 r., które wpłynęło do Trybunału w dniu 20 sierpnia 2010 r., w postępowaniu:

Galina Meister

przeciwko

Speech Design Carrier Systems GmbH,

TRYBUNAŁ (druga izba),

w składzie: J.N. Cunha Rodrigues, prezes izby, U. Lõhmus, A. Rosas (sprawozdawca), A. Arabadjiev i C.G. Fernlund, sędziowie,

rzecznik generalny: P. Mengozzi,

sekretarz: K. Malacek, administrator,

uwzględniając procedurę pisemną i po przeprowadzeniu rozprawy w dniu 30 listopada 2011 r.,

rozważywszy uwagi przedstawione:

– w imieniu G. Meister przez R. Wißbara, Rechtsanwalt,

– w imieniu Speech Design Carrier Systems GmbH przez U. Kappelhoff, Rechtsanwältin,

– w imieniu rządu niemieckiego przez T. Henzego oraz J. Möllera, działających w charakterze pełnomocników,

– w imieniu Komisji Europejskiej przez V. Kreuschitza, działającego w charakterze pełnomocnika,

po zapoznaniu się z opinią rzecznika generalnego na posiedzeniu w dniu 12 stycznia 2012 r.,

wydaje następujący

Wyrok

1 Wniosek o wydanie orzeczenia w trybie prejudycjalnym dotyczy wykładni art. 8 ust. 1 dyrektywy Rady 2000/43/WE z dnia 29 czerwca 2000 r. wprowadzającej w życie zasadę równego traktowania osób bez względu na pochodzenie rasowe lub etniczne (Dz.U. L 180, s. 22), art. 10 ust. 1 dyrektywy Rady 2000/78/WE z dnia 27 listopada 2000 r.

ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy (Dz.U. L 303, s. 16) i art. 19 ust. 1 dyrektywy 2006/54/WE Parlamentu Europejskiego i Rady z dnia 5 lipca 2006 r. w sprawie wprowadzenia w życie zasady równości szans oraz równego traktowania kobiet i mężczyzn w dziedzinie zatrudnienia i pracy (Dz.U. L 204, s. 23).

2 Wniosek ten został złożony w ramach sporu pomiędzy G. Meister a Speech Design Carrier Systems GmbH (zwaną dalej „Speech Design") w przedmiocie podniesionej przez G. Meister dyskryminacji ze względu na płeć, wiek i pochodzenie etniczne, która, jej zdaniem, została wobec niej zastosowana w ramach postępowania rekrutacyjnego.

Ramy prawne

Uregulowania Unii

Dyrektywa 2000/43

3 Motyw 15 dyrektywy 2000/43 stanowi, że „ocena faktów, które nasuwają przypuszczenie istnienia bezpośredniej i pośredniej dyskryminacji, należy do sądu krajowego lub innego właściwego organu, zgodnie z zasadami prawa krajowego lub praktyką krajową. Zasady te mogą przewidywać w szczególności, że fakt występowania dyskryminacji pośredniej można udowodnić z wykorzystaniem wszelkich środków, również na podstawie danych statystycznych".

4 Z motywu 21 wspomnianej dyrektywy wynika, że „dostosowanie przepisów dotyczących ciężaru dowodu wymaga, od momentu zaistnienia domniemania dyskryminacji i w przypadkach gdy fakt ten zostanie potwierdzony, skutecznego stosowania zasady równego traktowania, w której ciężar dowodu spoczywa na [stronie pozwanej]".

5 Artykuł 1 tej dyrektywy stanowi:

„Niniejsza dyrektywa ma na celu wyznaczenie ram walki z dyskryminacją ze względu na pochodzenie rasowe lub etniczne oraz wprowadzenie w życie w państwach członkowskich zasady równego traktowania".

6 Artykuł 3 ust. 1 dyrektywy stanowi:

„W granicach kompetencji powierzonych Wspólnocie niniejszą dyrektywę stosuje się do wszystkich osób, zarówno sektora publicznego, jak i prywatnego, włącznie z instytucjami publicznymi, w odniesieniu do:

a) warunków dostępu do zatrudnienia, do prowadzenia działalności na własny rachunek oraz uprawiania zawodu, włączając również kryteria selekcji i warunki rekrutacji, niezależnie od rodzaju działalności i na wszystkich szczeblach hierarchii zawodowej, również w odniesieniu do awansu zawodowego;

[…]".

7 Artykuł 7 ust. 1 dyrektywy 2000/43 stanowi:

„Państwa członkowskie zapewniają, że procedury sądowe i/lub administracyjne, włączając, o ile uznają to za właściwe, procedury pojednawcze, których celem jest doprowadzenie do przestrzegania obowiązków wynikających z niniejszej dyrektywy, są dostępne dla wszystkich osób, które uważają się za pokrzywdzone nieprzestrzeganiem wobec nich zasady równego traktowania, nawet po zakończeniu kontaktów, w których przypuszczalnie miała miejsce dyskryminacja".

8 Artykuł 8 dyrektywy zatytułowany „Ciężar dowodu" brzmi następująco:

„1. Państwa członkowskie podejmują takie środki, które są niezbędne, zgodnie z ich krajowymi systemami prawnymi, w celu zapewnienia, że gdy osoba, która uważa się za pokrzywdzoną nieprzestrzeganiem wobec niej zasady równego traktowania i przedstawia przed sądem lub właściwym organem fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji, to na stronie pozwanej ciąży udowodnienie, że zasada równego traktowania nie została naruszona.

2. Przepisy ust. 1 nie stanowią przeszkody dla ustanawiania przez państwa członkowskie zasad dowodowych korzystniejszych dla powoda.

3. Przepisów ust. 1 nie stosuje się do postępowań karnych.

4. Przepisy ust. 1, 2 i 3 stosuje się również do każdego postępowania wszczętego zgodnie z art. 7 ust. 2.

5. Państwa członkowskie mogą nie stosować przepisów ust. 1 do postępowań, w których ustalenie faktów należy do sądu lub właściwego organu".

Dyrektywa 2000/78

9 Motyw 15 dyrektywy 2000/78 stanowi, że „ocena stanu faktycznego, który nasuwa przypuszczenie o istnieniu bezpośredniej lub pośredniej dyskryminacji, należy do sądu krajowego lub innego właściwego organu, zgodnie z prawem krajowym lub praktyką krajową, które mogą przewidywać, w szczególności, że fakt występowania dyskryminacji pośredniej można udowodnić z wykorzystaniem wszelkich środków, również na podstawie danych statystycznych".

10 W motywie 31 wspomnianej dyrektywy sprecyzowano, że „wprowadzenie przepisów dotyczących ciężaru dowodu wymaga, od momentu zaistnienia domniemania dyskryminacji i, w przypadkach, gdy fakt ten zostanie potwierdzony, skutecznego stosowania zasady równego traktowania, w której ciężar dowodu [spoczywa] na [stronie pozwanej]. Jednakże [strona pozwana] nie ma obowiązku udowodnienia, że powód jest wyznawcą danej religii, posiada określone przekonania, jest w szczególny sposób niepełnosprawny, jest w danym wieku lub określonej orientacji seksualnej".

11 Artykuł 1 dyrektywy stanowi:

„Celem niniejszej dyrektywy jest wyznaczenie ogólnych ram dla walki z dyskryminacją ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w odniesieniu do zatrudnienia i pracy, w celu realizacji w państwach członkowskich zasady równego traktowania".

12 Artykuł 3 ust. 1 dyrektywy stanowi:

„W granicach kompetencji Wspólnoty niniejszą dyrektywę stosuje się do wszystkich osób, zarówno sektora publicznego, jak i prywatnego, włącznie z instytucjami publicznymi, w odniesieniu do:

a) warunków dostępu do zatrudnienia lub pracy na własny rachunek, w tym również kryteriów selekcji i warunków rekrutacji, niezależnie od dziedziny działalności i na wszystkich szczeblach hierarchii zawodowej, również w odniesieniu do awansu zawodowego;

[…]".

13 Artykuł 9 ust. 1 dyrektywy 2000/78 stanowi:

„Państwa członkowskie zapewnią, aby procedury sądowe i/lub administracyjne oraz, w przypadku gdy uznają to za właściwe, procedury pojednawcze, których celem jest doprowadzenie do stosowania zobowiązań wynikających z niniejszej dyrektywy, były dostępne dla wszystkich osób, które uważają się za pokrzywdzone w związku z naruszeniem

wobec nich zasady równego traktowania, nawet po zakończeniu [kontaktów], w których przypuszczalnie miała miejsce dyskryminacja".

14 Artykuł 10 dyrektywy zatytułowany „Ciężar dowodu" stanowi:

„1. Zgodnie z ich krajowymi systemami sądowymi państwa członkowskie podejmują niezbędne środki dla zapewnienia, aby strona pozwana musiała udowodnić, że nie wystąpiło pogwałcenie zasady równego traktowania, w przypadku gdy osoby, które uważają się za pokrzywdzone w związku z nieprzestrzeganiem wobec nich zasady równego traktowania, ustalą przed sądem lub innym właściwym organem fakty, które nasuwają przypuszczenie o zaistnieniu bezpośredniej i pośredniej dyskryminacji.

2. Ustęp 1 nie stanowi przeszkody dla ustanowienia przez państwa członkowskie zasad dowodowych korzystniejszych dla strony skarżącej.

3. Ustęp 1 nie ma zastosowania do postępowań karnych.

4. Przepisy ust. 1, 2 i 3 stosuje się również do każdej procedury sądowej wszczętej zgodnie z art. 9 ust. 2.

5. Państwa członkowskie mogą nie stosować przepisu ust. 1 do procedur sądowych, w których ustalenie okoliczności faktycznych sprawy należy do sądu lub właściwego organu".

Dyrektywa 2006/54

15 Motyw 30 dyrektywy 2006/54 brzmi następująco:

„Przyjęcie przepisów dotyczących ciężaru dowodu odgrywa znaczącą rolę w zapewnieniu, aby zasada równego traktowania była skutecznie egzekwowana. Jak orzekł Trybunał Sprawiedliwości, należy przyjąć przepisy w celu zagwarantowania przeniesienia ciężaru dowodu na pozwanego, jeżeli w sprawie istnieje domniemanie faktyczne wskazujące na wystąpienie dyskryminacji, z wyjątkiem postępowań, w których zadaniem sądu lub innego właściwego organu krajowego jest zbadanie okoliczności faktycznych. Należy jednak zaznaczyć, że ocena faktów, z których można domniemywać, że doszło do bezpośredniej lub pośredniej dyskryminacji, pozostaje w gestii właściwych organów krajowych, zgodnie z prawem lub zwyczajem krajowym. Ponadto do państw członkowskich należy wprowadzenie, na jakimkolwiek właściwym stadium postępowania, zasad dowodowych, które są korzystniejsze dla powoda".

16 Artykuł 1 wspomnianej dyrektywy stanowi:

„Celem niniejszej dyrektywy jest wprowadzenie w życie zasady równości szans oraz równego traktowania kobiet i mężczyzn w dziedzinie zatrudnienia i pracy.

W tym celu zawiera ona przepisy dotyczące wprowadzenia w życie zasady równego traktowania w odniesieniu do:

a) dostępu do zatrudnienia, w tym do awansu zawodowego i szkolenia zawodowego;

[…]".

17 Artykuł 14 ust. 1 dyrektywy stanowi:

„Zakazuje się wszelkiej bezpośredniej i pośredniej dyskryminacji ze względu na płeć w sektorze prywatnym i publicznym, w tym w instytucjach publicznych, w odniesieniu do:

a) warunków dostępu do zatrudnienia, do prowadzenia działalności na własny rachunek oraz wykonywania zawodu, w tym kryteriów selekcji i warunków rekrutacji, niezależnie od rodzaju działalności i na wszystkich szczeblach hierarchii zawodowej, włącznie z awansem zawodowym;

[…]”.

18 Artykuł 17 ust. 1 dyrektywy 2006/54 stanowi:

„Państwa członkowskie zapewniają, aby wszystkie osoby, które uważają się za pokrzywdzone w swoich prawach poprzez niestosowanie do nich zasady równego traktowania, mogły dochodzić swoich roszczeń, wynikających z niniejszej dyrektywy, przed sądem po ewentualnym zwróceniu się do innych właściwych organów, jak również, o ile państwa te uznają to za właściwe, po wykorzystaniu procedury pojednawczej, nawet wówczas gdy zakończeniu uległ stosunek, w ramach którego dyskryminacja miała mieć miejsce”.

19 Artykuł 19 dyrektywy zatytułowany „Ciężar dowodu” brzmi następująco:

„1. Państwa członkowskie podejmą takie działania, które są niezbędne, zgodnie z ich krajowymi systemami sądowymi, w celu zapewnienia, aby – jeżeli osoby, które uznają się za poszkodowane z powodu niezastosowania do nich zasady równego traktowania, uprawdopodobnią przed sądem lub innym właściwym organem okoliczności pozwalające domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji – do pozwanego należało udowodnienie, że nie nastąpiło naruszenie zasady równego traktowania.

2. Ustęp 1 nie stanowi przeszkody, aby państwa członkowskie wprowadziły reguły dowodowe korzystniejsze dla powoda.

3. Państwa członkowskie mogą odstąpić od stosowania ust. 1 do postępowań, w których ustalenie stanu faktycznego należy do sądu lub innego właściwego organu.

4. Ustępy 1, 2 i 3 stosuje się również do:

a) sytuacji objętych art. 141 traktatu [WE] oraz – w zakresie, w jakim dotyczy to dyskryminacji ze względu na płeć – objętych przepisami dyrektyw 92/85/EWG i 96/34/WE;

b) każdego postępowania cywilnego lub administracyjnego, dotyczącego sektora publicznego lub prywatnego, które przewiduje środki zadośćuczynienia zgodnie z prawem krajowym, stosownie do kwestii, o których mowa w lit. a), z wyjątkiem postępowań pozasądowych o charakterze dobrowolnym albo przewidzianych w prawie krajowym.

5. Niniejszego artykułu nie stosuje się do postępowań karnych, chyba że państwa członkowskie postanowią inaczej”.

Uregulowania krajowe

20 Paragraf 1 Allgemeines Gleichbehandlungsgesetz (ogólnej ustawy o równym traktowaniu) z dnia 14 sierpnia 2006 r. (BGBl. 2006 I, s. 1897), w wersji obowiązującej w czasie wystąpienia okoliczności rozpatrywanych przez sąd krajowy (zwanej dalej „AGG”) brzmiał następująco:

„Niniejsza ustawa ma na celu uniemożliwienie lub wyeliminowanie wszelkich nierówności ze względu na rasę lub pochodzenie etniczne, płeć, religię lub wyznanie, niepełnosprawność, wiek lub tożsamość płciową”.

21 Zgodnie z § 3 ust. 1 AGG:

„Dyskryminacja bezpośrednia ma miejsce, gdy z jednego ze względów wskazanych w § 1 osoba traktowana jest mniej przychylnie, niż traktuje się, traktowano lub traktowano by inną osobę w podobnej sytuacji. Dyskryminacja bezpośrednia ze względu na płeć w rozumieniu § 2 ust. 1 pkt 1–4 zachodzi również wówczas, gdy kobieta jest traktowana mniej korzystnie z powodu ciąży lub macierzyństwa”.

22 Paragraf 6 ust. 1 AGG stanowi:

„W rozumieniu niniejszej ustawy pracownikami są:

1) osoby zatrudnione jako pracownicy najemni;

2) osoby zatrudnione dla celów kształcenia zawodowego;

3) osoby, których status, z powodu ich zależności finansowej jest porównywalny ze statusem pracowników najemnych, kategoria ta obejmuje w szczególności osoby wykonujące pracę w domu lub osoby porównywalne.

Za pracowników uważa się również osoby ubiegające się o zatrudnienie, a także osoby, których stosunek pracy uległ zakończeniu".

23 Zgodnie z § 7 ust. 1 AGG nie można dyskryminować pracowników ze względów wymienionych w § 1. Zakaz ten znajduje również zastosowanie, jeżeli osoba dyskryminująca jedynie zakłada w ramach stosowanej dyskryminacji, że zachodzi jeden z powodów wymienionych w § 1.

24 Paragraf 15 ust. 2 AGG stanowi:

„W przypadku wyrządzenia szkody o charakterze niemajątkowym osoba zatrudniona może dochodzić stosownego odszkodowania pieniężnego. W razie odmowy zatrudnienia wysokość odszkodowania nie może przekraczać trzech miesięcznych pensji, jeśli dana osoba nie zostałaby zatrudniona także wówczas, gdyby postępowanie rekrutacyjne zostało przeprowadzone w sposób niedyskryminujący".

25 Paragraf 22 AGG stanowi:

„Jeżeli w toku postępowania jedna ze stron przedstawi wskazówki pozwalające domniemywać, że miało miejsce niekorzystne traktowanie w oparciu o jeden ze względów wymienionych w § 1, ciężar dowodu, że nie doszło do naruszenia przepisów o ochronie przed niekorzystnym traktowaniem spoczywa na drugiej stronie".

Okoliczności faktyczne leżące u podstaw sporu przed sądem krajowym i pytania prejudycjalne

26 Galina Meister urodziła się 7 września 1961 r. i jest pochodzenia rosyjskiego. Posiada rosyjski dyplom inżyniera systemów, którego równoważność z dyplomem wydawanym w Niemczech przez Fachhochschule (placówkę wyższego szkolnictwa zawodowego) została uznana w Niemczech.

27 Speech Design zamieściła w 2006 r. ogłoszenie w prasie w celu rekrutacji „doświadczonego informatyka programisty M/K", na które G. Meister odpowiedziała w dniu 5 października 2006 r., przedstawiając swoją kandydaturę. Pismem z dnia 11 października 2006 r. Speech Design odrzuciła jej kandydaturę bez zaproszenia na rozmowę kwalifikacyjną. Wspomniana spółka krótko po tym opublikowała na stronie internetowej kolejne ogłoszenie o treści podobnej do pierwszego ogłoszenia. W dniu 19 października 2006 r. G. Meister ponownie przedstawiła swoją kandydaturę, lecz Speech Design odrzuciła jej wniosek po raz kolejny, nie zaprosiwszy jej na rozmowę i nie udzieliwszy jakiejkolwiek informacji na temat odrzucenia jej kandydatury.

28 Żaden z dokumentów znajdujących się w posiadaniu Trybunału nie wskazuje na to, że wspomniana spółka uważała, iż poziom kwalifikacji G. Meister nie odpowiadał poziomowi poszukiwanemu w ramach tej procedury rekrutacyjnej.

29 G. Meister uznała, że skoro spełnia warunki wymagane dla zajmowania wspomnianego stanowiska, została potraktowana w sposób mniej korzystny niż inna osoba znajdująca się

w podobnej sytuacji ze względu na jej płeć, wiek i pochodzenie etniczne. W związku z tym wniosła pozew przeciwko Speech Design do Arbeitsgericht, żądając po pierwsze, aby spółka ta zapłaciła na jej rzecz odszkodowanie za dyskryminację w dziedzinie zatrudnienia, i po drugie, aby przedstawiła akta zatrudnionego kandydata, co pozwoliłoby G. Meister wykazać, iż jej kwalifikacje są wyższe.

30 Po oddaleniu pozwu w pierwszej instancji G. Meister wniosła odwołanie od wyroku oddalającego pozew do Landesarbeitsgericht, który to sąd również oddalił jej żądania. Następnie wniosła ona skargę kasacyjną „Revision" do Bundesarbeitsgericht. Sąd ten zastanawia się nad kwestią, czy G. Meister może skorzystać z prawa do uzyskania informacji na podstawie dyrektyw 2000/43, 2000/78 oraz 2006/654 i, w razie uznania, że może, jakie konsekwencje wynikają z odmowy udzielenia informacji przez Speech Design.

31 W tej sytuacji Bundesarbeitsgericht postanowił zawiesić postępowanie i zwrócić się do Trybunału z następującymi pytaniami prejudycjalnymi:

„1) Czy art. 19 ust. 1 dyrektywy 2006/54 […] i art. 8 ust. 1 dyrektywy 2000/43 […], a także art. 10 ust. 1 dyrektywy 2000/78 […] należy interpretować w ten sposób, że pracownikowi, który twierdzi w sposób przekonujący, że spełnia warunki zajęcia stanowiska oferowanego przez pracodawcę ale jego kandydatura nie została uwzględniona, przysługuje prawo do uzyskania od pracodawcy informacji na temat tego, czy zatrudnił on innego kandydata, a jeżeli tak, na podstawie jakich kryteriów ten inny kandydat został zatrudniony?

2) W przypadku odpowiedzi twierdzącej na pytanie pierwsze:

Czy okoliczność, że pracodawca nie udzielił żądanej informacji, pozwala przypuszczać, że doszło do zarzucanej mu przez pracownika dyskryminacji?".

W przedmiocie pytań prejudycjalnych

W przedmiocie pytania pierwszego

32 W drodze pytania pierwszego sąd krajowy zmierza zasadniczo do ustalenia czy art. 8 ust. 1 dyrektywy 2000/43, art. 10 ust. 1 dyrektywy 2000/78 i art. 19 ust. 1 dyrektywy 2006/54 należy interpretować w ten sposób, że ustanawiają one prawo pracownika, który twierdzi w sposób przekonujący, że spełnia warunki określone przez pracodawcę w ogłoszeniu o rekrutacji, ale jego kandydatura nie została uwzględniona, do uzyskania informacji na temat tego, czy w wyniku procedury rekrutacyjnej zatrudnił on innego kandydata, a jeżeli tak, na podstawie jakich kryteriów ten inny kandydat został zatrudniony.

33 Tytułem wstępu należy przypomnieć, że z art. 3 ust. 1 lit. a) dyrektywy 2000/43, z art. 3 ust. 1 lit. a) dyrektywy 2000/78 a także z art. 1 akapit drugi lit. a) i art. 14 ust. 1 lit. a) dyrektywy 2006/54 wynika, że dyrektywy te znajdują zastosowanie wobec osób poszukujących pracy, włączając w to również kryteria selekcji i warunki rekrutacji odnoszące się do tej pracy.

34 Artykuł 8 ust. 1 dyrektywy 2000/43, art. 10 ust. 1 dyrektywy 2000/78 i art. 19 ust. 1 dyrektywy 2006/54 stanowią zasadniczo, że państwa członkowskie podejmują takie środki, które są niezbędne, zgodnie z ich krajowymi systemami prawnymi, w celu zapewnienia, że gdy osoba, która uważa się za pokrzywdzoną nieprzestrzeganiem wobec niej zasady równego traktowania i przedstawia przed sądem lub innym właściwym organem fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji, to na stronie pozwanej ciąży udowodnienie, że zasada równego traktowania nie została naruszona.

35 Należy stwierdzić, że treść tych przepisów jest prawie taka sama jak treść art. 4 ust. 1 dyrektywy Rady 97/80/WE z dnia 15 grudnia 1997 r. dotyczącej ciężaru dowodu w sprawach dyskryminacji ze względu na płeć (Dz.U. 1998, L 14, s. 6), który to przepis został poddany wykładni Trybunału między innymi w jego wyroku z dnia 21 lipca 2011 r. w sprawie C-104/10 Kelly, dotychczas nieopublikowanym w Zbiorze. Tenże art. 4 ust. 1, który został

uchylony przez dyrektywę 2006/54 ze skutkiem od dnia 15 sierpnia 2009 r., tak jak i całościowo dyrektywa 97/80 poddały bowiem przypadki dyskryminacji ze względu na płeć tym samym rozwiązaniom prawnym w zakresie ciężaru dowodu co dyrektywy rozpatrywane w postępowaniu przed sądem krajowym.

36 Dokonując wykładni art. 4 ust. 1 dyrektywy 97/80 w ww. wyroku w sprawie Kelly, Trybunał orzekł w pkt 30 tego wyroku, że to na osobie, która uważa się za pokrzywdzoną z uwagi na nieprzestrzeganie wobec niej zasady równego traktowania, spoczywa w pierwszej kolejności obowiązek przedstawienia faktów, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji. Jedynie w przypadku, gdy osoba ta przedstawi takie fakty, do osoby pozwanej należy w drugiej kolejności udowodnienie, że nie miało miejsca naruszenie zasady niedyskryminacji.

37 Trybunał orzekł również, iż jak wynika z motywu 15 dyrektywy 2000/43 i z motywu 15 dyrektywy 2000/78 oraz z motywu 30 dyrektywy 2006/54, do sądów krajowych lub innych właściwych organów należy dokonanie, zgodnie z prawem lub zwyczajem krajowym, oceny faktów, z których można wywnioskować, że doszło do bezpośredniej lub pośredniej dyskryminacji (ww. wyrok w sprawie Kelly, pkt 31).

38 Trybunał sprecyzował ponadto, iż celem dyrektywy 97/80, zgodnie z jej art. 1, jest zapewnienie, by działania podjęte przez państwa członkowskie dla realizowania zasady równości traktowania stały się skuteczniejsze, aby umożliwić wszystkim osobom, które uznają się za skrzywdzone, ponieważ nie została wobec nich zastosowana zasada równości traktowania, potwierdzenie ich praw w procesie sądowym po wyczerpaniu możliwości przed innymi właściwymi organami (ww. wyrok w sprawie Kelly, pkt 33). W tym względzie należy zauważyć, że art. 7 ust. 1 dyrektywy 2000/43, art. 9 ust. 1 dyrektywy 2000/78 i art. 17 ust. 1 dyrektywy 2006/54 odwołują się do tej samej zasady.

39 W tych okolicznościach w pkt 34 ww. wyroku w sprawie Kelly Trybunał doszedł do wniosku, że o ile art. 4 ust. 1 dyrektywy 97/80 nie przyznaje osobie, która uważa się za pokrzywdzoną z uwagi na nieprzestrzeganie wobec niej zasady równości traktowania, specyficznego uprawnienia do uzyskania informacji, tak aby była ona w stanie przedstawić zgodnie z tym przepisem „fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji", o tyle nie zmienia to faktu, że nie można wykluczyć, iż odmówienie przez stronę pozwaną dostępu do informacji w kontekście przedstawiania takich faktów może zagrażać realizacji celu wytyczonego przez tę dyrektywę, a zwłaszcza pozbawiać omawiany przepis jego skuteczności (effet utile).

40 Jak zauważono w pkt 35 niniejszego wyroku, dyrektywa 97/80 została uchylona i zastąpiona przez dyrektywę 2006/54. Jednakże, mając na uwadze treść i systematykę artykułów będących przedmiotem niniejszego odesłania prejudycjalnego, nie występują okoliczności, które pozwoliłyby stwierdzić, iż przyjmując dyrektywy 2000/43, 2000/78 i 2006/54, prawodawca Unii miał zamiar dokonania zmiany ustanowionej w art. 4 ust. 1 dyrektywy 97/80 regulacji dotyczącej ciężaru dowodu. W konsekwencji, w ramach przedstawienia faktów, które pozwalają domniemywać istnienie bezpośredniej i pośredniej dyskryminacji, należy ustalić, czy odmowa udzielenia informacji przez stronę pozwaną nie zagraża realizacji celów, do których dążą dyrektywy 2000/43, 2000/78 i 2006/54.

41 Zgodnie z brzmieniem art. 4 ust. 3, odpowiednio, akapity drugi i trzeci TUE, państwa członkowskie w szczególności „podejmują wszelkie środki ogólne lub szczególne właściwe dla zapewnienia wykonania zobowiązań wynikających z traktatów lub aktów instytucji Unii" oraz „powstrzymują się od podejmowania wszelkich środków, które mogłyby zagrażać urzeczywistnieniu celów Unii", w tym wytyczonych przez dyrektywy (zob. wyrok z dnia 28 kwietnia 2011 r. w sprawie C-61/11 PPU El Dridi, dotychczas nieopublikowany w Zbiorze, pkt 56; ww. wyrok w sprawie Kelly, pkt 36).

42 Tak więc to sąd krajowy powinien upewnić się, że odmowa udzielenia informacji przez Speech Design, w ramach przedstawienia faktów, które pozwalają domniemywać istnienie bezpośredniej i pośredniej dyskryminacji wobec G. Meister, nie zagraża realizacji celów, do których dążą dyrektywy 2000/43, 2000/78, a także 2006/54. Powinien on w szczególności wziąć pod uwagę wszystkie okoliczności rozpatrywane w postępowaniu przed sądem

krajowym, aby ustalić, czy istnieją wystarczające wskazówki dla przyjęcia, że fakty pozwalające domniemywać istnienie takiej dyskryminacji zostały udowodnione.

43 W tym względzie należy przypomnieć, że jak wynika z motywu 15 dyrektywy 2000/43 i z motywu 15 dyrektywy 2000/78, a także z motywu 30 dyrektywy 2006/54 prawo krajowe lub praktyki krajowe państw członkowskich mogą przewidywać w szczególności, że fakt występowania dyskryminacji pośredniej można udowodnić z wykorzystaniem wszelkich środków, w tym na podstawie danych statystycznych.

44 Do elementów, które można wziąć pod uwagę, zalicza się między innymi okoliczność, że w odróżnieniu od sytuacji, która była rozpatrywana w postępowaniu zakończonym ww. wyrokiem w sprawie Kelly, wydaje się, iż pracodawca, którego dotyczy postępowanie przed sądem krajowym, odmówił udzielenia G. Meister wszelkich informacji, których ona zażądała.

45 Ponadto, jak zauważył rzecznik generalny w pkt 35–37 swojej opinii, można również wziąć pod uwagę między innymi fakt, że Speech Design nie zakwestionowała, iż poziom kwalifikacji G. Meister odpowiada poziomowi określonemu w ogłoszeniu o rekrutacji, a także nie zakwestionowała okoliczności, że pomimo to pracodawca nie zaprosił jej na rozmowę kwalifikacyjną oraz że nie została ona zaproszona na taką rozmowę również w toku nowego postępowania selekcyjnego dla kandydatów do zajmowania wspomnianego stanowiska.

46 W związku z powyższym na pytanie pierwsze należy odpowiedzieć, że art. 8 ust. 1 dyrektywy 2000/43, art. 10 ust. 1 dyrektywy 2000/78 i art. 19 ust. 1 dyrektywy 2006/54 należy interpretować w ten sposób, że nie ustanawiają one prawa pracownika, który twierdzi w sposób przekonujący, że spełnia warunki określone przez pracodawcę w ogłoszeniu o rekrutacji ale jego kandydatura nie została uwzględniona, do uzyskania informacji na temat tego, czy w wyniku procedury rekrutacyjnej pracodawca zatrudnił innego kandydata.

47 Nie można jednak wykluczyć, że całkowite odmówienie przez stronę pozwaną dostępu do informacji stanowi jeden z elementów, które należy wziąć pod uwagę w kontekście przedstawienia faktów pozwalających domniemywać istnienie bezpośredniej i pośredniej dyskryminacji. Do sądu krajowego należy sprawdzenie, z uwzględnieniem wszystkich okoliczności zawisłego przed nim sporu, czy tak jest w rozpatrywanym przezeń przypadku.

W przedmiocie pytania drugiego

48 Ze względu na odpowiedź udzieloną na pytanie pierwsze nie ma potrzeby udzielenia odpowiedzi na drugie z pytań przedstawionych przez sąd krajowy.

W przedmiocie kosztów

49 Dla stron postępowania przed sądem krajowym niniejsze postępowanie ma charakter incydentalny, dotyczy bowiem kwestii podniesionej przed tym sądem, do niego zatem należy rozstrzygnięcie o kosztach. Koszty poniesione w związku z przedstawieniem uwag Trybunałowi, inne niż poniesione przez strony postępowania przed sądem krajowym, nie podlegają zwrotowi.

Z powyższych względów Trybunał (druga izba) orzeka, co następuje:

Artykuł 8 ust. 1 dyrektywy Rady 2000/43/WE z dnia 29 czerwca 2000 r. wprowadzającej w życie zasadę równego traktowania osób bez względu na pochodzenie rasowe lub etniczne, art. 10 ust. 1 dyrektywy Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy i art. 19 ust. 1 dyrektywy 2006/54/WE Parlamentu Europejskiego i Rady z dnia 5 lipca 2006 r. w sprawie wprowadzenia w życie zasady równości szans oraz równego traktowania kobiet i mężczyzn w dziedzinie zatrudnienia i pracy należy interpretować w ten sposób, że nie ustanawiają one prawa pracownika, który twierdzi w sposób przekonujący, że spełnia warunki określone przez pracodawcę w ogłoszeniu o rekrutacji ale jego

kandydatura nie została uwzględniona, do uzyskania informacji na temat tego, czy w wyniku procedury rekrutacyjnej zatrudnił on innego kandydata.

Nie można jednak wykluczyć, że całkowite odmówienie przez stronę pozwaną dostępu do informacji stanowi jeden z elementów, które należy wziąć pod uwagę w kontekście przedstawienia faktów pozwalających domniemywać istnienie bezpośredniej i pośredniej dyskryminacji. Do sądu krajowego należy sprawdzenie, z uwzględnieniem wszystkich okoliczności zawisłego przed nim sporu, czy tak jest w rozpatrywanym przezeń przypadku.

Podpisy

WYROK TRYBUNAŁU (druga izba)

z dnia 21 lipca 2011 r.(*)

Dyrektywy 76/207/EWG, 97/80/WE i 2002/73/WE – Dostęp to kształcenia zawodowego – Zasada równego traktowania kobiet i mężczyzn – Odrzucenie kandydatury – Dostęp kandydata ubiegającego się o kształcenie zawodowe do informacji dotyczących kwalifikacji innych kandydatów

W sprawie C-104/10

mającej za przedmiot wniosek o wydanie, na podstawie art. 267 TFUE, orzeczenia w trybie prejudycjalnym, złożony przez High Court (Irlandia) postanowieniem z dnia 29 stycznia 2010 r., które wpłynęło do Trybunału w dniu 24 lutego 2010 r., w postępowaniu:

Patrick Kelly

przeciwko

National University of Ireland (University College, Dublin),

TRYBUNAŁ (druga izba),

w składzie: J.N. Cunha Rodrigues, prezes izby, A. Arabadjiev, A. Rosas (sprawozdawca), U. Lõhmus i P. Lindh, sędziowie,

rzecznik generalny: P. Mengozzi,

sekretarz: L. Hewlett, główny administrator,

uwzględniając procedurę pisemną i po przeprowadzeniu rozprawy w dniu 13 stycznia 2011 r.,

rozważywszy uwagi przedstawione:

– przez P. Kelly'ego, osobiście,

– w imieniu National University of Ireland (University College, Dublin) przez M. Bolger, SC, umocowaną przez E. O'Sullivana, solicitor,

– w imieniu rządu niemieckiego przez J. Möllera, działającego w charakterze pełnomocnika,

– w imieniu Komisji Europejskiej przez M. van Beeka oraz N. Yerrell, działających w charakterze pełnomocników,

podjąwszy, po wysłuchaniu rzecznika generalnego, decyzję o rozstrzygnięciu sprawy bez opinii,

wydaje następujący

Wyrok

1 Wniosek o wydanie orzeczenia w trybie prejudycjalnym dotyczy wykładni prawa Unii, a w szczególności art. 4 dyrektywy Rady 76/207/EWG z dnia 9 lutego 1976 r. w sprawie

wprowadzenia w życie zasady równego traktowania kobiet i mężczyzn w zakresie dostępu do zatrudnienia, kształcenia i awansu zawodowego oraz warunków pracy (Dz.U. L 39, s. 40), art. 4 ust. 1 dyrektywy Rady 97/80/WE Rady z dnia 15 grudnia 1997 r. dotyczącej ciężaru dowodu w sprawach dyskryminacji ze względu na płeć (Dz.U. 1998, L 14, s. 6) oraz art. 1 pkt 3 dyrektywy Parlamentu Europejskiego i Rady 2002/73/WE z dnia 23 września 2002 r. zmieniającej dyrektywę 76/207 (Dz.U. L 269, s. 15).

2 Wniosek ten został przedstawiony w ramach sporu toczącego się między P. Kelly'm a National University of Irland (University College, Dublin) (zwanym dalej „UCD") w następstwie odmowy przez ten uniwersytet ujawnienia dokumentów, w ich wersji niezmodyfikowanej, dotyczących procesu selekcji kandydatów ubiegających się o kształcenie zawodowe.

Ramy prawne

Uregulowania Unii

Dyrektywa 76/207

3 Dyrektywa 76/207, obowiązująca w czasie, kiedy miały miejsce okoliczności faktyczne sprawy będące podstawą skargi w przedmiocie dyskryminacji ze względu na płeć, a mianowicie w marcu i kwietniu 2002 r., stanowiła w art. 4:

„Stosowanie zasady równego traktowania w zakresie dostępu do wszystkich typów i poziomów poradnictwa zawodowego, kształcenia zawodowego, zaawansowanego kształcenia zawodowego oraz przekwalifikowania zawodowego zakłada, że państwa członkowskie podejmą niezbędne środki, aby:

a) przepisy ustawowe, wykonawcze i administracyjne sprzeczne z zasadą równego traktowania zostały uchylone;

b) przepisy sprzeczne z zasadą równego traktowania zawarte w układach zbiorowych lub w indywidualnych umowach o pracę, w wewnętrznych regulaminach przedsiębiorstw lub przepisach regulujących wykonywanie wolnych zawodów zostały unieważnione lub mogły zostać uznane za nieważne albo można je było zmienić;

c) nie naruszając autonomii przyznanej w niektórych państwach członkowskich niektórym prywatnym ośrodkom kształcenia, poradnictwo zawodowe, kształcenie zawodowe, zaawansowane kształcenie zawodowe i przekwalifikowanie zawodowe były dostępne, według tych samych kryteriów i na tych samych poziomach, bez dyskryminacji ze względu na płeć".

4 Artykuł 6 tej dyrektywy stanowił:

„Państwa członkowskie wprowadzą do [swo]ich krajowych systemów prawnych środki niezbędne w celu zapewnienia każdej osobie, która czuje się poszkodowana z powodu niezastosowania w stosunku do niej zasady równego traktowania w rozumieniu art. 3, 4 i 5, możliwości dochodzenia swych praw przed sądem, po wyczerpaniu możliwości przed innymi właściwymi organami".

Dyrektywa 2002/73

5 Dyrektywa 76/207 została zmieniona dyrektywą 2002/73, której art. 2 ust. 1 akapit pierwszy stanowi, że państwa członkowskie wprowadzą w życie przepisy ustawowe, wykonawcze i administracyjne niezbędne do wykonania tejże dyrektywy nie później niż do dnia 5 października 2005 r.

6 Dyrektywa 2002/73 skreśla między innymi art. 4 dyrektywy 76/207 i zgodnie ze swym art. 1 pkt 3 nadaje następujące brzmienie art. 3 rzeczonej dyrektywy 76/207:

„Stosowanie zasady równego traktowania oznacza, że nie może istnieć żadna bezpośrednia ani pośrednia dyskryminacja ze względu na płeć w sektorze prywatnym ani publicznym, włączając instytucje publiczne, w odniesieniu do:

[…]

b) dostępu do wszystkich rodzajów i szczebli poradnictwa zawodowego, kształcenia zawodowego, doskonalenia i przekwalifikowywania pracowników, łącznie ze zdobywaniem praktycznych doświadczeń;

[…]

2. W tym celu państwa członkowskie podejmują niezbędne środki, aby zapewnić, że:

a) wszelkie przepisy ustawowe, wykonawcze i administracyjne sprzeczne z zasadą równego traktowania zostaną uchylone;

b) wszelkie przepisy sprzeczne z zasadą równego traktowania włączone do kontraktów lub układów zbiorowych, regulaminów przedsiębiorstw lub zasad regulujących kwestie wolnych zawodów oraz organizacji pracowników i pracodawców zostaną lub mogą zostać uznane za nieważne lub zostaną zmienione".

Dyrektywa 97/80

7 Dyrektywa 97/80, której termin transpozycji wyznaczono na dzień 1 stycznia 2001 r., wprowadza w życie zasady dotyczące ciężaru dowodu w sprawach dyskryminacji ze względu na płeć.

8 Zgodnie z motywem trzynastym tej dyrektywy ocena faktów, z których można wywnioskować, że doszło do bezpośredniej lub pośredniej dyskryminacji, należy do sądów krajowych lub innych kompetentnych organów, zgodnie z prawem lub zwyczajem krajowym.

9 Zgodnie z motywem osiemnastym tej dyrektywy Trybunał Sprawiedliwości Wspólnot Europejskich przyjął, że zasady dotyczące ciężaru dowodu muszą być dostosowane w odniesieniu do niewątpliwych przypadków dyskryminacji oraz że dla skutecznego stosowania zasady równości traktowania ciężar dowodu musi przejść na stronę pozwaną, jeżeli przedstawiony jest dowód takiej dyskryminacji.

10 Zgodnie z art. 1 omawianej dyrektywy jej celem jest zapewnienie, że działania podjęte przez państwa członkowskie dla realizowania zasady równości traktowania staną się skuteczniejsze, aby umożliwić wszystkim osobom, które uznają się za skrzywdzone, ponieważ nie została do nich zastosowana zasada równości traktowania, potwierdzenie ich praw w procesie sądowym po wyczerpaniu możliwości przed innymi właściwymi organami.

11 Zgodnie z art. 3 ust. 1 lit. a) dyrektywy 97/80 dyrektywa ta ma zastosowanie między innymi do sytuacji objętych zakresem dyrektywy 76/207.

12 Artykuł 4 ust. 1 dyrektywy 97/80 ma następujące brzmienie:

„Państwa członkowskie podejmą takie działania, jakie są niezbędne, zgodnie z ich systemami prawnymi, w celu zapewnienia, że jeśli osoby, które uznają się za skrzywdzone, ponieważ nie została do nich zastosowana zasada równości traktowania, przedstawią przed sądem lub innym właściwym organem fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji, zadaniem strony pozwanej będzie udowodnienie, że zasada równości traktowania nie została naruszona".

Uregulowania krajowe

13 Z postanowienia odsyłającego wynika, iż zasady związane z ujawnianiem dokumentów na podstawie art. 57A ust. 6(6) Circuit Cour Rules (regulaminu sądów hrabstwa) odpowiadają

zasadom związanym z udostępnianiem dokumentów („discovery”) i badaniem dokumentów („inspection”) z art. 32 Rules of the Circuit 2001–2006 (regulaminu sądów hrabstwa z 2001–2006 r.) oraz art. 31 Rules of the Superior Courts 1986 (regulaminu sądów wyższej instancji z 1986 r.), ze zmianami.

14 Zgodnie z tymi zasadami wyraża się zgodę na udostępnienie danego dokumentu, jeżeli można wykazać, że dokument ten jest istotny dla kwestii podniesionych w sporze oraz że, między innymi, dokument ten jest niezbędny do sprawiedliwego rozstrzygnięcia sprawy.

15 Bez względu na fakt, że dany dokument jest uważany jednocześnie za istotny i za konieczny, jego okazanie może spotkać się z odmową, zwłaszcza jeżeli dokument ten objęty jest „przywilejem tajemnicy” lub obowiązkiem zachowania poufności.

16 W wypadku gdy zachodzi konflikt między prawem do otrzymania zgody na okazanie dokumentu po jednej stronie a obowiązkiem ochrony poufności bądź utrzymania innego przeciwstawnego obowiązku lub uprawnienia po drugiej stronie, sąd krajowy, do którego wniesiono o rozstrzygnięcie sporu musi wyważyć z jednej strony charakter przedstawionego żądania, jak i stopień podnoszonej poufności ze względami, a z drugiej strony interes publicznego w pełnym ujawnieniu tego dokumentu w ramach administrowania wymiarem sprawiedliwości.

Postępowanie przed sądem krajowym i pytania prejudycjalne

17 P. Kelly jest wykwalifikowanym nauczycielem zamieszkałym w Dublinie.

18 UCD jest uczelnią wyższą. W okresie akademickim obejmującym lata od 2002 do 2004 oferowała ona studia pod nazwą „Master’s degree in Social Science (Social Worker) mode A” [studia magisterskie w zakresie nauk społecznych dla pracowników socjalnych) w module A].

19 W dniu 23 grudnia 2001 r. P. Kelly złożył na omawianym uniwersytecie podanie o przyjęcie go na takie studia. Po zakończeniu procesu selekcji kandydatów został on poinformowany pismem z dnia 15 marca 2002 r., że jego podanie zostało odrzucone.

20 Nie będąc zadowolony z tej decyzji, P. Kelly złożył w kwietniu 2002 r. formalną skargę w przedmiocie dyskryminacji ze względu na płeć do Director of the Equality Tribunal, utrzymując, że posiadał on lepsze kwalifikacje niż najmniej wykwalifikowany kandydat płci żeńskiej, który został przyjęty na wyżej wymienione studia.

21 W dniu 2 listopada 2006 r. Equality Oficer, któremu Director of the Equality Tribunal powierzył rozpatrzenie wniesionej przez P. Kelly’ego skargi, wydał decyzję, zgodnie z którą skarżący nie był w stanie uprawdopodobnić zaistnienia dyskryminacji ze względu na płeć. P. Kelly wniósł odwołanie od tej decyzji do Circuit Court (sądu okręgowego).

22 P. Kelly złożył również w dniu 4 stycznia 2007 r. na podstawie art. 57A ust. 6(6) Circuit Cour Rules, wniosek, który został przekazany do Circuit Court, w którym zażądał on od UCD przedłożenia odpisów wskazanych w tym wniosku dokumentów („disclosure”, zwany dalej „wnioskiem o ujawnienie dokumentów”). Wniosek ten obejmował udostępnienie odpisów zarchiwizowanych podań, odpisów dokumentów załączonych do rzeczonych podań lub w nich zawartych oraz odpisów „kart punktacyjnych” kandydatów, których podania zostały zarchiwizowane.

23 Prezes Circuit Court oddalił wniosek o ujawnienie dokumentów postanowieniem z dnia 12 marca 2007 r. W dniu 14 marca 2007 r. P. Kelly wniósł odwołanie od tego postanowienia do High Court.

24 W dniu 23 kwietnia 2007 r. P. Kelly złożył również do High Court wniosek, w którym zażądał on od tego sądu wystąpienia do Trybunału Sprawiedliwości Wspólnot Europejskich z odesłaniem prejudycjalnym. W dniu 14 marca 2008 r. rzeczony sąd krajowy uznał, iż wystąpienie z takim odesłaniem byłoby przedwczesne, z uwagi na to, że sąd ten nie orzekł

jeszcze w kwestii, czy dostęp do przedmiotowych dokumentów mógłby zostać uzyskany na podstawie prawa krajowego. Po zbadaniu sprawy High Court doszedł do wniosku, że na podstawie tego prawa UCD nie musiał ujawniać w formie niezmodyfikowanej dokumentów, o których uzyskanie wniósł P. Kelly.

25 Mając wątpliwości w kwestii tego, czy oddalenie wniosku o ujawnienie dokumentów jest zgodne bądź niezgodne z prawem Unii, High Court postanowił zawiesić postępowanie w sprawie i zwrócić się do Trybunału z następującymi pytaniami prejudycjalnymi:

„1) Czy art. 4 ust. 1 dyrektywy […] 97/80 […] uprawnia kandydata ubiegającego się o kształcenie zawodowe – który uważa, że odmówiono mu dostępu do kształcenia zawodowego, ponieważ nie zastosowano w stosunku do niego zasady równego traktowania – do uzyskania informacji o odpowiednich kwalifikacjach innych kandydatów na przedmiotowe studia, a w szczególności kandydatów, którym nie odmówiono dostępu do kształcenia zawodowego, tak aby kandydat ten mógł »przedstawić przed sądem lub innym właściwym organem stan faktyczny, z którego można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji«?

2) Czy art. 4 dyrektywy […] 76/207 […] uprawnia kandydata ubiegającego się o kształcenie zawodowe – który uważa, że odmówiono mu dostępu do kształcenia zawodowego »na podstawie takich samych kryteriów« [jak innym kandydatom] oraz że stał się przedmiotem dyskryminacji »ze względu na płeć« w zakresie dostępu do kształcenia zawodowego – do informacji będących w posiadaniu organizatora studiów o odpowiednich kwalifikacjach innych kandydatów na przedmiotowe studia, a w szczególności kandydatów, którym nie odmówiono dostępu do kształcenia zawodowego?

3) Czy art. [1 pkt 3] dyrektywy […] 2002/73 […], który zakazuje »bezpośredniej bądź pośredniej dyskryminacji ze względu na płeć« w zakresie »dostępu« do kształcenia zawodowego uprawnia kandydata ubiegającego się o kształcenie zawodowe – który twierdzi, że stał się przedmiotem dyskryminacji „ze względu na płeć” w zakresie dostępu do kształcenia zawodowego – do informacji będących w posiadaniu organizatora studiów o odpowiednich kwalifikacjach innych kandydatów na przedmiotowe studia, a w szczególności kandydatów, którym nie odmówiono dostępu do kształcenia zawodowego?

4) Czy obowiązek wynikający z art. 267 ust. 3 TFUE ma odmienny charakter w państwie członkowskim, w którym istnieje kontradyktoryjny (w przeciwieństwie do inkwizycyjnego) system prawa, a jeżeli tak to, w jakim zakresie?

5) Czy na jakiekolwiek uprawnienie do uzyskania informacji wynikające z wyżej wymienionych dyrektyw może mieć wpływ funkcjonowanie krajowych bądź [unijnych] reguł dotyczących poufności?”.

W przedmiocie pytań prejudycjalnych

W przedmiocie pytania pierwszego

26 Zadając pierwsze pytanie, sąd krajowy zmierza zasadniczo do ustalenia, czy wykładni art. 4 ust. 1 dyrektywy 97/80 należy dokonywać w ten sposób, że uprawnia on kandydata ubiegającego się o kształcenie zawodowe, który uważa, że odmówiono mu dostępu do takiego kształcenia z uwagi na nieprzestrzeganie zasady równego traktowania, do uzyskania informacji posiadanych przez organizatora rzeczonego kształcenia dotyczących kwalifikacji innych kandytatów ubiegających się o takie kształcenie, tak aby był on w stanie przedstawić zgodnie z omawianym przepisem „fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji”.

Argumentacja stron

27 P. Kelly podnosi, iż art. 4 ust. 1 dyrektywy 97/80 przyznaje osobie, które uznaje się za pokrzywdzoną, ponieważ nie została do niej zastosowana zasada równości traktowania,

prawo do uzyskania dostępu do informacji, które, przy założeniu, że zasada ta niesłusznie nie została wobec niej zastosowana, wykażą lub pomogą jej wykazać przed sądem lub innym właściwym organem krajowym fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji. W odniesieniu do kandydata ubiegającego się o kształcenie zawodowe, który uważa się za pokrzywdzonego z uwagi na nieprzestrzeganie wobec niego omawianej zasady, obejmowałoby to informacje dotyczące kwalifikacji innych kandydatów.

28 Rząd niemiecki utrzymuje, że treść art. 4 ust. 1 dyrektywy 97/80 nie zawiera żadnej wskazówki dotyczącej przyznania prawa do informacji. Przepis ten reguluje, jak podnoszą również UCD i Komisja Europejska, warunki, na których miało miejsce przeniesienie ciężaru dowodu ze strony skarżącej na stronę pozwaną. Ich zdaniem tego typu przeniesienie następuje jedynie w przypadku, gdy dany kandydat przedstawił wcześniej fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji.

Ocena Trybunału

29 Dyrektywa 97/80 stanowi w art. 4 ust. 1, że państwa członkowskie podejmą działania, jakie są niezbędne, zgodnie z ich systemami prawnymi, w celu zapewnienia, że jeśli osoby, które uznają się za skrzywdzone, ponieważ nie została do nich zastosowana zasada równości traktowania, przedstawią przed sądem lub innym właściwym organem fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji, zadaniem strony pozwanej będzie udowodnienie, że zasada równości traktowania nie została naruszona (zob. wyrok z dnia 10 marca 2005 r. w sprawie C-196/02 Nikoloudi, Zb.Orz. s.I-1789, pkt 68).

30 Zatem na osobie, która uważa się za pokrzywdzoną z uwagi na nieprzestrzeganie wobec niej zasady równego traktowania, spoczywa w pierwszej kolejności obowiązek przedstawienia faktów, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji. Jedynie w przypadku gdy osoba ta przedstawi takie fakty, do osoby pozwanej należy w drugiej kolejności udowodnienie, że nie miało miejsca naruszenie zasady niedyskryminacji.

31 W tym zakresie z motywu trzynastego dyrektywy 97/80 wynika, że do sądów krajowych lub innych kompetentnych organów należy dokonanie, zgodnie z prawem lub zwyczajem krajowym, oceny faktów, z których można wywnioskować, że doszło do bezpośredniej lub pośredniej dyskryminacji.

32 W konsekwencji do sądu krajowego lub innego właściwego organu irlandzkiego należy dokonanie zgodnie z prawem irlandzkim lub zwyczajem krajowym oceny, czy P. Kelly przedstawił fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji.

33 Należy jednak sprecyzować, iż celem dyrektywy 97/80, zgodnie z jej art. 1, jest zapewnienie, by działania podjęte przez państwa członkowskie dla realizowania zasady równości traktowania stały się skuteczniejsze, aby umożliwić wszystkim osobom, które uznają się za skrzywdzone, ponieważ nie została do nich zastosowana zasada równości traktowania, potwierdzenie ich praw w procesie sądowym po wyczerpaniu możliwości przed innymi właściwymi organami.

34 Zatem o ile art. 4 ust. 1 omawianej dyrektywy nie przyznaje osobie, która uważa się za pokrzywdzoną z uwagi na nieprzestrzeganie wobec niej zasady równości traktowania, specyficznego uprawnienia do uzyskania informacji, tak aby była ona w stanie przedstawić zgodnie z tym przepisem „fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji”, o tyle nie zmienia to faktu, że nie można wykluczyć, iż odmówienie przez stronę pozwaną dostępu do informacji w kontekście przedstawiania takich faktów może zagrażać realizacji celu wytyczonego przez tę dyrektywę, a tym samym pozbawiać zwłaszcza omawiany przepis jego skuteczności (effet utile).

35 W tym zakresie należy przypomnieć, że państwa członkowskie nie mogą stosować regulowania mogącego zagrozić realizacji celów wytyczonych przez daną dyrektywę i w konsekwencji pozbawić ją jej skuteczności (effet utile) (zob. wyrok z dnia 28 kwietnia 2011 r. w sprawie C-61/11 PPU El Dridi (dotychczas nieopublikowany w Zbiorze, pkt 55).

36 Zgodnie bowiem z brzmieniem art. 4 ust. 3, odpowiednio akapity drugi i trzeci TUE, państwa członkowskie w szczególności „podejmują wszelkie środki ogólne lub szczególne właściwe dla zapewnienia wykonania zobowiązań wynikających z traktatów lub aktów instytucji Unii" oraz „powstrzymują się od podejmowania wszelkich środków, które mogłyby zagrażać urzeczywistnieniu celów Unii", w tym wytyczonych przez dyrektywy (zob. ww. wyrok w sprawie El Dridi, pkt 56).

37 W niniejszej sprawie z postanowienia odsyłającego wynika jednak, że mimo iż prezes Circuit Court oddalił przedstawiony przez P. Kellyego wniosek o ujawnienie dokumentów, to jednak należy stwierdzić, że UCD zaproponował dostarczenie P. Kelly'emu części informacji, o które się ubiegał, co jest kwestią przez niego niekwestionowaną.

38 Należy zatem odpowiedzieć na pytanie pierwsze, że wykładni art. 4 ust. 1 dyrektywy 97/80 należy dokonywać w ten sposób, że nie uprawnia on kandydata ubiegającego się o kształcenie zawodowe, który uważa, że odmówiono mu dostępu do takiego kształcenia z uwagi na nieprzestrzeganie zasady równego traktowania, do uzyskania informacji posiadanych przez organizatora rzeczonego kształcenia dotyczących kwalifikacji innych kandydatów ubiegających się o takie kształcenie, tak aby był on w stanie przedstawić zgodnie z omawianym przepisem „fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji".

39 Nie można jednak wykluczyć, że odmówienie przez stronę pozwaną dostępu do informacji w kontekście przedstawiania takich faktów może zagrozić realizacji celu wytyczonego przez omawianą dyrektywę, a tym samym pozbawić zwłaszcza art. 4 ust. 1 tejże dyrektywy jego skuteczności (effet utile). Do sądu krajowego należy weryfikacja, czy tak jest w przypadku sprawy w postępowaniu głównym.

W przedmiocie pytań drugiego i trzeciego

40 Zadając pytania drugie i trzecie, które należy zbadać łącznie, sąd krajowy zmierza zasadniczo do ustalenia, czy wykładni art. 4 dyrektywy 76/207 lub art. 1 pkt 3 dyrektywy 2002/73 należy dokonywać w ten sposób, że uprawniają one kandydata ubiegającego się o kształcenie zawodowe do uzyskania informacji posiadanych przez organizatora rzeczonego kształcenia dotyczących kwalifikacji innych kandydatów ubiegających się o takie kształcenie, zarówno dlatego że kandydat ten uważa, iż nie miał dostępu do rzeczonego kształcenia „na podstawie takich samych kryteriów" jak inni kandydaci oraz stał się przedmiotem dyskryminacji ze względu na płeć, o której mowa w tymże art. 4, jak i dlatego że kandydat ten twierdzi, że stał się przedmiotem dyskryminacji ze względu na płeć, o której mowa w omawianym art. 1 pkt 3, jeżeli chodzi o dostęp do tego kształcenia zawodowego.

Argumentacja stron

41 P. Kelly uważa, iż art. 4 dyrektywy 76/207 oraz art. 1 pkt 3 dyrektywy 2002/73 uprawniają tego, kto uważa, że odmówiono mu dostępu do kształcenia zawodowego z powodu dyskryminacji ze względu na płeć, do otrzymania informacji dotyczących kwalifikacji innych kandydatów ubiegających się o przedmiotowe kształcenie zawodowe.

42 Rząd niemiecki i Komisja podnoszą, że omawiane przepisy są przepisami materialnymi dotyczącymi zakazu dyskryminacji ze względu na płeć i że nie obejmują one kwestii przepisów proceduralnych. Uważają oni, iż przepisy te nie są w sposób wystarczająco konkretny sformułowane, aby uznać, że wynika z nich specyficzne uprawnienie, takie jak uprawnienie do uzyskania informacji.

Ocena Trybunału

43 Z treści art. 4 dyrektywy 76/207 lub art. 1 pkt 3 dyrektywy 2002/73 nie wynika, by kandydat ubiegający się o kształcenie zawodowe był uprawniony do uzyskania informacji posiadanych przez organizatora takiego kształcenia dotyczących kwalifikacji innych ubiegających się o takie kształcenie kandydatów.

44 Artykuł 4 lit. c) dyrektywy 76/207 przewiduje bowiem, że stosowanie zasady równego traktowania w zakresie dostępu do wszystkich typów i poziomów kształcenia zawodowego zakłada, że państwa członkowskie podejmą niezbędne środki, aby bez naruszania autonomii przyznanej w niektórych państwach członkowskich niektórym prywatnym ośrodkom kształcenia kształcenie zawodowe było dostępne, według tych samych kryteriów i na tych samych poziomach, bez dyskryminacji ze względu na płeć.

45 Jeżeli chodzi o art. 1 pkt 3 dyrektywy 2002/73 to stanowi on, że stosowanie zasady równego traktowania oznacza, że nie może istnieć żadna bezpośrednia ani pośrednia dyskryminacja ze względu na płeć w sektorze prywatnym ani publicznym, włączając instytucje publiczne, w odniesieniu do dostępu do wszystkich rodzajów i szczebli poradnictwa zawodowego, kształcenia zawodowego, doskonalenia i przekwalifikowywania pracowników, łącznie ze zdobywaniem praktycznych doświadczeń. W tym celu państwa członkowskie podejmują niezbędne środki, aby zapewnić, że wszelkie przepisy ustawowe, wykonawcze i administracyjne sprzeczne z zasadą równego traktowania zostaną uchylone.

46 Celem omawianych przepisów jest bowiem wprowadzenie w życie stosowania zasady równego traktowania jeżeli chodzi o dostęp do kształcenia, lecz przepisy te, zgodnie z art. 288 akapit trzeci TFUE, pozostawiają organom krajowym swobodę jeżeli chodzi o wybór formy i metod podjęcia niezbędnych środków, aby zapewnić, że „wszelkie przepisy ustawowe, wykonawcze i administracyjne" sprzeczne z omawianą zasadą zostaną uchylone.

47 Zatem nie można wywieść z rzeczonych przepisów szczególnego obowiązku przyznania kandydatowi ubiegającemu się o kształcenie zawodowe dostępu do informacji dotyczących kwalifikacji innych ubiegających się o takie kształcenie kandydatów.

48 Należy zatem odpowiedzieć na pytania drugie i trzecie, że wykładni art. 4 dyrektywy 76/207 lub art. 1 pkt 3 dyrektywy 2002/73 należy dokonywać w ten sposób, że nie uprawniają one kandydata ubiegającego się o kształcenie zawodowe do uzyskania informacji posiadanych przez organizatora rzeczonego kształcenia dotyczących kwalifikacji innych kandydatów na takie studia ani dlatego że kandydat ten uważa, iż nie miał dostępu do rzeczonego kształcenia „na podstawie takich samych kryteriów" jak inni kandydaci oraz stał się przedmiotem dyskryminacji ze względu na płeć, o której mowa w tymże art. 4, ani też dlatego że kandydat ten twierdzi, że stał się przedmiotem dyskryminacji ze względu na płeć, o której mowa w omawianym art. 1 pkt 3 jeżeli chodzi o dostęp do tego kształcenia zawodowego.

W przedmiocie pytania piątego

49 Zadając pytanie piąte, które należy zbadać przed pytaniem czwartym, sąd krajowy zmierza do ustalenia, czy na jakiekolwiek uprawnienie do uzyskania informacji wynikające z dyrektyw 76/207, 97/80 i 2002/73 mogą mieć wpływ unijne lub krajowe reguły dotyczące poufności.

50 Mając na uwadze odpowiedź udzieloną na trzy pierwsze pytania i z tego względu, że w ramach postępowania określonego w art. 267 TFUE Trybunał nie jest właściwy do dokonywania wykładni prawa krajowego, ponieważ zadanie to należy wyłącznie do sądu krajowego (zob. wyroki: z dnia 7 września 2006 r. w sprawie C-53/04 Marrosu i Sardino, Zb. Orz. s. I-7213, pkt 54; z dnia 18 listopada 2010 r. w sprawach połączonych C-250/09 i C-268/09 Georgiev, Zb.Orz. s. I-11869, pkt 75), pytanie piąte należy zrozumieć w ten sposób, że sąd krajowy zmierza zasadniczo do ustalenia, czy na ewentualne prawo powołania się na jedną z przytaczanych w trzech pierwszych pytaniach dyrektyw, po to aby uzyskać informacje będące w posiadaniu organizatora kształcenia zawodowego dotyczące kwalifikacji kandydatów ubiegających się o takie kształcenie, mogą mieć wpływ przepisy prawa Unii dotyczące poufności.

Argumentacja stron

51 P. Kelly uważa, że na prawo przyznane na podstawie prawnie wiążącego aktu Unii, w tym dyrektywy, tak jak są one zdefiniowane w art. 288 akapit trzeci TFUE, mogą mieć wpływ nie przepisy krajowe czy ich wprowadzenie w życie, lecz jedynie inne prawnie wiążące akty Unii.

52 UCD oraz rząd niemiecki uważają, że na pytanie to należy odpowiedzieć jedynie posiłkowo, ponieważ uprawnienie do uzyskania informacji, jakie zostało określone przez skarżącego w postępowaniu przed sądem krajowym, nie istnieje zgodnie z art. 4 dyrektywy 76/207 i art. 1 pkt 3 dyrektywy 2002/73. Jednakże nawet gdyby Trybunał miał dojść do wniosku, że te przepisy przyznają takie uprawnienie P. Kelly'emu, poufność, która jest pojęciem uznanym przez prawo Unii i usankcjonowanym w kilku jego aktach, miałaby pierwszeństwo przed tym uprawnieniem do uzyskania informacji.

Ocena Trybunału

53 Należy na wstępie przypomnieć, iż Trybunał orzekł w pkt 38 niniejszego wyroku, że art. 4 ust. 1 dyrektywy 97/80 nie uprawnia kandydata ubiegającego się o kształcenie zawodowe, który uważa, że odmówiono mu dostępu do takiego kształcenia z uwagi na nieprzestrzeganie zasady równego traktowania, do uzyskania informacji posiadanych przez organizatora rzeczonego kształcenia dotyczących kwalifikacji innych kandydatów ubiegających się o takie kształcenie, tak aby był on w stanie przedstawić zgodnie z omawianym przepisem „fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji".

54 Jednak Trybunał również orzekł w pkt 39 tego wyroku, iż nie można wykluczyć, że odmówienie przez stronę pozwaną dostępu do informacji w kontekście przedstawiania takich faktów może zagrozić realizacji celu wytyczonego przez dyrektywę 97/80, a tym samym pozbawić zwłaszcza omawiany przepis jego skuteczności (effet utile).

55 Dokonując oceny takich okoliczności, sądy krajowe lub inne kompetentne organy winny wziąć pod uwagę reguły dotyczące poufności wynikające z takich aktów prawa Unii jak dyrektywa 95/46/WE Parlamentu Europejskiego i Rady z dnia 24 października 1995 r. w sprawie ochrony osób fizycznych w zakresie przetwarzania danych osobowych i swobodnego przepływu tych danych (Dz.U. L 281, s. 31) i dyrektywa 2002/58/WE Parlamentu Europejskiego i Rady z dnia 12 lipca 2002 r. dotycząca przetwarzania danych osobowych i ochrony prywatności w sektorze łączności elektronicznej (dyrektywa o prywatności i łączności elektronicznej) (Dz.U. L 201, s. 37), zmieniona dyrektywą 2009/136/WE Parlamentu Europejskiego i Rady z dnia 25 listopada 2009 r. (Dz.U. L 337, s. 11). Ochrona danych osobowych jest również przewidziana w art. 8 Karty praw podstawowych Unii Europejskiej.

56 Zatem na pytanie piąte należy odpowiedzieć, że w przypadku gdy kandydat ubiegający się kształcenie zawodowe może powołać się na dyrektywę 97/80, aby uzyskać informacje będące w posiadaniu organizatora tego kształcenia dotyczące kwalifikacji innych ubiegających się o to kształcenie kandydatów, na to prawo dostępu do informacji mogą mieć wpływ normy prawa Unii dotyczące poufności.

W przedmiocie pytania czwartego

57 Zadając pytanie czwarte, sąd krajowy zmierza do ustalenia, czy charakter obowiązku przewidzianego w art. 267 akapit trzeci TFUE ulega zmianie w zależności od tego, czy w danym państwie członkowskim funkcjonuje kontradyktoryjny system prawa, czy też inkwizycyjny system prawa, a jeżeli tak, to w jakim zakresie.

Argumentacja stron

58 P. Kelly podnosi, że zakres obowiązku występowania do Trybunału z pytaniami prejudycjalnymi przez sąd krajowy orzekający w ramach kontradyktoryjnego systemu prawnego jest szerszy niż w przypadku sądu w państwie członkowskim, w którym funkcjonuje inkwizycyjny system prawny, ze względu na to, że to strony, a nie sam sąd, dyktują formę, treść i rytm postępowania w inkwizycyjnym systemie prawa. Zatem w takim systemie sąd krajowy nie może dokonać merytorycznej zmiany kwestii podniesionej przez stronę czy też przedłożyć Trybunałowi własnej opinii dotyczącej sposobu, w jaki kwestia ta powinna być rozpatrzona.

59 UCD, rząd niemiecki i Komisja podzielają opinię, że charakter obowiązku przewidzianego w art. 267 ust. 3 TFUE nie jest uzależniony od specyficznych cech charakterystycznych

systemu prawnego państw członkowskich. Ponadto z wyroku z dnia 6 października 1982 w sprawie 283/81 Cilfit i in., Rec. s. 3415, wynika, że na sądzie krajowym spoczywa obowiązek postanowienia, czy i w danym przypadku – w jaki sposób należy zadać pytania prejudycjalne.

Ocena Trybunału

60 Z utrwalonego orzecznictwa Trybunału wynika, że art. 267 TFUE ustanawia mechanizm odesłania prejudycjalnego, który ma na celu zapobieżenie rozbieżnościom w wykładni prawa Unii, które ma być stosowane przez sądy krajowe, i służy zapewnieniu takiego stosowania, stwarzając sądowi krajowemu możliwość wyeliminowania trudności związanych z wymogiem nadania prawu Unii pełnej skuteczności w ramach systemów sądowniczych państw członkowskich (zob. podobnie opinia 1/09 z dnia 8 marca 2011 r., Zb.Orz. s. I-2099, pkt 83 i przytoczone tam orzecznictwo).

61 Artykuł 267 TFUE upoważnia bowiem, a w niektórych przypadkach zobowiązuje, sądy krajowe do wystąpienia z odesłaniem prejudycjalnym, gdy sąd stwierdzi bądź to z urzędu, bądź to na wniosek stron, że do meritum sprawy zalicza się kwestia wchodząca w zakres akapitu pierwszego tego postanowienia. Wynika z tego, że sądy krajowe mają jak najszersze możliwości jeśli chodzi o wystąpienie do Trybunału, jeśli uznają, że w zawisłej przed nimi sprawie pojawiły się pytania związane z wykładnią lub oceną przepisów prawa Unii wymagające rozstrzygnięcia z ich strony (zob. zwłaszcza wyroki: z dnia 16 grudnia 2008 r. w sprawie C-210/06 Cartesio, Zb.Orz. s. I-9641, pkt 88; a także z dnia 22 czerwca 2010 r. w sprawach połączonych C-188/10 i C-189/10 Melki i Abdeli, Zb.Orz. s. I-5667, pkt 41).

62 Ponadto Trybunał orzekł już, że system ustanowiony na mocy art. 267 TFUE w celu zapewnienia spójności wykładni prawa Unii w państwach członkowskich wprowadza bezpośrednią współpracę między Trybunałem a sądami krajowymi w drodze procedury przebiegającej bez inicjatywy stron (zob. zwłaszcza ww. wyrok w sprawie Cartesio, pkt 90).

63 W tym zakresie odesłanie prejudycjalne opiera się na dialogu pomiędzy sądami, którego podjęcie zależy wyłącznie od dokonanej przez sąd krajowy oceny istotnego znaczenia i konieczności takiego odesłania (ww. wyrok w sprawie Cartesio, pkt 91).

64 Zatem o ile do sądu krajowego należy ocena, czy aby rozstrzygnąć zawisły przed nim spór, zachodzi potrzeba dokonania wykładni normy prawa Unii, zgodnie z przewidzianym w art. 267 TFUE mechanizmem proceduralnym, o tyle do tego właśnie sądu krajowego należy zadecydowanie, w jaki sposób pytania te powinny zostać sformułowane.

65 O ile rzeczony sąd może wezwać strony toczącego się przed nim sporu do przedstawienia ich sugestii co do tego, jak pytania prejudycjalne mogą zostać ostatecznie sformułowane, o tyle nie zmienia to faktu, że to na nim jedynym spoczywa obowiązek podjęcia ostatecznej decyzji w kwestii zarówno formy, jak i treści tych pytań.

66 W konsekwencji na pytanie czwarte należy odpowiedzieć, że obowiązek przewidziany w art. 267 ust. 3 TFUE nie ulega zmianie w zależności od tego, czy w danym państwie członkowskim funkcjonuje kontradyktoryjny, czy też inkwizycyjny system prawa.

W przedmiocie kosztów

67 Dla stron postępowania przed sądem krajowym niniejsze postępowanie ma charakter incydentalny, dotyczy bowiem kwestii podniesionej przed tym sądem; do niego zatem należy rozstrzygnięcie o kosztach. Koszty poniesione w związku z przedstawieniem uwag Trybunałowi, inne niż poniesione przez strony postępowania przed sądem krajowym, nie podlegają zwrotowi.

Z powyższych względów Trybunał (druga izba) orzeka, co następuje:

1) **Wykładni art. 4 ust. 1 dyrektywy Rady 97/80/WE Rady z dnia 15 grudnia 1997 r. dotyczącej ciężaru dowodu w sprawach dyskryminacji ze względu na płeć należy dokonywać w ten sposób, że nie uprawnia on kandydata ubiegającego się o kształcenie zawodowe, który uważa, że odmówiono mu dostępu do takiego kształcenia z uwagi na nieprzestrzeganie zasady równego traktowania, do uzyskania informacji posiadanych przez organizatora rzeczonego kształcenia dotyczących kwalifikacji innych kandydatów ubiegających się o takie kształcenie, tak aby był on w stanie przedstawić zgodnie z omawianym przepisem „fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji".**

Nie można jednak wykluczyć, że odmówienie przez stronę pozwaną dostępu do informacji w kontekście przedstawiania takich faktów może zagrozić realizacji celu wytyczonego przez omawianą dyrektywę, a tym samym pozbawić zwłaszcza art. 4 ust. 1 tejże dyrektywy jego skuteczności (effet utile). Do sądu krajowego należy weryfikacja, czy tak jest w przypadku sprawy w postępowaniu głównym.

2) **Wykładni art. 4 dyrektywy Rady 76/207/EWG z dnia 9 lutego 1976 r. w sprawie wprowadzenia w życie zasady równego traktowania kobiet i mężczyzn w zakresie dostępu do zatrudnienia, kształcenia i awansu zawodowego oraz warunków pracy lub art. 1 pkt 3 dyrektywy Parlamentu Europejskiego i Rady 2002/73/WE z dnia 23 września 2002 r. zmieniającej dyrektywę 76/207 należy dokonywać w ten sposób, że nie uprawniają one kandydata ubiegającego się o kształcenie zawodowe do uzyskania informacji posiadanych przez organizatora rzeczonego kształcenia dotyczących kwalifikacji innych kandydatów na takie studia ani dlatego że kandydat ten uważa, iż nie miał dostępu do rzeczonego kształcenia „na podstawie takich samych kryteriów" jak inni kandydaci oraz żstał się przedmiotem dyskryminacji ze względu na płeć, o której mowa w tymże art. 4, ani dlatego że kandydat ten twierdzi, że stał się przedmiotem dyskryminacji ze względu na płeć, o której mowa w omawianym art. 1 pkt 3 jeżeli chodzi o dostęp do tego kształcenia zawodowego.**

3) **W przypadku gdy kandydat ubiegający się kształcenie zawodowe może powołać się na dyrektywę 97/80, aby uzyskać informacje będące w posiadaniu organizatora tego kształcenia dotyczące kwalifikacji innych ubiegających się o to kształcenie kandydatów, na to prawo dostępu mogą mieć wpływ normy prawa Unii dotyczące poufności.**

4) **Obowiązek przewidziany w art. 267 ust. 3 TFUE nie ulega zmianie w zależności od tego, czy w danym państwie członkowskim funkcjonuje kontradyktoryjny, czy też inkwizycyjny system prawa.**

Podpisy

WYROK TRYBUNAŁU (wielka izba)

z dnia 8 marca 2011 r.(*)

Środowisko naturalne – Konwencja z Aarhus – Udział społeczeństwa w podejmowaniu decyzji oraz dostęp do wymiaru sprawiedliwości w sprawach dotyczących środowiska – Bezpośrednia skuteczność

W sprawie C-240/09

mającej za przedmiot wniosek o wydanie, na podstawie art. 234 WE, orzeczenia w trybie prejudycjalnym, złożony przez Najvyšší súd Slovenskej republiky (Słowacja) postanowieniem z dnia 22 czerwca 2009 r., które wpłynęło do Trybunału w dniu 3 lipca 2009 r., w postępowaniu:

Lesoochranárske zoskupenie VLK

przeciwko

Ministerstvo životného prostredia Slovenskej republiky,

TRYBUNAŁ (wielka izba),

w składzie: V. Skouris, prezes, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.C. Bonichot (sprawozdawca), K. Schiemann i D. Šváby, prezesi izb, A. Rosas, R. Silva de Lapuerta, U. Lõhmus, A. Ó Caoimh, M. Safjan i M. Berger, sędziowie,

rzecznik generalny: E. Sharpston,

sekretarz: R. Şereş, administrator,

uwzględniając procedurę pisemną i po przeprowadzeniu rozprawy w dniu 4 maja 2010 r.,

rozważywszy uwagi przedstawione:

– w imieniu Lesoochranárske zoskupenie VLK przez I. Rajtákovą, advokátka,

– w imieniu rządu słowackiego przez B. Ricziovą, działającą w charakterze pełnomocnika,

– w imieniu rządu niemieckiego przez M. Lummę oraz B. Kleina, działających w charakterze pełnomocników,

– w imieniu rządu greckiego przez G. Karipsiadisa oraz T. Papadopoulou, działających w charakterze pełnomocników,

– w imieniu rządu francuskiego przez G. de Bergues'a oraz S. Meneza, działających w charakterze pełnomocników,

– w imieniu rządu polskiego przez M. Dowgielewicza, D. Krawczyka oraz M. Nowackiego, działających w charakterze pełnomocników,

– w imieniu rządu fińskiego przez J. Heliskoskiego oraz M. Pere, działających w charakterze pełnomocników,

– w imieniu rządu szwedzkiego przez A. Falk, działającą w charakterze pełnomocnika,

– w imieniu rządu Zjednoczonego Królestwa przez L. Seeborutha oraz J. Stratford, działających w charakterze pełnomocników,

– w imieniu Komisji Europejskiej przez P. Olivera oraz A. Tokára, działających w charakterze pełnomocników,

po zapoznaniu się z opinią rzecznika generalnego na posiedzeniu w dniu 15 lipca 2010 r.,

wydaje następujący

Wyrok

1 Niniejszy wniosek o wydanie orzeczenia w trybie prejudycjalnym dotyczy wykładni art. 9 ust. 3 Konwencji o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do sprawiedliwości w sprawach dotyczących środowiska, zatwierdzonej w imieniu Wspólnoty Europejskiej decyzją Rady 2005/370/WE z dnia 17 lutego 2005 r. (Dz.U. L 124, s. 1, zwanej dalej „konwencją z Aarhus").

2 Wniosek ten został złożony w ramach sporu między Lesoochranárske zoskupenie VLK (zwanym dalej „zoskupenie"), stowarzyszeniem utworzonym zgodnie z prawem słowackim w celu ochrony środowiska, a Ministerstvo životného prostredia Slovenskej republiky (ministerstwem ochrony środowiska Republiki Słowackiej, zwanym dalej „Ministerstvo životného prostredia") w przedmiocie wniosku stowarzyszenia o uznanie jego statusu „strony" postępowania administracyjnego dotyczącego przyznania odstępstw od systemu ochrony takich gatunków jak niedźwiedź brunatny, dostępu do chronionych obszarów naturalnych czy też stosowania produktów chemicznych na tych obszarach.

Ramy prawne

Prawo międzynarodowe

3 Artykuł 9 konwencji z Aarhus stanowi:

„1. Każda ze stron zapewni, w ramach krajowego porządku prawnego, że każda osoba, która stwierdzi, że jej żądanie udostępnienia informacji zgodnie z postanowieniami artykułu 4 pozostało nierozpatrzone, niesłusznie odrzucone w całości lub w części, załatwione nieodpowiednio lub w inny sposób potraktowane niezgodnie z postanowieniami tego artykułu, będzie miała dostęp do procedury odwoławczej przed sądem lub innym niezależnym i bezstronnym organem powołanym z mocy ustawy.

W sytuacji gdy strona zapewni takie odwołanie do sądu, umożliwi też takiej osobie dostęp do szybkiej procedury prawnej, bezpłatnej lub niedrogiej, umożliwiającej ponowne rozpatrzenie sprawy przez władzę publiczną lub rewizję przez niezależny i bezstronny organ inny niż sąd.

Ostateczne rozstrzygnięcia regulowane niniejszym ustępem 1 są wiążące dla władzy publicznej posiadającej informacje. Uzasadnienie podaje się pisemnie, przynajmniej wtedy, gdy odmawia się dostępu do informacji na mocy tego ustępu.

2. Każda ze stron zapewni, w ramach krajowego porządku prawnego, że członkowie zainteresowanej społeczności:

a) mający wystarczający interes lub, alternatywnie,

b) powołujący się na naruszenie uprawnień, jeśli przepisy postępowania administracyjnego strony wymagają tego jako przesłanki,

mają dostęp do procedury odwoławczej przed sądem lub innym niezależnym i bezstronnym organem powołanym z mocy ustawy dla kwestionowania legalności z przyczyn

merytorycznych lub formalnych każdej decyzji, działania lub zaniechania w sprawach regulowanych postanowieniami artykułu 6 oraz, jeśli przewiduje tak prawo krajowe i z zastrzeżeniem ustępu 3 poniżej, innych postanowień [innymi postanowieniami] niniejszej konwencji.

Określenie tego, co stanowi wystarczający interes oraz naruszenie uprawnień, następuje zgodnie z wymaganiami prawa krajowego i stosownie do celu, jakim jest przyznanie zainteresowanej społeczności szerokiego dostępu do wymiaru sprawiedliwości w zakresie określonym niniejszą konwencją. Dla osiągnięcia tego interes organizacji pozarządowej spełniającej wymagania, o których mowa w artykule 2 ustęp 5, uważa się za wystarczający w rozumieniu litery a). Taką organizację uważa się również za posiadającą uprawnienia mogące być przedmiotem naruszeń w rozumieniu litery b).

Postanowienia niniejszego ustępu 2 nie wykluczają możliwości istnienia procedury odwoławczej przed organem administracyjnym i nie mają wpływu na obowiązek wyczerpania administracyjnych procedur odwoławczych przed skorzystaniem z sądowej procedury odwoławczej, jeżeli taki obowiązek jest przewidziany w prawie krajowym.

3. Dodatkowo i bez naruszania postanowień odnoszących się do procedur odwoławczych, o których mowa w ustępach 1 i 2, każda ze stron zapewni, że członkowie społeczeństwa spełniający wymagania, o ile takie istnieją, określone w prawie krajowym, będą mieli dostęp do administracyjnej lub sądowej procedury umożliwiającej kwestionowanie działań lub zaniechań osób prywatnych lub władz publicznych naruszających postanowienia jej prawa krajowego w dziedzinie środowiska.

[…]”.

4 Artykuł 19 ust. 4 i 5 konwencji z Aarhus stanowi:

„4. Każda z organizacji, o których mowa w artykule 17, stająca się stroną niniejszej konwencji, a której żadne z państw członkowskich nie jest stroną, przyjmuje na siebie wszystkie zobowiązania wynikające z niniejszej konwencji. W przypadku organizacji, której jedno lub więcej państw członkowskich jest stroną niniejszej konwencji, organizacja i jej państwa członkowskie zdecydują o podziale odpowiedzialności za wypełnienie zobowiązań wynikających z niniejszej konwencji. W takich przypadkach organizacja i jej państwa członkowskie nie mogą równocześnie korzystać z uprawnień wynikających z niniejszej konwencji.

5. Regionalne organizacje integracji gospodarczej, o których mowa w artykule 17, w swoich dokumentach dotyczących ratyfikacji, przyjęcia, zatwierdzenia lub przystąpienia określają zakres swoich kompetencji odnośnie do spraw regulowanych niniejszą konwencją. Organizacje te informują depozytariusza o każdej istotnej zmianie w zakresie ich kompetencji”.

Prawo Unii

5 Artykuł 12 ust. 1 dyrektywy Rady 92/43/EWG z dnia 21 maja 1992 r. w sprawie ochrony siedlisk przyrodniczych oraz dzikiej fauny i flory (Dz.U. L 206, s. 7, zwanej dalej „dyrektywą siedliskową”) stanowi:

„Państwa członkowskie podejmą wymagane środki w celu ustanowienia systemu ścisłej ochrony gatunków zwierząt wymienionych w załączniku IV lit. a) w ich naturalnym zasięgu, zakazujące:

a) jakichkolwiek form celowego chwytania lub zabijania okazów tych gatunków dziko występujących;

b) celowego niepokojenia tych gatunków, w szczególności podczas okresu rozrodu, wychowu młodych, snu zimowego i migracji;

c) celowego niszczenia lub wybierania jaj;

d) pogarszania stanu lub niszczenia terenów rozrodu lub odpoczynku”.

6 Ponadto art. 16 ust. 1 dyrektywy siedliskowej stanowi:

„Pod warunkiem że nie ma zadowalającej alternatywy i że odstępstwo nie jest szkodliwe dla zachowania populacji danych gatunków we właściwym stanie ochrony w ich naturalnym zasięgu, państwa członkowskie mogą wprowadzić odstępstwa od przepisów art. 12, 13, 14 i 15 lit. a) i b):

a) w interesie ochrony dzikiej fauny i flory oraz ochrony siedlisk przyrodniczych;

b) aby zapobiec poważnym szkodom, w szczególności w odniesieniu do upraw, zwierząt gospodarskich, lasów, połowów ryb, wód oraz innych rodzajów własności;

c) w interesie zdrowia i bezpieczeństwa publicznego lub z innych powodów o charakterze zasadniczym wynikających z nadrzędnego interesu publicznego, w tym z powodów o charakterze społecznym lub gospodarczym oraz powodów związanych z korzystnymi skutkami o podstawowym znaczeniu dla środowiska;

d) do celów związanych z badaniami i edukacją, z odbudową populacji i ponownym wprowadzeniem określonych gatunków oraz dla koniecznych do tych celów działań reprodukcyjnych, włączając w to sztuczne rozmnażanie roślin;

e) aby umożliwić, w ściśle nadzorowanych warunkach, w sposób wybiórczy i w ograniczonym stopniu, pozyskiwanie lub przetrzymywanie niektórych okazów gatunków wymienionych w załączniku IV, w ograniczonej liczbie określonej przez właściwe władze krajowe”.

7 Załącznik IV do dyrektywy siedliskowej dotyczący gatunków roślin i zwierząt ważnych dla Wspólnoty, które wymagają ścisłej ochrony, wymienia w szczególności gatunek Ursus arctos.

8 Motyw piąty dyrektywy 2003/4/WE Parlamentu Europejskiego i Rady z dnia 28 stycznia 2003 r. w sprawie publicznego dostępu do informacji dotyczących środowiska i uchylającej dyrektywę Rady 90/313/EWG (Dz.U. L 41, s. 26) ma następujące brzmienie:

„Dnia 25 czerwca 1998 r. Wspólnota Europejska podpisała Konwencję EKG ONZ o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do sprawiedliwości w sprawach dotyczących środowiska (»konwencja z Aarhus«). Ze względu na zawarcie powyższej konwencji przez Wspólnotę Europejską przepisy prawa wspólnotowego muszą być z nią zgodne”.

9 Artykuł 6 dyrektywy 2003/4 wykonuje art. 9 ust. 1 konwencji z Aarhus i stanowi prawie identyczne powtórzenie jego postanowień.

10 Motywy piąty, dziewiąty i jedenasty dyrektywy 2003/35/WE Parlamentu Europejskiego i Rady z dnia 26 maja 2003 r. przewidującej udział społeczeństwa w odniesieniu do sporządzania niektórych planów i programów w zakresie środowiska oraz zmieniającej w odniesieniu do udziału społeczeństwa i dostępu do wymiaru sprawiedliwości dyrektywy Rady 85/337/EWG i 96/61/WE (Dz.U. L 156, s. 17) mają następujące brzmienie:

„(5) 25 czerwca 1998 r. Wspólnota podpisała Konwencję ONZ/EKG o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do wymiaru sprawiedliwości w sprawach dotyczących środowiska (»konwencja z Aarhus«). Prawo wspólnotowe powinno być właściwie dopasowane do tej konwencji w związku z jej ratyfikacją przez Wspólnotę.

[…]

(9) Artykuł 9 ust. 2 i 4 konwencji z Aarhus przewiduje dostęp do procedury sądowej i innych procedur w celu zakwestionowania materialnej lub proceduralnej legalności

decyzji, aktów lub zaniechań z zastrzeżeniem przepisów art. 6 tej konwencji [objętych postanowieniami art. 6 konwencji dotyczącymi udziału społeczeństwa].

[…]

(11) Dyrektywa Rady 85/337/EWG z dnia 27 czerwca 1985 r. [w sprawie oceny skutków wywieranych przez niektóre przedsięwzięcia publiczne i prywatne na środowisko naturalne] [Dz.U. L 175, s. 40] oraz dyrektywa Rady 96/61/WE z dnia 24 września 1996 r. dotycząca zintegrowanego zapobiegania zanieczyszczeniom i ich kontroli [Dz.U. L 257, s. 26] powinny zostać zmienione, aby zapewnić, że są w pełni zgodne z postanowieniami konwencji z Aarhus, w szczególności jej art. 6 oraz art. 9 ust. 2 i 4".

11 Artykuł 3 pkt 7 i art. 4 pkt 4 dyrektywy 2003/35 wprowadzają odpowiednio art. 10a do dyrektywy 85/337 oraz art. 15a do dyrektywy 96/61 w celu wykonania art. 9 ust. 2 konwencji z Aarhus i stanowią prawie identyczne powtórzenie jego postanowień.

12 Motywy czwarty, piąty, szósty i siódmy decyzji 2005/370 mają następujące brzmienie:

„(4) Zgodnie z postanowieniami konwencji z Aarhus regionalna organizacja integracji gospodarczej jest zobowiązana określić w swoich dokumentach dotyczących ratyfikacji, przyjęcia, zatwierdzenia lub przystąpienia zakres swoich kompetencji w odniesieniu do spraw regulowanych konwencją.

(5) Zgodnie z traktatem, w szczególności z jego art. 175 ust. 1, Wspólnota wraz z jej państwami członkowskimi posiada kompetencje do zawierania umów międzynarodowych oraz do realizacji obowiązków z nich wynikających, które [to umowy] przyczyniają się do osiągnięcia celów określonych w art. 174 [ust. 1] traktatu.

(6) Wspólnota i większość jej państw członkowskich podpisały konwencję z Aarhus w 1998 r. i od tego czasu podejmują wysiłki mające na celu zatwierdzenie przez nich konwencji. Tymczasem właściwe prawodawstwo wspólnotowe jest dostosowywane do konwencji.

(7) Cel konwencji z Aarhus określony w jej art. 1 jest zgodny z celami polityki Wspólnoty w dziedzinie środowiska określonymi w art. 174 traktatu, zgodnie z którymi Wspólnota, która dzieli kompetencje z jej państwami członkowskimi, przyjęła już wszechstronne prawodawstwo, które podlega rozwojowi i przyczynia się do osiągnięcia celu konwencji, nie tylko przez jej własne instytucje, lecz również przez władze publiczne w jej państwach członkowskich".

13 Artykuł 1 decyzji 2005/370 stanowi:

„Konwencja NZ/EKG o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do sprawiedliwości w sprawach dotyczących środowiska (»konwencja z Aarhus«) zostaje niniejszym zatwierdzona w imieniu Wspólnoty".

14 W deklaracji w sprawie kompetencji złożonej na podstawie art. 19 ust. 5 konwencji z Aarhus i załączonej do decyzji 2005/370 Wspólnota stwierdziła w szczególności, „że obowiązujące instrumenty prawne nie obejmują w pełni realizacji obowiązków wynikających z art. 9 ust. 3 konwencji, jako że odnoszą się one do procedur administracyjnych i sądowych mających na celu kwestionowanie działań i zaniechań osób prywatnych i władz publicznych innych niż instytucje Wspólnoty Europejskiej objęte art. 2 ust. 2 lit. d) konwencji oraz że w wyniku tego jej państwa członkowskie są odpowiedzialne za wykonanie tych obowiązków w momencie zatwierdzenia konwencji przez Wspólnotę Europejską i nie zmieni się to, o ile i do czasu, gdy Wspólnota, wykonując swoje uprawnienia na mocy traktatu WE, przyjmie przepisy prawa wspólnotowego obejmujące wykonanie tych obowiązków".

15 Artykuły 10–12 rozporządzenia (WE) nr 1367/2006 Parlamentu Europejskiego i Rady z dnia 6 września 2006 r. w sprawie zastosowania postanowień Konwencji z Aarhus o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do sprawiedliwości

w sprawach dotyczących środowiska do instytucji i organów Wspólnoty (Dz.U. L 264, s. 13) mają na celu zapewnienie organizacjom pozarządowym dostępu do wymiaru sprawiedliwości w zakresie aktów administracyjnych wydanych przez instytucje i organy Unii lub w zakresie ich zaniechań zgodnie z art. 9 ust. 3 konwencji z Aarhus.

Prawo słowackie

16 Zgodnie § 82 ust. 3 zákon č. 543/2002 Z.z. o ochrane prírody a krajiny (ustawy 543/2002 o ochronie środowiska i przyrody) ze zmianami mającej zastosowanie w postępowaniu przed sądem krajowym stowarzyszenie posiadające osobowość prawną jest uznawane za „uczestnika" postępowania administracyjnego lub postępowań administracyjnych w rozumieniu tego postanowienia, wówczas gdy jego celem od przynajmniej jednego roku jest ochrona środowiska i przyrody oraz gdy zapowiedziało na piśmie swój udział w rzeczonym postępowaniu w terminie przewidzianym w owym artykule. Status „uczestnika" zapewnia mu prawo do bycia informowanym o wszystkich toczących się postępowaniach administracyjnych w sprawie ochrony środowiska i przyrody.

17 Stosownie do § 15a ust. 2 Správny poriadok (kodeksu postępowania administracyjnego) „uczestnik" ma prawo do bycia poinformowanym o wszczęciu postępowania administracyjnego, prawo dostępu do dokumentów przedłożonych przez strony postępowania administracyjnego, prawo do uczestniczenia w rozprawie i wizjach lokalnych, jak również do przedstawienia środków dowodowych oraz innych informacji, na podstawie których decyzja zostanie wydana.

18 Zgodnie z § 250 ust. 2 Občiansky súdny poriadok (kodeksu postępowania cywilnego) stroną skarżącą jest każda osoba fizyczna lub prawna, która twierdzi, że naruszone zostały jej prawa jako strony postępowania administracyjnego w wyniku decyzji lub działania organu administracyjnego. Stroną skarżącą może być również każda osoba fizyczna lub prawna, która nie brała udziału w postępowaniu administracyjnym, a której udział w charakterze strony postępowania był jednak wymagany.

19 Stosownie do § 250m ust. 3 kodeksu postępowania cywilnego stronami postępowania są strony postępowania przed organem administracyjnym i organ administracyjny, który wydał zaskarżoną decyzję.

Postępowanie przed sądem krajowym i pytania prejudycjalne

20 Zoskupenie zostało poinformowane o wszczęciu – na wniosek stowarzyszeń łowieckich lub innych podmiotów – kilku postępowań administracyjnych w sprawie przyznania odstępstw od systemu ochrony takich gatunków jak niedźwiedź brunatny, dostępu do chronionych obszarów naturalnych czy też stosowania produktów chemicznych na tych obszarach.

21 Zoskupenie wniosło wówczas do Ministerstvo životného prostredia o uznanie jego statusu „strony" postępowania administracyjnego dotyczącego przyznania tych odstępstw lub tych zezwoleń i powołało się w tym celu na konwencję z Aarhus. Ministerstvo životného prostredia nie uwzględniło owego wniosku i oddaliło odwołanie od tej decyzji odmownej wniesione później przez zoskupenie.

22 Zoskupenie wniosło wtedy skargę na te dwie decyzje, twierdząc w szczególności, że postanowienia art. 9 ust. 3 konwencji z Aarhus wywołują skutek bezpośredni.

23 W tych okolicznościach Najvyšší súd Slovenskej republiky postanowił zawiesić postępowanie i zwrócić się do Trybunału z następującymi pytaniami prejudycjalnymi:

„1) Czy jest możliwe przypisanie bezpośredniego skutku (»self executing effect«), który posiadają konwencje międzynarodowe, art. 9 konwencji z Aarhus z dnia 25 czerwca 1998 r., a w szczególności ustępowi 3 tego artykułu, uwzględniając podstawowy cel tej konwencji międzynarodowej, jakim jest odejście od klasycznej koncepcji legitymacji procesowej poprzez przyznanie statusu strony również społeczeństwu lub zainteresowanemu społeczeństwu, w sytuacji gdy w obecnej chwili Unia Europejska,

mimo że przystąpiła do rzeczonej konwencji w dniu 17 lutego 2005 r., nie przyjęła przepisów wspólnotowych w celu jej wykonania?

2) Czy jest możliwe przypisanie art. 9 konwencji z Aarhus, a w szczególności ustępowi 3 tego artykułu, który stanowi obecnie część prawa wspólnotowego, bezpośredniego skutku lub bezpośredniego stosowania w rozumieniu utrwalonego orzecznictwa Trybunału Sprawiedliwości?

3) W przypadku odpowiedzi twierdzącej na pytanie 1 lub 2, czy możliwe jest dokonanie wykładni art. 9 ust. 3 konwencji z Aarhus, uwzględniając jej podstawowy cel, w ten sposób, że wyrażenie »działania władz publicznych« obejmuje również działanie w postaci wydania decyzji, co oznaczałoby, że przyznanie społeczeństwu możliwości wszczęcia postępowania przed sądem obejmuje również prawo do zaskarżenia decyzji organu publicznego, której niezgodność z prawem przejawia się w oddziaływaniu na środowisko?".

24 Postanowieniem prezesa Trybunału z dnia 23 października 2009 r. wniosek sądu krajowego o zastosowanie w odniesieniu do niniejszego odesłania prejudycjalnego trybu przyspieszonego przewidzianego w art. 104a akapit pierwszy regulaminu Trybunału został oddalony.

W przedmiocie pytań prejudycjalnych

W przedmiocie dopuszczalności

25 Rządy polski i Zjednoczonego Królestwa twierdzą, że pytania są dopuszczalne tylko w zakresie, w jakim dotyczą postanowień zawartych w art. 9 ust. 3 konwencji z Aarhus, a w pozostałym zakresie są niedopuszczalne, ponieważ wykładnia prawa Unii, o której dokonanie wnosi sąd krajowy, nie ma żadnego związku ze stanem faktycznym lub przedmiotem sporu w postępowaniu przed sądem krajowym.

26 Aby ustosunkować się do tej argumentacji, wystarczy stwierdzić, że zadane pytania dotyczą w istocie jedynie art. 9 ust. 3 konwencji z Aarhus i nie odnoszą się do innych ustępów tego artykułu.

27 W tej sytuacji Trybunał nie ma podstaw, by orzec, że zadane pytania są częściowo niedopuszczalne, ponieważ dotyczą one innych postanowień niż postanowienia zawarte w art. 9 ust. 3 konwencji z Aarhus.

W przedmiocie pytań pierwszego i drugiego

28 W swych dwóch pierwszych pytaniach, które należy zbadać łącznie, sąd krajowy dąży w istocie do ustalenia, czy jednostki, a zwłaszcza stowarzyszenia ochrony środowiska, które chcą zaskarżyć decyzję wprowadzającą odstępstwo od systemu ochrony środowiska takiego jak system wprowadzony przez dyrektywę siedliskową na rzecz gatunku wymienionego w załączniku IV do tej dyrektywy, mogą wywieść legitymację procesową z prawa Unii, zważywszy w szczególności na postanowienia art. 9 ust. 3 konwencji z Aarhus, co do którego bezpośredniej skuteczności sąd krajowy stawia pytania.

29 Tytułem wstępu należy przypomnieć, że zgodnie z art. 300 ust. 7 WE „[u]mowy zawarte zgodnie z warunkami określonymi w niniejszym artykule wiążą instytucje Wspólnoty oraz państwa członkowskie".

30 Konwencja z Aarhus została podpisana przez Wspólnotę i następnie zatwierdzona decyzją 2005/370. Dlatego też zgodnie z utrwalonym orzecznictwem postanowienia tej konwencji stanowią od tej pory integralną część porządku prawnego Unii (zob. analogicznie w szczególności wyroki: z dnia 10 stycznia 2006 r. w sprawie C-344/04 IATA i ELFAA, Zb.Orz. s. I-403, pkt 36; z dnia 30 maja 2006 r. w sprawie C-459/03 Komisja przeciwko Irlandii, Zb.Orz. s. I-4635, pkt 82). W ramach tego porządku prawnego Trybunał jest zatem właściwy do orzekania w trybie prejudycjalnym w przedmiocie wykładni owej konwencji

(zob. w szczególności wyroki: z dnia 30 kwietnia 1974 r. w sprawie 181/73 Haegeman, Rec. s. 449, pkt 4–6; z dnia 30 września 1987 r. w sprawie 12/86 Demirel, Rec. s. 3719, pkt 7).

31 Ponieważ konwencja z Aarhus została zawarta przez Wspólnotę i wszystkie państwa członkowskie w ramach kompetencji dzielonej, Trybunał, do którego wniesiono sprawę zgodnie z przepisami traktatu WE, a w szczególności z art. 234 WE, jest właściwy do rozgraniczenia obowiązków spoczywających na Unii i obowiązków ciążących wyłącznie na państwach członkowskich oraz do dokonania wykładni postanowień konwencji z Aarhus (zob. analogicznie wyroki: z dnia 14 grudnia 2000 r. w sprawach połączonych C-300/98 i C-392/98 Dior i in., Rec. s. I-11307, pkt 33; z dnia 11 września 2007 r. w sprawie C-431/05 Merck Genéricos – Produtos Farmacêuticos, Zb.Orz. s. I-7001, pkt 33).

32 Następnie należy ustalić, czy w dziedzinie objętej art. 9 ust. 3 konwencji z Aarhus Unia skorzystała ze swych uprawnień i wydała przepisy dotyczące wykonania obowiązków, które z niego wynikają. Gdyby nie miało to miejsca, obowiązki wynikające z art. 9 ust. 3 konwencji z Aarhus podlegałyby nadal prawu krajowemu państw członkowskich. W takim przypadku do sądów tychże państw należałoby ustalenie na podstawie prawa krajowego, czy jednostki mogą oprzeć się bezpośrednio na normach tej umowy międzynarodowej, które dotyczą owej dziedziny, lub czy wspomniane sądy winny stosować je z urzędu. W tym przypadku prawo Unii nie wymaga bowiem ani nie zabrania tego, by porządek prawny państwa członkowskiego przyznał jednostkom prawo do powołania się bezpośrednio na tę normę lub nałożył na sądy obowiązek stosowania jej z urzędu (zob. analogicznie ww. wyroki: w sprawach połączonych Dior i in., pkt 48; w sprawie Merck Genéricos – Produtos Farmacêuticos, pkt 34).

33 Gdyby natomiast stwierdzono, że Unia skorzystała ze swych uprawnień i wydała przepisy w dziedzinie objętej art. 9 ust. 3 konwencji z Aarhus, prawo Unii miałoby zastosowanie, a do Trybunału należałoby ustalenie, czy przepis omawianej umowy międzynarodowej wywołuje skutek bezpośredni.

34 Należy zatem zbadać, czy w szczególnej dziedzinie, która objęta jest zakresem art. 9 ust. 3 konwencji z Aarhus, Unia skorzystała ze swego uprawnienia i wydała przepisy dotyczące wykonania obowiązków, które z niego wynikają (zob. analogicznie ww. wyrok w sprawie Merck Genéricos – Produtos Farmacêuticos, pkt 39).

35 Przede wszystkim należy zaznaczyć w tym względzie, że Unia posiada wyraźną kompetencję zewnętrzną w dziedzinie środowiska na podstawie art. 175 WE w związku z art. 174 ust. 2 WE (zob. ww. wyrok w sprawie Komisja przeciwko Irlandii, pkt 94, 95).

36 Ponadto Trybunał uznał, że konkretna kwestia, która nie była jeszcze przedmiotem przepisów Unii, podlega prawu Unii, jeżeli owa kwestia została uregulowana w umowach zawartych przez Unię i przez państwa członkowskie oraz dotyczy dziedziny objętej w szerokim zakresie prawem Unii (zob. analogicznie wyrok z dnia 7 października 2004 r. w sprawie C-239/03 Komisja przeciwko Francji, Zb.Orz. s. I-9325, pkt 29–31).

37 W rozpatrywanym przypadku spór przed sądem krajowym dotyczy kwestii, czy stowarzyszenie ochrony środowiska może być „stroną" postępowania administracyjnego dotyczącego w szczególności przyznania odstępstw od systemu ochrony takich gatunków jak niedźwiedź brunatny. Otóż wspomniany gatunek został wymieniony w pkt a) załącznika IV do dyrektywy siedliskowej, tak że zgodnie z art. 12 tejże dyrektywy ów gatunek podlega systemowi ścisłej ochrony, od którego odstępstwo może zostać przyznane tylko na zasadach przewidzianych w art. 16 omawianej dyrektywy.

38 Wynika stąd, że spór przed sądem krajowym podlega prawu Unii.

39 Prawdą jest, że w deklaracji w sprawie kompetencji złożonej na podstawie art. 19 ust. 5 konwencji z Aarhus i załączonej do decyzji 2005/370 Wspólnota stwierdziła w szczególności, „że obowiązujące instrumenty prawne nie obejmują w pełni realizacji obowiązków wynikających z art. 9 ust. 3 konwencji, jako że odnoszą się one do procedur administracyjnych i sądowych mających na celu kwestionowanie działań i zaniechań osób prywatnych i władz publicznych innych niż instytucje Wspólnoty Europejskiej objęte art. 2

ust. 2 lit. d) konwencji oraz że w wyniku tego jej państwa członkowskie są odpowiedzialne za wykonanie tych obowiązków w momencie zatwierdzenia konwencji przez Wspólnotę Europejską i nie zmieni się to, o ile i do czasu, gdy Wspólnota, wykonując swoje uprawnienia na mocy traktatu WE, przyjmie przepisy prawa wspólnotowego obejmujące wykonanie tych obowiązków".

40 Nie można jednak wysnuć stąd wniosku, że spór przed sądem krajowym nie podlega prawu Unii, ponieważ – jak przypomniano w pkt 36 niniejszego wyroku – konkretna kwestia, która nie była jeszcze przedmiotem przepisów Unii, może podlegać prawu Unii, jeżeli dotyczy dziedziny objętej w szerokim zakresie prawem Unii.

41 W tym względzie nie ma znaczenia okoliczność, że rozporządzenie nr 1367/2006, które ma na celu wykonanie przepisów art. 9 ust. 3 konwencji z Aarhus, dotyczy wyłącznie instytucji Unii i nie może być postrzegane jako wydanie przez Unię przepisów dotyczących wykonania obowiązków wynikających z art. 9 ust. 3 rzeczonej konwencji w odniesieniu do krajowych procedur administracyjnych lub sądowych.

42 Jeśli bowiem dany przepis może znaleźć zastosowanie zarówno do sytuacji objętych prawem krajowym, jak i do sytuacji objętych prawem Unii, niewątpliwe znaczenie ma to, by w celu uniknięcia przyszłych rozbieżności interpretacyjnych ów przepis był interpretowany w jednolity sposób, niezależnie od warunków, w jakich ma być stosowany (zob. w szczególności wyroki: z dnia 17 lipca 1997 r. w sprawie C-130/95 Giloy, Rec. s. I-4291, pkt 28; z dnia 16 czerwca 1998 r. w sprawie C-53/96 Hermès, Rec. s. I-3603, pkt 32).

43 Wynika stąd, że Trybunał jest właściwy do dokonania wykładni postanowień art. 9 ust. 3 konwencji z Aarhus, a w szczególności do zajęcia stanowiska w kwestii, czy wywołują one lub nie skutek bezpośredni.

44 W tym względzie postanowienie umowy zawartej przez Unię i jej państwa członkowskie z państwami trzecimi należy uznać za postanowienie bezpośrednio skuteczne, jeżeli – zważywszy na jego brzmienie oraz cel i charakter tej umowy – zawiera ono jasny i precyzyjny obowiązek, który nie jest uzależniony – w zakresie jego wypełnienia lub skutków – od wydania kolejnego aktu (zob. w szczególności wyroki: z dnia 12 kwietnia 2005 r. w sprawie C-265/03 Simutenkov, Zb.Orz. s. I-2579, pkt 21; z dnia 13 grudnia 2007 r. w sprawie C-372/06 Asda Stores, Zb.Orz. s. I-11223, pkt 82).

45 Należy stwierdzić, że postanowienia art. 9 ust. 3 konwencji z Aarhus nie zawierają żadnego jasnego i precyzyjnego obowiązku regulującego bezpośrednio sytuację prawną jednostek. Skoro bowiem tylko „członkowie społeczeństwa spełniający wymagania, o ile takie istnieją, określone w prawie krajowym" mają prawa przewidziane w rzeczonym art. 9 ust. 3, przepis ten jest uzależniony – w zakresie jego wykonania lub skutków – od wydania kolejnego aktu.

46 Należy jednak zaznaczyć, że chociaż owe postanowienia zostały sformułowane w sposób ogólny, mają one na celu umożliwić zapewnienie skutecznej ochrony środowiska.

47 W braku uregulowań Unii w danej dziedzinie zadaniem wewnętrznego porządku prawnego każdego państwa członkowskiego jest określenie zasad proceduralnych dotyczących środków prawnych, które mają zapewnić ochronę uprawnień, jakie podmioty prawa wywodzą z prawa Unii, w niniejszym przypadku z dyrektywy siedliskowej, przy czym państwa członkowskie są odpowiedzialne za zapewnienie w każdym przypadku skutecznej ochrony tych uprawnień (zob. w szczególności wyrok z dnia 15 kwietnia 2008 r. w sprawie C-268/06 Impact, Zb.Orz. s. I-2483, pkt 44, 45).

48 Jak wynika z utrwalonego orzecznictwa, zasady proceduralne dotyczące środków prawnych mających zapewnić ochronę uprawnień, jakie podmioty prawa wywodzą z prawa Unii, nie mogą być mniej korzystne niż w przypadku podobnych środków prawnych o charakterze wewnętrznym (zasada równoważności) i nie mogą powodować w praktyce, że korzystanie z uprawnień wynikających z porządku prawnego Unii stanie się niemożliwe lub nadmiernie utrudnione (zasada skuteczności) (zob. ww. wyrok w sprawie Impact, pkt 46 i przytoczone tam orzecznictwo).

49 Nie można więc, bez narażenia na szwank skutecznej ochrony zapewnionej przez prawo Unii w zakresie ochrony środowiska, dokonać wykładni postanowień art. 9 ust. 3 konwencji z Aarhus, która powodowałaby w praktyce, że korzystanie z uprawnień wynikających z prawa Unii byłoby niemożliwe lub nadmiernie utrudnione.

50 Wynika stąd, że jeśli sprawa dotyczy gatunku chronionego przez prawo Unii, a zwłaszcza przez dyrektywę siedliskową, sąd krajowy powinien – w celu zapewnienia skutecznej ochrony sądowej w dziedzinach objętych unijnym prawem ochrony środowiska – dokonać wykładni swojego prawa krajowego, która w możliwie najszerszym zakresie będzie zgodna z celami określonymi w art. 9 ust. 3 konwencji z Aarhus.

51 Zadaniem sądu krajowego jest więc dokonanie – w zakresie, w jakim jest to tylko możliwe – wykładni przepisów proceduralnych dotyczących przesłanek, które winny zostać spełnione, aby móc wszcząć postępowanie administracyjne lub sądowe zgodnie z celami art. 9 ust. 3 konwencji z Aarhus, jak i z celem skutecznej ochrony sądowej uprawnień wynikających z prawa Unii, ażeby umożliwić organizacji zajmującej się ochroną środowiska takiej jak zoskupenie zaskarżenie do sądu decyzji wydanej po przeprowadzeniu postępowania administracyjnego, które mogło być sprzeczne z unijnym prawem ochrony środowiska (zob. podobnie wyrok z dnia 13 marca 2007 r. w sprawie C-432/05 Unibet, Zb.Orz. s. I-2271, pkt 44; ww. wyrok w sprawie Impact, pkt 54).

52 W tych okolicznościach na zadane pytania pierwsze i drugie należy odpowiedzieć, że art. 9 ust. 3 konwencji z Aarhus jest pozbawiony bezpośredniej skuteczności na gruncie prawa Unii. Zadaniem sądu krajowego jest jednak dokonanie – w zakresie, w jakim jest to tylko możliwe – wykładni przepisów proceduralnych dotyczących przesłanek, które winny zostać spełnione, aby móc wszcząć postępowanie administracyjne lub sądowe zgodnie z celami art. 9 ust. 3 tejże konwencji, jak i z celem skutecznej ochrony sądowej uprawnień wynikających z prawa Unii, ażeby umożliwić organizacji zajmującej się ochroną środowiska takiej jak zoskupenie zaskarżenie do sądu decyzji wydanej po przeprowadzeniu postępowania administracyjnego, które mogło być sprzeczne z unijnym prawem ochrony środowiska.

W przedmiocie pytania trzeciego

53 Zważywszy na odpowiedź udzieloną na pytania pierwsze i drugie, nie zachodzi potrzeba udzielenia odpowiedzi na pytanie trzecie.

W przedmiocie kosztów

54 Dla stron postępowania przed sądem krajowym niniejsze postępowanie ma charakter incydentalny, dotyczy bowiem kwestii podniesionej przed tym sądem, do niego zatem należy rozstrzygnięcie o kosztach. Koszty poniesione w związku z przedstawieniem uwag Trybunałowi, inne niż poniesione przez strony postępowania przed sądem krajowym, nie podlegają zwrotowi.

Z powyższych względów Trybunał (wielka izba) orzeka, co następuje:

Artykuł 9 ust. 3 konwencji o dostępie do informacji, udziale społeczeństwa w podejmowaniu decyzji oraz dostępie do sprawiedliwości w sprawach dotyczących środowiska, zatwierdzonej w imieniu Wspólnoty Europejskiej decyzją Rady 2005/370/WE z dnia 17 lutego 2005 r., jest pozbawiony bezpośredniej skuteczności na gruncie prawa Unii. Zadaniem sądu krajowego jest jednak dokonanie – w zakresie, w jakim jest to tylko możliwe – wykładni przepisów proceduralnych dotyczących przesłanek, które winny zostać spełnione, aby móc wszcząć postępowanie administracyjne lub sądowe zgodnie z celami art. 9 ust. 3 tejże konwencji, jak i z celem skutecznej ochrony sądowej uprawnień wynikających z prawa Unii, ażeby umożliwić organizacji zajmującej się ochroną środowiska takiej jak Lesoochranárske zoskupenie VLK zaskarżenie do sądu

decyzji wydanej po przeprowadzeniu postępowania administracyjnego, które mogło być sprzeczne z unijnym prawem ochrony środowiska.

Podpisy

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* Język postępowania: słowacki.

WYROK TRYBUNAŁU (wielka izba)

z dnia 19 stycznia 2010 r.(*)

Zasada niedyskryminacji ze względu na wiek – Dyrektywa 2000/78/WE – Ustawodawstwo krajowe dotyczące rozwiązania umowy o pracę przez pracodawcę, nieuwzględniające okresu zatrudnienia ukończonego przed osiągnięciem wieku 25 lat do obliczania długości okresu wypowiedzenia – Uzasadnienie środka – Uregulowanie krajowe sprzeczne z dyrektywą – Rola sądu krajowego

W sprawie C-555/07

mającej za przedmiot wniosek o wydanie, na podstawie art. 234 WE, orzeczenia w trybie prejudycjalnym, złożony przez Landesarbeitsgericht Düsseldorf (Niemcy) postanowieniem z dnia 21 listopada 2007 r., które wpłynęło do Trybunału w dniu 13 grudnia 2007 r., w postępowaniu

Seda Kücükdeveci

przeciwko

Swedex GmbH & Co. KG,

TRYBUNAŁ (wielka izba),

w składzie: V. Skouris, prezes, J.N. Cunha Rodrigues, K. Lenaerts, J.C. Bonichot, R. Silva de Lapuerta, P. Lindh (sprawozdawca) i C. Toader, prezesi izb, C.W.A. Timmermans, A. Rosas, P. Kūris, T. von Danwitz, A. Arabadjiev, i J.J. Kasel, sędziowie,

rzecznik generalny: Y. Bot,

sekretarz: K. Malacek, administrator,

uwzględniając procedurę pisemną i po przeprowadzeniu rozprawy w dniu 31 marca 2009 r.,

rozważywszy uwagi przedstawione:

– w imieniu Swedex GmbH & Co. KG przez M. Nebelinga, Rechtsanwalt,

– w imieniu rządu niemieckiego przez M. Lummę oraz J. Möllera, działających w charakterze pełnomocników,

– w imieniu rządu czeskiego przez M. Smolka, działającego w charakterze pełnomocnika,

– w imieniu rządu duńskiego przez J. Beringa Liisberga, działającego w charakterze pełnomocnika,

– w imieniu Irlandii przez D. O'Hagana, działającego w charakterze pełnomocnika, wspieranego przez N. Traversa, BL, oraz A. Collinsa, SC,

– w imieniu rządu niderlandzkiego przez C. Wissels oraz M. de Mol, działające w charakterze pełnomocników,

– w imieniu rządu Zjednoczonego Królestwa przez I. Rao, działającą w charakterze pełnomocnika, wspieraną przez J. Stratford, barrister,

– w imieniu Komisji Wspólnot Europejskich przez V. Kreuschitza oraz J. Enegrena, działających w charakterze pełnomocników,

po zapoznaniu się z opinią rzecznika generalnego na posiedzeniu w dniu 7 lipca 2009 r.,

wydaje następujący

Wyrok

1 Wniosek o wydanie orzeczenia w trybie prejudycjalnym dotyczy wykładni zasady niedyskryminacji ze względu na wiek oraz dyrektywy Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy (Dz.U. L 303, s. 16).

2 Wniosek ten został przedstawiony w ramach sporu pomiędzy S. Kücükdeveci a jej byłym pracodawcą, Swedex GmbH & Co. KG (zwanym dalej „Swedex"), dotyczącego obliczenia długości okresu wypowiedzenia mającego zastosowanie przy rozwiązaniu z nią umowy o pracę.

Ramy prawne

Prawo Unii

3 Dyrektywa 2000/78 przyjęta została na podstawie art. 13 WE. Jej motywy 1, 4 i 25 mają następujące brzmienie:

„(1) Zgodnie z art. 6 Traktatu o Unii Europejskiej, Unia Europejska opiera się na zasadach wolności, demokracji, poszanowania praw człowieka i podstawowych wolności oraz zasadach państwa prawa, zasadach, które są wspólne dla wszystkich państw członkowskich, i przestrzega podstawowych praw, zagwarantowanych w Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności oraz wynikających z tradycji konstytucyjnych wspólnych dla państw członkowskich, jako zasad ogólnych prawa wspólnotowego.

[...]

(4) Prawo wszystkich osób do równości wobec prawa i ochrony przed dyskryminacją jest powszechnym prawem uznanym przez Powszechną Deklarację Praw Człowieka, Konwencję Narodów Zjednoczonych w sprawie Likwidacji Wszelkich Form Dyskryminacji Kobiet, Pakty Narodów Zjednoczonych dotyczące praw obywatelskich i politycznych oraz praw gospodarczych, społecznych i kulturalnych oraz przez Europejską Konwencją o Ochronie Praw Człowieka i Podstawowych Wolności, których sygnatariuszami są wszystkie państwa członkowskie. Konwencja nr 111 Międzynarodowej Organizacji Pracy (MOP) zakazuje dyskryminacji w zakresie zatrudnienia i pracy.

[...]

(25) Zakaz dyskryminacji ze względu na wiek jest podstawowym elementem na drodze do osiągnięcia celów określonych w wytycznych dotyczących zatrudnienia i popierania zróżnicowania zatrudnienia. Jednakże w niektórych okolicznościach różnice w traktowaniu ze względu na wiek mogą być uzasadnione i wymagają wprowadzenia szczególnych przepisów, które mogą się różnić w zależności od sytuacji państw członkowskich. Należy więc odróżnić odmienne traktowanie, które jest uzasadnione, w szczególności wynikającymi z prawa celami polityki zatrudnienia, rynku pracy i kształcenia zawodowego, od dyskryminacji, która musi być zakazana".

4 Zgodnie z art. 1 dyrektywy jej celem jest wyznaczenie ogólnych ram dla walki z dyskryminacją ze względu na religię lub przekonania, niepełnosprawność, wiek lub orientację seksualną w odniesieniu do zatrudnienia i pracy, w celu realizacji w państwach członkowskich zasady równego traktowania.

5 Artykuł 2 dyrektywy stanowi:

„1. Do celów niniejszej dyrektywy »zasada równego traktowania« oznacza brak jakichkolwiek form bezpośredniej lub pośredniej dyskryminacji z przyczyn określonych w art. 1.

2. Do celów ust. 1:

a) dyskryminacja bezpośrednia występuje w przypadku, gdy osobę traktuje się mniej przychylnie niż traktuje się, traktowano lub traktowano by inną osobę w porównywalnej sytuacji, z jakiejkolwiek przyczyny wymienionej w art. 1;

[...]".

6 Artykuł 3 ust. 1 dyrektywy przewiduje, że:

„1. W granicach kompetencji Wspólnoty, niniejszą dyrektywę stosuje się do wszystkich osób, zarówno sektora publicznego jak i prywatnego, włącznie z instytucjami publicznymi, w odniesieniu do:

[...]

c) warunków zatrudnienia i pracy, łącznie z warunkami zwalniania i wynagradzania;

[...]".

7 Artykuł 6 ust. 1 tej dyrektywy stanowi:

„Niezależnie od przepisów art. 2 ust. 2, państwa członkowskie mogą uznać, że odmienne traktowanie ze względu na wiek nie stanowi dyskryminacji, jeżeli w ramach prawa krajowego zostanie to obiektywnie i racjonalnie uzasadnione zgodnym z przepisami celem, w szczególności celami polityki zatrudnienia, rynku pracy i kształcenia zawodowego, i jeżeli środki mające służyć realizacji tego celu są właściwe i konieczne.

Takie odmienne traktowanie może polegać między innymi na:

a) wprowadzeniu specjalnych warunków dostępu do zatrudnienia i kształcenia zawodowego, zatrudnienia i pracy, włącznie z warunkami zwalniania i wynagradzania, dla ludzi młodych, pracowników starszych i osób mających na utrzymaniu inne osoby, w celu wspierania ich integracji zawodowej lub zapewnienia im ochrony;

b) określeniu warunków dolnej granicy wieku, doświadczenia zawodowego lub stażu pracy, wymaganego do zatrudnienia lub niektórych korzyści związanych z zatrudnieniem;

c) określeniu górnej granicy wieku przy rekrutacji, z uwzględnieniem wykształcenia wymaganego na danym stanowisku lub potrzeby racjonalnego okresu zatrudnienia przed przejściem na emeryturę".

8 Zgodnie z art. 18 akapit pierwszy dyrektywy 2000/78 jej transpozycja do porządku prawnego państw członkowskich miała nastąpić najpóźniej w dniu 2 grudnia 2003 r. Jednak akapit drugi tego artykułu stanowi:

„W celu uwzględnienia szczególnych warunków, państwa członkowskie mogą, o ile zaistnieje taka potrzeba, dysponować dodatkowym terminem trzech lat, licząc od dnia 2 grudnia 2003 r., to znaczy w sumie sześć lat na wprowadzenie w życie przepisów niniejszej

dyrektywy dotyczących dyskryminacji ze względu na wiek i niepełnosprawność. W tym wypadku niezwłocznie powiadamiają o tym Komisję […]".

9 Republika Federalna Niemiec skorzystała z tej możliwości i w ten sposób transpozycja przepisów dyrektywy 2000/78 dotyczących dyskryminacji ze względu na wiek i niepełnosprawność w tym państwie członkowskim miała nastąpić najpóźniej w dniu 2 grudnia 2006 r.

Uregulowania krajowe

Ogólna ustawa o równości traktowania

10 Paragrafy 1, 2 i 10 Allgemeines Gleichbehandlungsgesetz (ogólnej ustawy o równości traktowania) z dnia 14 sierpnia 2006 r. (BGBl. 2006 I. s. 1897), w której dokonano transpozycji dyrektywy 2000/78, stanowią:

„Paragraf 1 – Przedmiot ustawy

Niniejsza ustawa ma na celu uniemożliwienie lub wyeliminowanie wszelkich nierówności ze względu na rasę lub pochodzenie etniczne, płeć, religię lub wyznanie, niepełnosprawność, wiek lub tożsamość płciową.

Paragraf 2 – Zakres stosowania

[...]

4) W stosunku do wypowiedzeń stosunku pracy obowiązują wyłącznie przepisy dotyczące ogólnej i szczególnej ochrony przed wypowiedzeniem.

[...]

Paragraf 10 – Dopuszczalność niektórych różnic w traktowaniu ze względu na wiek

Bez uszczerbku dla § 8, pewna różnica w traktowaniu związana z wiekiem jest dopuszczalna, jeżeli jest obiektywnie i racjonalnie uzasadniona celem zgodnym z przepisami. Środki mające służyć realizacji tego celu powinny być właściwe i konieczne. Takie odmienne traktowanie może polegać między innymi na:

1) wprowadzeniu specjalnych warunków dostępu do zatrudnienia i kształcenia zawodowego, zatrudnienia i pracy, włącznie z warunkami zwalniania i wynagradzania, dla ludzi młodych, pracowników starszych i osób mających na utrzymaniu inne osoby, w celu wspierania ich integracji zawodowej lub zapewnienia im ochrony;

[...]".

Przepisy dotyczące okresów wypowiedzenia stosunku pracy

11 Paragraf 622 Bürgerliches Gesetzbuch (niemieckiego kodeksu cywilnego, zwanego dalej „BGB"), zatytułowany „Okresy wypowiedzenia stosunku pracy", stanowi:

„1) Okres wypowiedzenia stosunku pracy z pracownikiem fizycznym lub umysłowym (zwanych dalej „pracownikami") wynosi cztery tygodnie ze skutkiem na 15. dzień miesiąca lub na koniec miesiąca kalendarzowego.

2) Okres wypowiedzenia stosunku pracy przez pracodawcę wynosi:

– 1 miesiąc ze skutkiem na koniec miesiąca kalendarzowego gdy stosunek pracy w zakładzie lub przedsiębiorstwie trwał 2 lata;

– 2 miesiące ze skutkiem na koniec miesiąca kalendarzowego, gdy stosunek pracy w zakładzie lub przedsiębiorstwie trwał 5 lat;

– 3 miesiące ze skutkiem na koniec miesiąca kalendarzowego, gdy stosunek pracy w zakładzie lub przedsiębiorstwie trwał 8 lat –;

– 4 miesiące ze skutkiem na koniec miesiąca kalendarzowego, gdy stosunek pracy w zakładzie lub przedsiębiorstwie trwał 10 lat;

– 5 miesięcy ze skutkiem na koniec miesiąca kalendarzowego, gdy stosunek pracy w zakładzie lub przedsiębiorstwie trwał 12 lat;

– 6 miesięcy ze skutkiem na koniec miesiąca kalendarzowego, gdy stosunek pracy w zakładzie lub przedsiębiorstwie trwał 15 lat;

– 7 miesięcy ze skutkiem na koniec miesiąca kalendarzowego, gdy stosunek pracy w zakładzie lub przedsiębiorstwie trwał 20 lat.

Dokonując obliczenia okresu zatrudnienia, nie uwzględnia się okresów ukończonych przez pracownika przed osiągnięciem przez niego 25 lat życia".

Postępowanie przed sądem krajowym i pytania prejudycjalne

12 S. Kücükdeveci urodziła się w dniu 12 lutego 1978 r. Była zatrudniona przez Swedex od dnia 4 czerwca 1996 r., tj. od ukończenia 18 lat.

13 Swedex rozwiązał z nią umowę o pracę pismem z dnia 19 grudnia 2006 r., ze skutkiem z dniem 31 stycznia 2007 r., uwzględniając ustawowy okres wypowiedzenia. Pracodawca obliczył okres wypowiedzenia w taki sposób, jak gdyby jej staż pracy wynosił 3 lata, podczas gdy w rzeczywistości przepracowała 10 lat.

14 S. Kücükdeveci zaskarżyła rozwiązanie z nią umowy o pracę do Arbeitsgericht Mönchengladbach (Niemcy). W postępowaniu przed tym sądem podniosła, że na podstawie § 622 ust. 2 akapit pierwszy pkt 4 BGB okres wypowiedzenia jej umowy o pracę powinien wynosić 4 miesiące, licząc od dnia 31 grudnia 2006 r., to jest powinien kończyć się w dniu 30 kwietnia 2007 r. Taki termin odpowiada dziesięcioletniemu stażowi pracy. Spór przed sądem krajowym toczy się zatem przed dwiema jednostkami, tj. z jednej strony – S. Kücükdeveci i z drugiej strony – Swedex.

15 Zdaniem S. Kücükdeveci, § 622 ust. 2 akapit drugi BGB w zakresie, w jakim przewiduje, że okresy zatrudnienia ukończone przed osiągnięciem 25 lat życia nie są uwzględniane przy obliczaniu długości okresu wypowiedzenia, stanowi dyskryminację ze względu na wiek sprzeczną z prawem Unii. W związku z tym ten przepis nie powinien być stosowany.

16 Landesarbeitsgericht Düsseldorf, rozpoznający sprawę w postępowaniu odwoławczym, zauważył, że na dzień wypowiedzenia umowy o pracę termin transpozycji dyrektywy 2000/78 już upłynął. Sąd ten stwierdził także, że § 622 BGB przewiduje odmienne traktowanie bezpośrednio związane z wiekiem i choć nie jest przekonany o jego niekonstytucyjności, to jednak jego zgodność z prawem Unii jest zdaniem tego sądu dyskusyjna. W tej kwestii zastanawia się, czy ewentualne istnienie dyskryminacji bezpośredniej związanej z wiekiem powinno być rozpatrywane w świetle pierwszeństwa prawa Unii, co zdaje się sugerować wyrok z dnia 22 listopada 2005 r. w sprawie C-144/04 Mangold, Zb.Orz. s. I-9981, czy też w świetle dyrektywy 2000/78. Podkreślając, że sporny przepis krajowy jest jasny i nie mógłby zostać ewentualnie poddany wykładni nadającej znaczenie zgodne z dyrektywą, sąd ten zastanawia się także, czy – aby móc nie stosować tego przepisu w sporze między podmiotami prywatnymi – powinien najpierw – w celu ochrony uzasadnionych oczekiwać podmiotów prawa – zwrócić się do Trybunału Sprawiedliwości w trybie prejudycjalnym o potwierdzenie niezgodności tego przepisu z prawem Unii.

17 W tych okolicznościach Landesarbeitsgericht Düsseldorf postanowił zawiesić postępowanie i zwrócić się do Trybunału z następującymi pytaniami prejudycjalnymi:

„1 a) Czy krajowe uregulowanie ustawowe, zgodnie z którym okres wypowiedzenia obowiązujący pracodawcę ulega stopniowemu wydłużeniu stosownie do wydłużającego się okresu zatrudnienia pracownika, jednakże okresy zatrudnienia ukończone przez pracownika przed osiągnięciem przez niego wieku 25 lat nie są w tym przypadku uwzględniane, narusza wspólnotowy zakaz dyskryminacji ze względu na wiek, szczególnie wspólnotowe prawo pierwotne lub dyrektywę 2000/78 [...]?

b) Czy uzasadnieniem dla obowiązku przestrzegania przez pracodawcę w stosunku do młodszych pracowników wyłącznie podstawowego okresu wypowiedzenia może być okoliczność, że uznaje się, iż pracodawca realizuje uznany interes przedsiębiorstwa polegający na elastyczności jego składu osobowego, który to interes naruszają dłuższe okresy wypowiedzenia, oraz iż młodszym pracownikom nie przyznaje się (wywodzonej – w stosunku do starszych pracowników – z dłuższych okresów wypowiedzenia) ochrony istnienia stosunku zatrudnienia i ochrony swobody decyzyjnej pracownika w kwestiach związanych ze stosunkiem zatrudnienia, ponieważ, dla przykładu, w związku z ich wiekiem lub mniejszymi obciążeniami o charakterze socjalnym, rodzinnym i prywatnym można od nich oczekiwać większej zawodowej i osobistej elastyczności oraz mobilności?

2) W przypadku udzielenia odpowiedzi twierdzącej na pytanie pierwsze lit. a) i odpowiedzi przeczącej na pytanie pierwsze lit. b):

Czy w przypadku sporu między podmiotami prywatnymi sąd państwa członkowskiego jest zobowiązany do niezastosowania uregulowania ustawowego wyraźnie niezgodnego z prawem wspólnotowym, czy też należy uwzględnić zaufanie, jakie adresaci norm pokładają w zastosowaniu obowiązujących ustaw krajowych w ten sposób, że skutek w postaci niezastosowania przepisu następuje dopiero po wydaniu przez Trybunał Sprawiedliwości orzeczenia w przedmiocie spornego lub zasadniczo podobnego uregulowania?”.

W przedmiocie pytań prejudycjalnych

W przedmiocie pytania pierwszego

18 Poprzez pytanie pierwsze sąd odsyłający zmierza zasadniczo do ustalenia, czy uregulowanie krajowe, takie jak w sprawie przed sądem krajowym, które przewiduje, że okresy zatrudnienia ukończone przez pracownika, zanim osiągnął on wiek 25 lat, nie są uwzględniane przy obliczaniu okresu wypowiedzenia stosunku pracy, stanowi odmienne traktowanie ze względu na wiek zabronione prawem Unii, w szczególności prawem pierwotnym lub dyrektywą 2000/78. Sąd ten zastanawia się zwłaszcza nad kwestią, czy takie uregulowanie znajduje uzasadnienie w okoliczności, że w przypadku rozwiązywania przez pracodawcę stosunków pracy z młodymi pracownikami powinien być przestrzegany jedynie podstawowy okres wypowiedzenia po pierwsze po to, by umożliwić pracodawcom elastyczne zarządzanie personelem, co nie byłoby możliwe w przypadku dłuższych okresów wypowiedzenia, a po drugie – ponieważ od młodych pracowników można racjonalnie wymagać większej mobilności zawodowej i osobistej, niż wymagana jest od starszych pracowników.

19 W celu udzielenia odpowiedzi na to pytanie należy – zgodnie z sugestią sądu odsyłającego – sprecyzować na wstępie, czy pytanie to należy rozważać w aspekcie pierwotnego prawa Unii, czy dyrektywy 2000/78.

20 W tej kwestii należy po pierwsze przypomnieć, że na podstawie art. 13 WE Rada Unii Europejskiej przyjęła dyrektywę 2000/78, co do której Trybunał orzekł, że sama w sobie nie ustanawia zasady równego traktowania w zakresie zatrudnienia i pracy – która to zasada ma swoje źródło w różnych instrumentach międzynarodowych i we wspólnej tradycji

konstytucyjnej państw członkowskich – lecz ma jedynie na celu ustanowienie w tych dziedzinach ogólnych ram dla walki z dyskryminacją z różnych względów, między innymi ze względu na wiek (zob. ww. wyrok w sprawie Mangold, pkt 74).

21 W tym kontekście Trybunał potwierdził istnienie zasady niedyskryminacji ze względu na wiek, którą należy uważać za ogólną zasadę prawa Unii (zob. podobnie ww. wyrok w sprawie Mangold, pkt 75). Dyrektywa 2000/78 zasadę tę konkretyzuje (zob. analogicznie wyrok z dnia 8 kwietnia 1976 r. w sprawie 43/75, Defrenne, Rec. s. 455, pkt 54).

22 Należy także wskazać, że art. 6 ust. 1 TUE stanowi, że Karta praw podstawowych Unii Europejskiej ma taką samą moc prawną jak traktaty. Zgodnie z art. 21 ust. 1 tej karty „[z]akazana jest wszelka dyskryminacja w szczególności ze względu na [...] wiek".

23 Aby zasadę niedyskryminacji ze względu na wiek można było stosować w sytuacji takiej jak w sprawie przed sądem krajowym, konieczne jest jeszcze, by sytuacja ta mieściła się w zakresie zastosowania prawa Unii.

24 W tej kwestii, inaczej niż w sprawie C-427/06 Bartsch, zakończonej wyrokiem z dnia 23 września 2008 r., Zb.Orz. s. I-7245, zachowanie, któremu w sprawie głównej zarzuca się dyskryminujący charakter, miało miejsce po upływie terminu wyznaczonego państwu członkowskiemu w celu transpozycji dyrektywy 2000/78, który w przypadku Republiki Federalnej Niemiec upłynął w dniu 2 grudnia 2006 r.

25 Z tym dniem dyrektywa spowodowała, że w zakres zastosowania prawa Unii weszło uregulowanie będące przedmiotem sporu przed sądem krajowym, obejmujące materię uregulowaną w dyrektywie, tj., w niniejszej sprawie, warunki rozwiązania stosunku pracy przez pracodawcę.

26 Przepis krajowy taki jak § 622 ust. 2 akapit drugi BGB, w zakresie w jakim przewiduje, że przy obliczaniu długości okresu wypowiedzenia nie są brane pod uwagę okresy zatrudnienia ukończone przez pracownika przed osiągnięciem przez niego wieku 25 lat, ma bowiem wpływ na warunki rozwiązywania przez pracodawcę stosunku pracy z pracownikami. Uregulowanie tego rodzaju należy zatem uważać za uregulowanie zawierające normy dotyczące warunków rozwiązywania stosunku pracy.

27 Z powyższych rozważań wynika, że ustalenia, czy prawo Unii stoi na przeszkodzie istnieniu przepisu krajowego takiego jak w sprawie przed sądem krajowym, należy dokonywać na podstawie zasady ogólnej prawa Unii zakazującej wszelkiej dyskryminacji ze względu na wiek, skonkretyzowanej w dyrektywie 2000/78.

28 Po drugie, odnośnie do kwestii, czy przepis, którego dotyczy sprawa przed sądem krajowym, przewiduje odmienne traktowanie oparte na kryterium wieku, należy przypomnieć, że zgodnie z brzmieniem art. 2 ust. 1 dyrektywy 2000/78 pojęcie „zasada równego traktowania" w rozumieniu tej dyrektywy oznacza brak jakichkolwiek form bezpośredniej lub pośredniej dyskryminacji z przyczyn określonych w art. 1 tej dyrektywy. Artykuł 2 ust. 2 lit. a) tej dyrektywy uściśla, że do celów ust. 1 dyskryminacja bezpośrednia występuje w przypadku, gdy osobę traktuje się w sposób gorszy, niż traktuje się inną osobę w porównywalnej sytuacji, z jakiejkolwiek przyczyny wymienionej w art. 1 (zob. wyroki: z dnia 16 października 2007 r. w sprawie C-411/05 Palacios de la Villa, Zb.Orz. s. I-8531, pkt 50; z dnia 5 marca 2009 r. w sprawie C-388/07 Age Concern England, Zb.Orz. s. I-1569, pkt 33).

29 W niniejszej sprawie § 622 ust. 2 akapit drugi BGB przewiduje mniej korzystne traktowanie pracowników, których pracodawca zatrudnił, zanim ukończyli 25 lat. Ten przepis krajowy wprowadza zatem odmienne traktowanie osób posiadających taki sam staż pracy w zależności od tego, w jakim były wieku w chwili zatrudnienia w przedsiębiorstwie.

30 I tak w wypadku dwóch pracowników, z których każdy ma dwudziestoletni staż pracy, temu, który rozpoczął pracę w przedsiębiorstwie w wieku 18 lat, będzie przysługiwał pięciomiesięczny okres wypowiedzenia, natomiast temu, który został zatrudniony w wieku 25 lat, będzie przysługiwał okres siedmiomiesięczny. Ponadto, jak wskazał rzecznik

generalny w pkt 36 opinii, przepis krajowy, którego dotyczy postępowanie główne, w sposób generalny stawia młodszych pracowników w sytuacji gorszej od pracowników starszych, ponieważ ci pierwsi, jak pokazuje sytuacja skarżącej w sprawie przed sądem krajowym, potencjalnie mogą zostać wyłączeni – mimo dłuższego o kilka lat stażu pracy w przedsiębiorstwie – z dobrodziejstwa progresywnego wydłużania okresu wypowiedzenia w zależności od czasu trwania stosunku pracy, z którego będą natomiast mogli korzystać pracownicy starsi o porównywalnym stażu pracy.

31 Z powyższego wynika, że przepis, którego dotyczy sprawa przed sądem krajowym, przewiduje odmienne traktowanie oparte na kryterium wieku.

32 Po trzecie należy ustalić, czy takie odmienne traktowanie może stanowić dyskryminację zabronioną przez skonkretyzowaną w dyrektywie zasadę niedyskryminacji ze względu na wiek.

33 W tej kwestii art. 6 ust. 1 akapit pierwszy dyrektywy 2000/78 stanowi, że odmienne traktowanie ze względu na wiek nie stanowi dyskryminacji, jeżeli w ramach prawa krajowego zostanie to obiektywnie i racjonalnie uzasadnione zgodnym z przepisami celem, w szczególności celami polityki zatrudnienia, rynku pracy i kształcenia zawodowego, i jeżeli środki mające służyć realizacji tego celu są właściwe i konieczne.

34 Zarówno z informacji sądu odsyłającego, jak i wyjaśnień udzielonych na rozprawie przez rząd niemiecki wynika, że źródłem § 622 BGB jest ustawa z 1926 r. Ustalenie w tej ustawie progu 25 lat było wynikiem kompromisu między po pierwsze ówczesnym rządem, który zamierzał w sposób jednolity przedłużyć o trzy miesiące okres wypowiedzenia stosunku pracy wobec pracowników w wieku powyżej 40 lat, po drugie – zwolennikami stopniowego wydłużania okresu wypowiedzenia wobec wszystkich pracowników i po trzecie – zwolennikami stopniowego wydłużania okresu wypowiedzenia, lecz bez uwzględniania stażu pracy, przy czym celem tego przepisu było stopniowe uwolnienie pracodawców od wydłużonych okresów wypowiedzenia w wypadku pracowników w wieku poniżej 25 lat.

35 Zdaniem sądu odsyłającego, § 622 ust. 2 akapit drugi BGB odzwierciedla ocenę ustawodawcy, zgodnie z którą młodsi pracownicy łatwiej i szybciej reagują na utratę pracy i można wymagać od nich większej elastyczności. Wreszcie, zdaniem tego sądu, krótszy w wypadku młodszych pracowników okres wypowiedzenia sprzyja ich zatrudnianiu dzięki zwiększeniu elastyczności w zarządzaniu personelem.

36 Charakter celów przytaczanych przez rząd niemiecki oraz sąd odsyłający zdaje się wskazywać na to, iż są to cele polityki zatrudnienia i rynku pracy w rozumieniu art. 6 ust. 1 dyrektywy 2000/78.

37 Zgodnie z brzmieniem tegoż art. 6 ust. 1 dyrektywy 2000/78 należy jeszcze ustalić, czy środki mające służyć realizacji takiego prawnie uzasadnionego celu są „właściwe i konieczne”.

38 W tej kwestii należy przypomnieć, że państwa członkowskie dysponują szerokim zakresem uznania w kwestii wyboru środków właściwych dla realizacji przyjętych przez nie celów w dziedzinie polityki socjalnej i zatrudnienia (zob. ww. wyroki: w sprawie Mangold, pkt 63; w sprawie Palacios de la Villa, pkt 68).

39 Sąd odsyłający zauważa, że celem spornego środka jest umożliwienie pracodawcy większej elastyczności w zarządzaniu personelem poprzez zmniejszenie obciążenia pracodawcy w zakresie rozwiązywania stosunku pracy z młodymi pracownikami, od których można rozsądnie wymagać zwiększonej mobilności zawodowej i osobistej.

40 Omawiany środek nie jest jednak właściwy do realizacji tego celu, ponieważ stosowany jest wobec wszystkich pracowników, którzy rozpoczęli pracę w przedsiębiorstwie przed ukończeniem 25 lat, niezależnie od ich wieku w chwili rozwiązania z nimi stosunku pracy.

41 Odnośnie do przyświecającego ustawodawcy przy ustanawianiu tego przepisu, a przypomnianego przez rząd niemiecki celu, polegającego na wzmocnieniu ochrony pracowników w zależności od czasu przepracowanego w przedsiębiorstwie, okazuje się, że na podstawie spornego przepisu wydłużenie okresu wypowiedzenia stosunku pracy w zależności od stażu pracownika opóźnia się w przypadku wszystkich pracowników, którzy zostali zatrudnieni przed osiągnięciem wieku 25 lat, nawet jeżeli w chwili wypowiedzenia zainteresowany mógłby wykazać się długim stażem pracy w przedsiębiorstwie. Nie można zatem uznać, że środek ten jest odpowiedni do realizacji wskazanego celu.

42 Należy podkreślić, że – jak podkreśla sąd odsyłający – przepis, którego dotyczy sprawa główna, wpływa na sytuację młodych ludzi w nierównym stopniu, wpływa bowiem na sytuację tej ich grupy, która bez wykształcenia zawodowego albo po okresie krótkiego kształcenia zawodowego wcześnie podjęła zatrudnienie, nie wpływa natomiast na sytuację tej grupy, która podejmuje zatrudnienie, po tym jak odbyła wieloletnie kształcenie.

43 Z ogółu powyższych rozważań wynika, że na pytanie pierwsze należy udzielić następującej odpowiedzi: wykładni prawa Unii, a dokładniej zasady niedyskryminacji ze względu na wiek skonkretyzowanej w dyrektywie 2000/78, należy dokonywać w ten sposób, że stoi na przeszkodzie istnieniu przepisu krajowego takiego jak w sporze przed sądem krajowym, który przewiduje, że okresy zatrudnienia ukończone przez pracownika, zanim osiągnął on wiek 25 lat, nie są uwzględniane przy obliczaniu okresu wypowiedzenia stosunku pracy.

W przedmiocie pytania drugiego

44 Poprzez pytanie drugie sąd odsyłający zmierza zasadniczo do ustalenia, czy aby móc nie stosować w sporze między jednostkami przepisu, który uważa za sprzeczny z prawem Unii, powinien najpierw – w celu ochrony uzasadnionych oczekiwań podmiotów prawa – zwrócić się do Trybunału na podstawie art. 267 TFUE o potwierdzenie niezgodności tego przepisu z prawem Unii.

45 Odnośnie do, po pierwsze, roli sądu krajowego w sporze między jednostkami, kiedy okazuje się, że prawo krajowe jest sprzeczne z prawem Unii, Trybunał orzekł już, że to na sądach krajowych spoczywa w szczególności obowiązek zapewnienia ochrony prawnej gwarantowanej podmiotom prawa poprzez przepisy prawa Unii oraz zapewnienie pełnej skuteczności tych przepisów (zob. podobnie wyroki: z dnia 5 października 2004 r. w sprawach połączonych od C-397/01 do C-403/01 Pfeiffer i in., Zb.Orz. s. I-8835, pkt 111; z dnia 15 kwietnia 2008 r. w sprawie C-268/06 Impact, Zb.Orz. s. I-2483, pkt 42).

46 W kwestii sporów między jednostkami Trybunał orzekał niezmiennie, że dana dyrektywa nie może sama z siebie tworzyć obowiązków po stronie jednostki i nie można zatem powoływać się na dyrektywę jako taką przeciwko jednostce (zob. w szczególności wyroki: z dnia 26 lutego 1986 r. w sprawie 152/84 Marshall, Rec. s. 723, pkt 48; z dnia 14 lipca 1994 r. w sprawie C-91/92 Faccini Dori, Rec. str. I-3325, pkt 20; ww. wyrok w sprawie Pfeiffer i in., pkt 108).

47 Jednak wynikające z dyrektywy zobowiązanie państw członkowskich do osiągnięcia rezultatu w niej wskazanego, jak również powinność podjęcia wszelkich właściwych środków ogólnych lub szczególnych w celu zapewnienia wykonania tego zobowiązania, ciążą na wszystkich organach tych państw, w tym, w granicach ich kompetencji, na organach sądowych (zob. w szczególności wyroki: z dnia 10 kwietnia 1984 r. w sprawie 14/83 von Colson i Kamann, Rec. s. 1891, pkt 26; z dnia 13 listopada 1990 r. w sprawie C-106/89 Marleasing, Rec. s. I-4135, pkt 8; ww. wyrok w sprawie Faccini Dori, pkt 26; wyrok z dnia 18 grudnia 1997 r. w sprawie C-129/96 Inter-Environnement Wallonie, Rec. s. I-7411, pkt 40; ww. wyrok w sprawie Pfeiffer i in., pkt 110; wyrok z dnia 23 kwietnia 2009 r. w sprawach połączonych od C-378/07 do C-380/07 Angelidaki i in., Zb.Orz. s. I-3071, pkt 106).

48 Z powyższego wynika, że stosując prawo krajowe, sąd krajowy – dokonując interpretacji tego prawa – powinien w najszerszym możliwym zakresie dokonywać jej w świetle treści i celów dyrektywy w celu osiągnięcia zamierzonego przez nią skutku, postępując tym samym zgodnie z art. 288 akapit trzeci TFUE (zob. podobnie ww. wyroki: w sprawie Colson

i Kamann, pkt 26; w sprawie Marleasing, pkt 8; w sprawie Faccini Dori, pkt 26; w sprawie Pfeiffer i in., pkt 113). Wymóg dokonywania wykładni zgodnej prawa krajowego jest nierozłącznie związany z systemem traktatu, gdyż zezwala sądowi krajowemu na zapewnienie, w ramach jego właściwości, pełnej skuteczności prawa Unii przy rozpoznawaniu zawisłego przed nim sporu (zob. podobnie ww. wyrok w sprawie Pfeiffer i in., pkt 114).

49 Jednak – zdaniem sądu odsyłającego – § 622 ust. 2 akapit drugi BGB jest jasny i w związku z tym nie może zostać ewentualnie poddany wykładni zgodnej z dyrektywą 2000/78.

50 W tej kwestii należy przypomnieć po pierwsze, że – jak wskazano w pkt 20 niniejszego wyroku – dyrektywa 2000/78 nie ustanawia zasady równego traktowania w dziedzinie zatrudnienia i pracy, lecz jedynie ją konkretyzuje, a po drugie, że zasada niedyskryminacji ze względu na wiek jest zasadą ogólną prawa Unii, gdyż stanowi konkretne zastosowanie ogólnej zasady równości traktowania (zob. podobnie ww. wyrok w sprawie Mangold, pkt 74–76).

51 W tych okolicznościach na sądzie krajowym, przed którym zawisł spór dotyczący zakazu dyskryminacji ze względu na wiek skonkretyzowanej w dyrektywie 2000/78, spoczywa obowiązek zagwarantowania – w ramach jego kompetencji – ochrony prawnej wynikającej dla podmiotów prawa z prawa Unii oraz zapewnienia jego pełnej skuteczności poprzez niestosowanie jakichkolwiek przepisów prawa krajowego sprzecznych z tą zasadą (zob. podobnie ww. wyrok w sprawie Mangold, pkt 77).

52 Po drugie, co się tyczy ewentualnie ciążącego na sądzie krajowym, rozpoznającym spór między jednostkami, obowiązku zwrócenia się do Trybunału w trybie prejudycjalnym o wykładnię prawa Unii przed odstąpieniem od stosowania przepisu krajowego, który uważa za sprzeczny z tym prawem, należy wskazać, że – jak wynika z postanowienia odsyłającego – ten aspekt pytania jest uzasadniony faktem, że na podstawie prawa krajowego sąd odsyłający nie może zaniechać stosowania obowiązującego przepisu prawa krajowego, o ile Bundesverfassungsgericht (federalny trybunał konstytucyjny) nie stwierdził wcześniej jego niekonstytucyjności.

53 W tej kwestii należy podkreślić, że konieczność zagwarantowania pełnej skuteczności zasady niedyskryminacji ze względu na wiek skonkretyzowanej w dyrektywie 2000/78 oznacza, że kiedy sąd krajowy napotyka przepis wchodzący w zakres zastosowania prawa Unii, który uważa za niezgodny z tą zasadą, a dokonanie wykładni tego przepisu zgodnej z prawem Unii okazuje się niemożliwe, powinien odstąpić od stosowania tego przepisu, i ani nie jest przy tym zobowiązany do uprzedniego wystąpienia do Trybunału z pytaniem prejudycjalnym, ani nie można mu w tym przeszkodzić.

54 Przyznane w ten sposób sądowi krajowemu w art. 267 akapit drugi TFUE uprawnienie do domagania się, przed odstąpieniem od stosowania przepisu krajowego sprzecznego z prawem Unii, wykładni Trybunału dokonanej w trybie prejudycjalnym, nie może jednak przekształcić się w obowiązek wynikający z tego, że prawo krajowe nie pozwala temu sądowi na niestosowanie przepisu krajowego, który uważa za sprzeczny z konstytucją, jeżeli wcześniej trybunał konstytucyjny nie stwierdził jego niekonstytucyjności. Na podstawie bowiem zasady pierwszeństwa prawa Unii, z której korzysta także zasada niedyskryminacji ze względu na wiek, uregulowanie krajowe, które wchodzi w zakres zastosowania prawa Unii, a jest z nim sprzeczne, nie powinno być stosowane (zob. podobnie ww. wyrok w sprawie Mangold, pkt 77).

55 Z powyższych rozważań wynika, że sąd krajowy, rozpoznając spór między jednostkami, nie jest zobowiązany do wystąpienia do Trybunału w trybie prejudycjalnym o wykładnię zasady niedyskryminacji ze względu na wiek skonkretyzowanej w dyrektywie 2000/78 przed odstąpieniem od stosowania przepisu prawa krajowego, który uważa za sprzeczny z tą zasadą, lecz ma takie uprawnienie. Fakultatywność takiego zwrócenia się do Trybunału jest niezależna od szczegółowego trybu, którego sąd krajowy powinien przestrzegać na podstawie prawa krajowego przy odstępowaniu od stosowania przepisu krajowego, który uważa za sprzeczny z Konstytucją.

56 W świetle powyższych rozważań na pytanie drugie należy odpowiedzieć w ten sposób, że na sądzie krajowym, przed którym zawisł spór między jednostkami, spoczywa obowiązek zagwarantowania przestrzegania zasady niedyskryminacji ze względu na wiek skonkretyzowanej w dyrektywie 2000/78 poprzez niestosowanie, w razie potrzeby, jakichkolwiek sprzecznych z nią przepisów prawa krajowego, niezależnie od przysługującego mu w wypadkach wskazanych w art. 267 akapit drugi TFUE uprawnienia do zwrócenia się do Trybunału w trybie prejudycjalnym o wykładnię tej zasady.

W przedmiocie kosztów

57 Dla stron postępowania przed sądem krajowym niniejsze postępowanie ma charakter incydentalny, dotyczy bowiem kwestii podniesionej przed tym sądem; do niego zatem należy rozstrzygnięcie o kosztach. Koszty poniesione w związku z przedstawieniem uwag Trybunałowi, inne niż koszty poniesione przez strony postępowania przed sądem krajowym, nie podlegają zwrotowi.

Z powyższych względów Trybunał (wielka izba) orzeka, co następuje:

1) Wykładni prawa Unii, a dokładniej zasady niedyskryminacji ze względu na wiek skonkretyzowanej w dyrektywie Rady 2000/78/WE z dnia 27 listopada 2000 r. ustanawiającej ogólne warunki ramowe równego traktowania w zakresie zatrudnienia i pracy, należy dokonywać w ten sposób, że stoi ona na przeszkodzie istnieniu przepisu krajowego takiego jak w sporze przed sądem krajowym, który przewiduje, że okresy zatrudnienia ukończone przez pracownika, zanim osiągnął on wiek 25 lat, nie są uwzględniane przy obliczaniu długości okresu wypowiedzenia stosunku pracy.

2) Na sądzie krajowym, przed którym zawisł spór między jednostkami, spoczywa obowiązek zagwarantowania przestrzegania zasady niedyskryminacji ze względu na wiek skonkretyzowanej w dyrektywie 2000/78 poprzez niestosowanie, w razie potrzeby, jakichkolwiek sprzecznych z nią przepisów prawa krajowego, niezależnie od przysługującego mu w wypadkach wskazanych w art. 267 akapit drugi TFUE uprawnienia do zwrócenia się do Trybunału w trybie prejudycjalnym o wykładnię tej zasady.

Podpisy

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* Język postępowania: niemiecki.

WYROK TRYBUNAŁU (druga izba)

z dnia 10 lipca 2008 r.(*)

Dyrektywa 2000/43/WE – Dyskryminujące kryteria doboru pracowników – Ciężar dowodu – Sankcje

W sprawie C-54/07

mającej za przedmiot wniosek o wydanie, na podstawie art. 234 WE, orzeczenia w trybie prejudycjalnym, złożony przez arbeidshof te Brussel (Belgia) postanowieniem z dnia 24 stycznia 2007 r., które wpłynęło do Trybunału w dniu 6 lutego 2007 r., w postępowaniu:

Centrum voor gelijkheid van kansen en voor racismebestrijding

przeciwko

Firma Feryn NV,

TRYBUNAŁ (druga izba),

w składzie: C.W.A. Timmermans, prezes izby, L. Bay Larsen, K. Schiemann, J. Makarczyk i J.C. Bonichot (sprawozdawca), sędziowie,

rzecznik generalny: M. Poiares Maduro,

sekretarz: B. Fülöp, administrator,

uwzględniając procedurę pisemną i po przeprowadzeniu rozprawy w dniu 28 listopada 2007 r.,

rozważywszy uwagi przedstawione:

– w imieniu Centrum voor gelijkheid van kansen en voor racismebestrijding przez C. Bayart, advocaat,

– w imieniu rządu belgijskiego przez L. Van den Broeck oraz C. Pochet, działające w charakterze pełnomocników,

– w imieniu Irlandii przez D. O'Hagana oraz P. McGarry'ego, działających w charakterze pełnomocników,

– w imieniu rządu Zjednoczonego Królestwa przez T. Harris, działającą w charakterze pełnomocnika, wspieraną przez T. Warda, barrister, oraz J. Eady, solicitor,

– w imieniu Komisji Wspólnot Europejskich przez M. van Beeka oraz J. Enegrena, działających w charakterze pełnomocników,

po zapoznaniu się z opinią rzecznika generalnego na posiedzeniu w dniu 12 marca 2008 r.,

wydaje następujący

Wyrok

1 Wniosek o wydanie orzeczenia w trybie prejudycjalnym dotyczy wykładni dyrektywy Rady 2000/43/WE z dnia 29 czerwca 2000 r. wprowadzającej w życie zasadę równego traktowania osób bez względu na pochodzenie rasowe lub etniczne (Dz.U. L 180, s. 22).

2 Wniosek ten został złożony w ramach sporu między Centrum voor gelijkheid van kansen en voor racismebestrijding (Centrum Równości Szans i Zwalczania Rasizmu), powodem w sprawie przed sądem krajowym, a spółką Firma Feryn NV (zwaną dalej „Feryn"), pozwaną w sprawie przed sądem krajowym, w następstwie wypowiedzi jednego z kierowników spółki, który publicznie ogłosił, że spółka nie zamierza zatrudniać „cudzoziemców".

Ramy prawne

Uregulowania wspólnotowe

3 Zgodnie z art. 1 dyrektywy 2000/43 „ma [ona] na celu wyznaczenie ram walki z dyskryminacją ze względu na pochodzenie rasowe lub etniczne oraz wprowadzenie w życie w państwach członkowskich zasady równego traktowania".

4 Zgodnie z art. 2 ust. 2 lit. a) tej dyrektywy:

„dyskryminacja bezpośrednia ma miejsce, gdy ze względu na pochodzenie rasowe lub etniczne osoba traktowana jest mniej przychylnie, niż traktuje się, traktowano lub traktowano by inną osobę w podobnej sytuacji".

5 W art. 3 ust. 1 lit. a) dyrektywy wskazano, że dotyczy ona „warunków dostępu do zatrudnienia, do prowadzenia działalności na własny rachunek oraz uprawiania zawodu, włączając również kryteria selekcji i warunków rekrutacji, niezależnie od rodzaju działalności i na wszystkich szczeblach hierarchii zawodowej, również w odniesieniu do awansu zawodowego". Natomiast zgodnie z art. 3 ust. 2 tej dyrektywy nie obejmuje ona „różnego traktowania ze względu na obywatelstwo […]".

6 Artykuł 6 ust. 1 dyrektywy 2000/43 stanowi:

„Państwa członkowskie mogą przyjmować lub utrzymywać przepisy bardziej korzystne dla zasady równego traktowania od przepisów ustanowionych w niniejszej dyrektywie".

7 Zgodnie z art. 7 tej dyrektywy:

„1. Państwa członkowskie zapewniają, że procedury sądowe i/lub administracyjne, włączając, o ile uznają to za właściwe, procedury pojednawcze, których celem jest doprowadzenie do przestrzegania obowiązków wynikających z niniejszej dyrektywy, są dostępne dla wszystkich osób, które uważają się za pokrzywdzone nieprzestrzeganiem wobec nich zasady równego traktowania, nawet po zakończeniu kontaktów, w których przypuszczalnie miała miejsce dyskryminacja.

2. Państwa członkowskie zapewniają, że stowarzyszenia, organizacje lub osoby prawne, które mają, zgodnie z kryteriami ustanowionymi w prawie krajowym, uzasadniony interes w zapewnieniu, aby przestrzegane były przepisy niniejszej dyrektywy, mogą wszczynać, na rzecz skarżącego lub wspierając go, za jego zgodą, postępowanie sądowe i/lub administracyjne przewidziane w celu przestrzegania obowiązków wynikających z niniejszej dyrektywy.

[...]".

8 Artykuł 8 ust. 1 dyrektywy przewiduje ponadto, że:

„Państwa członkowskie podejmują takie środki, które są niezbędne, zgodnie z ich krajowymi systemami prawnymi, w celu zapewnienia, że gdy osoba, która uważa się za pokrzywdzoną nieprzestrzeganiem wobec niej zasady równego traktowania i przedstawia przed sądem lub

właściwym organem fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji, to na stronie pozwanej ciąży udowodnienie, że zasada równego traktowania nie została naruszona".

9 Artykuł 13 ust. 1 dyrektywy 2000/43 nakłada na państwa członkowskie obowiązek wyznaczenia organu lub organów mających wspierać równe traktowanie. Zgodnie z art. 13 ust. 2 tej dyrektywy:

„Państwa członkowskie zapewniają, że kompetencje tych organów obejmują:

– bez uszczerbku dla praw ofiar i stowarzyszeń, organizacji i innych osób prawnych określonych w art. 7 ust. 2, świadczenie niezależnej pomocy ofiarom dyskryminacji we wnoszeniu skarg dotyczących dyskryminacji […]

[...]".

10 Wreszcie art. 15 tej dyrektywy powierza państwom członkowskim ustanowienie systemu obowiązujących sankcji oraz precyzuje, że te sankcje mogą obejmować wypłatę odszkodowania na rzecz pokrzywdzonego, a także powinny być „skuteczne, proporcjonalne i odstraszające".

Uregulowania krajowe

11 Transpozycji dyrektywy 2000/43/WE do prawa belgijskiego dokonuje ustawa o zwalczaniu dyskryminacji z dnia 25 lutego 2003 r. zmieniająca ustawę z dnia 15 lutego 1993 r. o utworzeniu Centrum Równości Szans i Zwalczania Rasizmu (*Moniteur belge* z dnia 17 marca 2003 r., s. 12844), ze zmianami wprowadzonymi ustawą z dnia 20 lipca 2006 r. zawierającą przepisy różne (*Moniteur belge* z dnia 28 lipca 2006 r., s. 36940), (zwana dalej „ustawą z dnia 25 lutego 2003 r.").

12 Artykuł 2 ustawy z dnia 25 lutego 2003 r. zabrania wszelkiej dyskryminacji, bezpośredniej lub pośredniej, w zakresie warunków dostępu do działalności zarobkowej. Artykuł 19 tej ustawy dokonuje transpozycji art. 8 dyrektywy 2000/43 dotyczącego ciężaru dowodu.

13 Ustawa z dnia 25 lutego 2003 r. pozwala również występować przeciwko przypadkom dyskryminacji bądź w postępowaniu karnym, bądź cywilnym. Sąd może, na podstawie art. 19 tej ustawy, nakazać zaniechanie dyskryminacji (ust. 1) i publikację orzeczenia (ust. 2) lub – na podstawie art. 20 tej ustawy – wymierzyć grzywnę.

14 Ustawodawca belgijski przyznał Centrum voor gelijkheid van kansen en voor racismebestrijding zdolność sądową w zakresie istniejącej lub możliwej dyskryminacji, przy czym nie jest konieczne istnienie wcześniejszej skargi w tej kwestii.

Postępowanie przed sądem krajowym i pytania prejudycjalne

15 Centrum voor gelijkheid van kansen en voor racismebestrijding, będące podmiotem prawa belgijskiego utworzonym, na podstawie art. 13 dyrektywy 2000/43, w celu wspierania równego traktowania, wniosło do belgijskich sądów pracy pozew o ustalenie, że Feryn, specjalizująca się w sprzedaży i montażu drzwi i bram wahadłowych oraz segmentowych, stosuje dyskryminującą politykę zatrudnienia.

16 Centrum voor gelijkheid van kansen en voor racismebestrijding opiera się na publicznych oświadczeniach kierownika tego przedsiębiorstwa, zgodnie z którymi – w ogólnym zarysie – jego przedsiębiorstwo poszukiwało monterów, lecz nie mogło zatrudnić „cudzoziemców" z uwagi na niechęć klientów do udostępniania tym osobom prywatnych mieszkań na czas wykonywania prac.

17 Postanowieniem z dnia 26 czerwca 2006 r. voorzitter van de arbeidsrechtbank te Brussel (prezes sądu pracy w Brukseli) oddalił pozew Centrum voor gelijkheid van kansen en voor

racismebestrijding, wskazując w szczególności, że nie istnieje ani dowód, ani domniemanie, że ktokolwiek starał się o pracę i nie został zatrudniony z uwagi na swoje pochodzenie etniczne.

18 W tej sytuacji arbeidshof te Brussel (sąd pracy w Brukseli), do którego Centrum voor gelijkheid van kansen en voor racismebestrijding wniosło apelację, postanowił zawiesić postępowanie i przedstawić Trybunałowi następujące pytania prejudycjalne:

„1) Czy bezpośrednią dyskryminację w rozumieniu art. 2 ust. 2 lit. a) dyrektywy Rady 2000/43/WE z dnia 29 czerwca 2000 r. wprowadzającej w życie zasadę równego traktowania osób bez względu na pochodzenie rasowe lub etniczne stanowi złożone przez pracodawcę, po tym jak dał przyciągające uwagę ogłoszenie o pracy, publiczne oświadczenie o następującej treści:

»Ja muszę spełniać oczekiwania moich klientów. Jeżeli pan/pani mi powie: 'Chciał(a)bym ten konkretny produkt albo chciał(a)bym, żeby to zostało wykonane w taki czy inny sposób', i ja odpowiem: 'Ja tego nie robię, ale wyślę panu/pani tych ludzi', to odpowie mi pan/pani: 'Właściwie to ja wcale tych drzwi nie potrzebuję'. W ten sposób rujnuję mój własny interes. My musimy spełniać oczekiwania naszych klientów. To nie ja jestem odpowiedzialny za powstanie tego problemu w Belgii. Ja chcę, żeby moja firma dobrze prosperowała i żebyśmy na końcu roku osiągali zysk. W jaki sposób mogę to zrealizować? Dostosowując się do życzeń klienta!«.

2) Czy dla stwierdzenia bezpośredniej dyskryminacji w odniesieniu do warunków zatrudnienia w charakterze pracownika najemnego wystarcza stwierdzenie, że pracodawca stosuje bezpośrednio dyskryminujące kryteria wyboru?

3) Czy w ramach oceny dyskryminującego charakteru polityki zatrudnienia prowadzonej przez pracodawcę, służącej stwierdzeniu bezpośredniej dyskryminacji w rozumieniu art. 2 ust. 2 lit. a) dyrektywy [...] 2000/43/WE [...], może zostać wzięta pod uwagę okoliczność, że spółka związana z tym pracodawcą zatrudnia wyłącznie monterów rodzimych [...]?

4) Co należy rozumieć przez »fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji« w rozumieniu art. 8 ust. 1 dyrektywy? Jak surowo sąd krajowy musi oceniać okoliczności, które mogą prowadzić do powstania domniemania dyskryminacji?

a) W jakim stopniu wcześniejsze przejawy dyskryminacji (podanie do wiadomości publicznej bezpośrednio dyskryminujących kryteriów wyboru pracowników w kwietniu 2005 r.) stanowią »fakty, z których można domniemywać istnienie bezpośredniej lub pośredniej dyskryminacji« w rozumieniu art. 8 ust. 1 dyrektywy [2000/43]?

b) Czy stwierdzona w kwietniu 2005 r. dyskryminacja (publiczne oświadczenie złożone w kwietniu 2005 r.) prowadzi następnie do powstania domniemania kontynuowania bezpośrednio dyskryminującej polityki zatrudnienia? Czy w świetle okoliczności postępowania przed sądem krajowym dla powstania domniemania (że pracodawca prowadzi i kontynuuje dyskryminującą politykę zatrudnienia) wystarcza, że zapytany w kwietniu 2005 r., czy jako pracodawca nie traktuje w ten sam sposób pracowników rodzimych i o odmiennym pochodzeniu etnicznym, a zatem czy nie jest jednak w pewnym stopniu rasistą, udzielił publicznie odpowiedzi: »Ja muszę spełniać oczekiwania moich klientów. Jeżeli pan/pani mi powie: 'Chciał(a)bym ten konkretny produkt albo chciał(a)bym, żeby to zostało wykonane w taki czy inny sposób', i ja odpowiem: 'Ja tego nie robię, ale wyślę panu/pani tych ludzi', to odpowie mi pan/pani: 'Właściwie to ja wcale tych drzwi nie potrzebuję'. W ten sposób rujnuję mój własny interes. My musimy spełniać oczekiwania naszych klientów. To nie ja jestem odpowiedzialny za powstanie tego problemu w Belgii. Ja chcę, żeby moja firma dobrze prosperowała i żebyśmy na końcu roku osiągali zysk. W jaki sposób mogę to zrealizować? Dostosowując się do życzeń klienta!«.

c) Czy w świetle okoliczności postępowania przed sądem krajowym wspólne oświadczenie prasowe pracodawcy i krajowej organizacji zwalczającej dyskryminację, w którym pracodawca przynajmniej w dorozumiany sposób potwierdził prowadzenie działań o charakterze dyskryminującym, może prowadzić do powstania takiego domniemania?

d) Czy okoliczność, że pracodawca nie zatrudnia żadnych monterów o odmiennym pochodzeniu etnicznym, może prowadzić do powstania domniemania pośredniej dyskryminacji, jeżeli jakiś czas temu pracodawca ten miał poważne trudności z zatrudnieniem monterów i w związku z tym oświadczył publicznie, że jego klienci niechętnie współpracują z monterami o odmiennym pochodzeniu etnicznym?

e) Czy jedna okoliczność wystarcza do powstania domniemania dyskryminacji?

f) Czy w świetle okoliczności postępowania przed sądem krajowym domniemanie dyskryminacji przez pracodawcę może zostać wywiedzione z okoliczności, iż związana z tym pracodawcą spółka zatrudniała wyłącznie pracowników rodzimych?

5) Jak surowo sąd krajowy musi oceniać dowód przeciwny, który musi zostać przeprowadzony w przypadku powstania domniemania dyskryminacji w rozumieniu art. 8 ust. 1 dyrektywy 2000/43 [...]? Czy domniemanie dyskryminacji w rozumieniu art. 8 ust. 1 dyrektywy 2000/43 [...] może zostać obalone przez zwykłe jednostronne oświadczenie pracodawcy w prasie, że nie podejmuje on, względnie już nie podejmuje, dyskryminujących działań i że monterzy o odmiennym pochodzeniu etnicznym są mile widziani, lub przez zwykłe oświadczenie pracodawcy, że z wyjątkiem siostrzanego przedsiębiorstwa wszystkie wolne stanowiska monterów są zajęte, lub też przez oświadczenie, że zatrudnił tunezyjską sprzątaczkę, czy też w świetle okoliczności postępowania przed sądem krajowym domniemanie to może zostać obalone wyłącznie przez okoliczność, że monterzy o odmiennym pochodzeniu etnicznym faktycznie są zatrudniani lub też, że obietnice złożone we wspólnym oświadczeniu prasowym zostały spełnione?

6) Co należy rozumieć przez »skuteczną, proporcjonalną i odstraszającą« sankcję w rozumieniu art. 15 dyrektywy 2000/43/WE [...]? Czy w świetle okoliczności postępowania przed sądem krajowym wymóg dotyczący charakteru sankcji wyrażony w art. 15 dyrektywy 2000/43/WE [...] umożliwia sądowi krajowemu zwykłe stwierdzenie wystąpienia bezpośredniej dyskryminacji? Czy też przepis ten wymaga, aby sąd krajowy wydał również nakaz zaniechania, tak jak przewiduje prawo krajowe? W jakim stopniu niezbędne jest, aby w świetle okoliczności postępowania przed sądem krajowym sąd krajowy zarządził tytułem skutecznej, proporcjonalnej i odstraszającej sankcji podanie wydanego wyroku do wiadomości publicznej?".

W przedmiocie pytań prejudycjalnych

19 Tytułem wstępu należy przypomnieć, że w ramach art. 234 WE Trybunał jest uprawniony nie do stosowania przepisów wspólnotowych do określonego przypadku, lecz wyłącznie do orzekania w kwestii wykładni traktatu WE oraz aktów przyjętych przez instytucje Wspólnoty (zob. w szczególności wyrok z dnia 15 lipca 1964 r. w sprawie 100/63 Van der Veen, Rec. s. 1105, 1121 oraz wyrok z dnia 10 maja 2001 r. w sprawie C-203/99 Veedfald, Rec. s. I-3569, pkt 31). W ramach współpracy sądowej ustanowionej w tym postanowieniu Trybunał może jednak, na podstawie informacji zawartych w aktach sprawy, dostarczać sądom krajowym elementów wykładni prawa wspólnotowego, które mogą być im przydatne dla oceny skutków danego przepisu prawa wspólnotowego (wyrok z dnia 8 grudnia 1987 r. w sprawie 20/87 Gauchard, Rec. s. 4879, pkt 5 oraz wyrok z dnia 5 marca 2002 r. w sprawach połączonych C-515/99, od C-519/99 do C-524/99 i od C-526/99 do C-540/99 Reisch i in., Rec. s. I-2157, pkt 22).

20 Sąd krajowy oczekuje zasadniczo od Trybunału wykładni przepisów dyrektywy 2000/43 dla celów dokonania oceny pojęcia dyskryminacji bezpośredniej w świetle publicznych

oświadczeń pracodawcy w ramach procesu rekrutacji (pytania pierwsze i drugie), okoliczności, w których może znaleźć zastosowanie norma dotycząca odwrócenia ciężaru dowodu przewidziana w tej dyrektywie (pytania trzecie, czwarte i piąte) i charakteru sankcji, jakie można uznać ewentualnie za właściwe w przypadku takim jak ten, którego dotyczy sprawa przed sądem krajowym (pytanie szóste).

W przedmiocie pytań pierwszego i drugiego

21 Co się tyczy pytań pierwszego i drugiego, Irlandia, jak również Zjednoczone Królestwo Wielkiej Brytanii i Irlandii Północnej, podnoszą, że nie można mówić o dyskryminacji bezpośredniej w rozumieniu dyrektywy 2000/43 – a zatem dyrektywa ta nie ma zastosowania – w sytuacji gdy zarzucana dyskryminacja wynika z publicznych oświadczeń pracodawcy w przedmiocie jego polityki rekrutacyjnej, lecz brak jest możliwego do zidentyfikowania powoda utrzymującego, że był on ofiarą tej dyskryminacji.

22 Prawdą jest, jak wskazują te dwa państwa członkowskie, że art. 2 dyrektywy 2000/43 definiuje dyskryminację bezpośrednią jako sytuację, gdy ze względu na pochodzenie rasowe lub etniczne dana osoba „traktowana jest" mniej przychylnie, niż traktuje się, traktowano lub traktowano by inną osobę w podobnej sytuacji. Podobnie art. 7 tej dyrektywy nakłada na państwa członkowskie obowiązek czuwania nad tym, by procedury sądowe były „dostępne dla wszystkich osób, które uważają się za pokrzywdzone nieprzestrzeganiem wobec nich zasady równego traktowania" i podmiotów interesu publicznego, które występują przed sądami „na rzecz skarżącego lub wspierając go".

23 Nie sposób stąd jednak wywieść, że brak możliwego do zidentyfikowania skarżącego pozwala na stwierdzenie, że nie ma miejsca jakakolwiek dyskryminacja bezpośrednia w rozumieniu dyrektywy 2000/43. Celem tej dyrektywy jest bowiem, jak przypomniano w jej motywie 8, „wspierani[e] rynku pracy sprzyjającego społecznej integracji". W tym celu w art. 3 ust. 1 lit. a) dyrektywy dodano, że odnosi się ona między innymi do kryteriów selekcji i warunków rekrutacji.

24 Osiągnięcie celu polegającego na wspieraniu rynku pracy sprzyjającego społecznej integracji byłoby trudne, gdyby zakres zastosowania dyrektywy 2000/43 był ograniczony jedynie do przypadków, gdy kandydat, któremu nie powiodło się przy rekrutacji, uważający się za ofiarę dyskryminacji bezpośredniej, wszczyna postępowania sądowe przeciwko pracodawcy.

25 Okoliczność bowiem, że pracodawca publicznie oświadcza, iż nie będzie zatrudniał pracowników o określonym pochodzeniu etnicznym lub rasowym – co w sposób oczywisty może poważnie zniechęcać określonych kandydatów do składania swojej kandydatury, a tym samym stanowić dla nich przeszkodę w dostępie do rynku pracy – stanowi bezpośrednią dyskryminację przy zatrudnianiu w rozumieniu dyrektywy 2000/43. Istnienie takiej bezpośredniej dyskryminacji nie wymaga, by pojawił się możliwy do zidentyfikowania skarżący, który ewentualnie był jej ofiarą.

26 Ustalenie, czym jest dyskryminacja w rozumieniu dyrektywy 2000/43, należy odróżnić od kwestii środków prawnych przewidzianych jej w art. 7 dla potrzeb stwierdzenia naruszenia zasady równego traktowania i nakładania sankcji. Te środki prawne powinny bowiem, zgodnie z tym przepisem, być dostępne dla osób, które uważają się za pokrzywdzone nieprzestrzeganiem wobec nich zasady równego traktowania. Przepisy art. 7 dyrektywy 2000/43 są jednak, jak wskazano w jej art. 6, jedynie normami minimalnymi, a dyrektywa ta nie zabrania państwom członkowskim wprowadzania lub utrzymywania w mocy przepisów bardziej korzystnych dla ochrony zasady równego traktowania.

27 W konsekwencji art. 7 dyrektywy 2000/43 w żaden sposób nie stoi na przeszkodzie temu, by państwa członkowskie przewidziały w swoim prawie krajowym, że stowarzyszeniom, które mają uzasadniony interes w doprowadzeniu do przestrzegania tej dyrektywy lub podmiotom wyznaczonym zgodnie z jej art. 13, przysługuje prawo do wszczynania postępowań sądowych lub administracyjnych w celu spowodowania przestrzegania zobowiązań wynikających z tej dyrektywy bez konieczności występowania w imieniu

określonego skarżącego lub w braku skarżącego możliwego do zidentyfikowania. Wyłącznie do sądu krajowego należy jednak ustalenie, czy ustawodawstwo daje taką możliwość.

28 W tym stanie rzeczy na pytania pierwsze i drugie należy odpowiedzieć w ten sposób, że okoliczność, że pracodawca publicznie oświadcza, iż nie będzie zatrudniał pracowników o określonym pochodzeniu etnicznym lub rasowym, stanowi bezpośrednią dyskryminację przy zatrudnianiu w rozumieniu art. 2 ust. 2 lit. a) dyrektywy 2000/43, ponieważ takie deklaracje mogą poważnie zniechęcać określonych kandydatów do składania swoich kandydatur, a tym samym stanowić dla nich przeszkodę w dostępie do rynku pracy.

W przedmiocie pytań od trzeciego do piątego

29 Pytania od trzeciego do piątego dotyczą kwestii, w jaki sposób należy stosować zasadę odwrócenia ciężaru dowodu przewidzianą w art. 8 ust. 1 dyrektywy 2000/43 w sytuacji, gdy zarzut dyskryminującej polityki zatrudnienia jest podnoszony w odniesieniu do publicznej wypowiedzi pracodawcy na temat jego polityki rekrutacyjnej.

30 Artykuł 8 dyrektywy 2000/43 stanowi w tym względzie, że w sytuacji, gdy fakty pozwalają na domniemanie, że ma miejsce bezpośrednia lub pośrednia dyskryminacja, to strona pozwana powinna udowodnić, że zasada równego traktowania nie została naruszona. Obowiązek dostarczenia dowodu przeciwnego, który ciąży więc na domniemanym sprawcy dyskryminującego zachowania, jest uzależniony wyłącznie od ustalenia, że istnieje domniemanie dyskryminacji – o ile domniemanie to jest oparte na ustalonych faktach.

31 Takimi faktami, które pozwalają na przyjęcie domniemania, że ma miejsce dyskryminująca polityka zatrudnienia, mogą być oświadczenia, w których pracodawca podaje do publicznej wiadomości, że w ramach swojej polityki rekrutacyjnej nie będzie zatrudniał osób o określonym pochodzeniu etnicznym lub rasowym.

32 Do tego pracodawcy należy zatem przedstawienie dowodu, że nie naruszył zasady równego traktowania, co może w szczególności uczynić poprzez wykazanie, że rzeczywista praktyka zatrudniania stosowana przez przedsiębiorstwo nie odpowiada tym oświadczeniom.

33 Do sądu krajowego należy po pierwsze ustalenie, czy zachowania zarzucane temu pracodawcy rzeczywiście zostały wykazane, a po drugie ocena, czy dowody, które przedstawia na poparcie swoich twierdzeń, że nie naruszył zasady równego traktowania, są wystarczające.

34 W konsekwencji na pytania od trzeciego do piątego należy odpowiedzieć w ten sposób, że publiczne oświadczenia, w których pracodawca informuje, że w ramach swojej polityki rekrutacyjnej nie będzie zatrudniał osób o określonym pochodzeniu etnicznym lub rasowym, są wystarczające dla domniemania, w rozumieniu art. 8 ust. 1 dyrektywy 2000/43, że ma miejsce bezpośrednio dyskryminująca polityka zatrudnienia. Do tego pracodawcy należy zatem przedstawienie dowodu, że nie naruszył zasady równego traktowania. Może to uczynić poprzez wykazanie, że rzeczywista praktyka zatrudniania nie odpowiada tym oświadczeniom. Do sądu krajowego należy ustalenie, czy zachowania zarzucane temu pracodawcy zostały udowodnione, oraz ocena, czy dowody przedstawione na poparcie twierdzeń tego pracodawcy, że nie naruszył zasady równego traktowania, są wystarczające.

W przedmiocie pytania szóstego

35 Pytanie szóste dotyczy zasadniczo kwestii sankcji, jakie można uznać za odpowiednie w przypadku dyskryminacji przy zatrudnieniu wykazanej na podstawie publicznych oświadczeń pracodawcy.

36 Artykuł 15 dyrektywy 2000/43 powierza państwom członkowskim ustanowienie systemu sankcji stosowanych w przypadku naruszenia przepisów krajowych wydanych na podstawie dyrektywy. W artykule tym dodano, że sankcje te powinny być skuteczne, proporcjonalne i odstraszające oraz że mogą obejmować wypłatę odszkodowania na rzecz ofiary.

37 Artykuł 15 dyrektywy 2000/43 nakłada więc na państwa członkowskie obowiązek wprowadzenia do ich porządku prawnego takich środków, które są wystarczająco skuteczne dla osiągnięcia celu dyrektywy, i do dokonania tego w taki sposób, by możliwe było skuteczne powoływanie się na nie przed sądami krajowymi, tak aby ochrona sądowa była rzeczywista i skuteczna. Dyrektywa 2000/43 nie narzuca określonych sankcji, lecz pozostawia państwom członkowskim wolny wybór pomiędzy różnymi rozwiązaniami właściwymi do realizacji wyznaczonego w niej celu.

38 W przypadku takim, jaki przedstawił Trybunałowi sąd krajowy, gdzie nie występuje bezpośredni pokrzywdzony dyskryminującym zachowaniem, lecz ustalenia istnienia dyskryminacji i nałożenia sankcji domaga się podmiot upoważniony do tego ustawą, sankcje, których wprowadzenia do prawa krajowego wymaga przepis art. 15 dyrektywy 2000/43, powinny być również skuteczne, proporcjonalne i odstraszające.

39 Ewentualne sankcje, o ile będzie to uzasadnione w sytuacji, której dotyczy spór przed sądem krajowym, mogą polegać na stwierdzeniu przez sąd lub właściwy organ administracji, że dyskryminacja miała miejsce, i odpowiednim upublicznieniu tego stwierdzenia na koszt strony pozwanej. Mogą również polegać na nakazaniu pracodawcy, stosownie do przepisów prawa krajowego, zaniechania stwierdzonej dyskryminującej praktyki, ewentualnie z równoczesnym wymierzeniem grzywny. Mogą też polegać na zasądzeniu świadczenia na rzecz podmiotu zaangażowanego w postępowanie.

40 W tych okolicznościach na pytanie szóste należy odpowiedzieć w ten sposób, że art. 15 dyrektywy 2000/43 wymaga, by również w sytuacji braku możliwego do zidentyfikowania pokrzywdzonego system sankcji stosowanych w przypadkach naruszenia przepisów krajowych wydanych w celu transpozycji tej dyrektywy był skuteczny, proporcjonalny i odstraszający.

W przedmiocie kosztów

41 Dla stron postępowania przed sądem krajowym niniejsze postępowanie ma charakter incydentalny, dotyczy bowiem kwestii podniesionej przed tym sądem, do niego zatem należy rozstrzygnięcie o kosztach. Koszty poniesione w związku z przedstawieniem uwag Trybunałowi, inne niż poniesione przez strony postępowania przed sądem krajowym, nie podlegają zwrotowi.

Z powyższych względów Trybunał (druga izba) orzeka, co następuje:

1) Okoliczność, że pracodawca publicznie oświadcza, iż nie będzie zatrudniał pracowników o określonym pochodzeniu etnicznym lub rasowym, stanowi bezpośrednią dyskryminację przy zatrudnianiu w rozumieniu art. 2 ust. 2 lit. a) dyrektywy Rady 2000/43/WE z dnia 29 czerwca 2000 r. wprowadzającej w życie zasadę równego traktowania osób bez względu na pochodzenie rasowe lub etniczne, ponieważ takie deklaracje mogą poważnie zniechęcać określonych kandydatów do składania swoich kandydatur, a tym samym stanowić dla nich przeszkodę w dostępie do rynku pracy.

2) Publiczne oświadczenia, w których pracodawca informuje, że w ramach swojej polityki rekrutacyjnej nie będzie zatrudniał osób o określonym pochodzeniu etnicznym lub rasowym, są wystarczające dla domniemania, w rozumieniu art. 8 ust. 1 dyrektywy 2000/43, że ma miejsce bezpośrednio dyskryminująca polityka zatrudnienia. Do tego pracodawcy należy zatem przedstawienie dowodu, że nie naruszył zasady równego traktowania. Może to uczynić poprzez wykazanie, że rzeczywista praktyka zatrudniania stosowana przez przedsiębiorstwo nie odpowiada tym oświadczeniom. Do sądu krajowego należy ustalenie, czy zachowania zarzucane temu pracodawcy zostały udowodnione, oraz ocena, czy dowody przedstawione na poparcie twierdzeń tego pracodawcy, że nie naruszył zasady równego traktowania, są wystarczające.

3) **Artykuł 15 dyrektywy 2000/43 wymaga, by również w sytuacji braku możliwego do zidentyfikowania pokrzywdzonego system sankcji stosowanych w przypadkach naruszenia przepisów krajowych wydanych w celu transpozycji tej dyrektywy był skuteczny, proporcjonalny i odstraszający.**

Podpisy

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* Język postępowania: niderlandzki.

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.

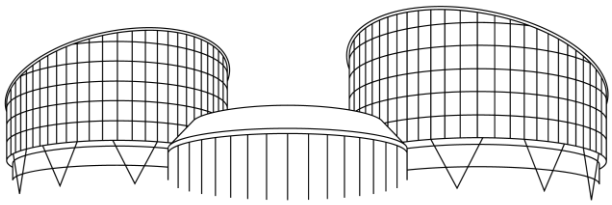
R. Grass

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;

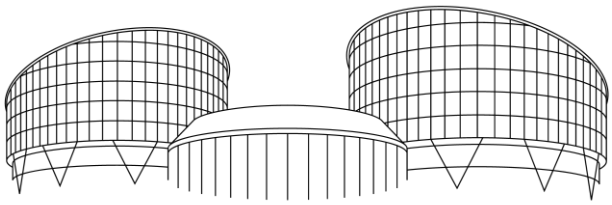
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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;

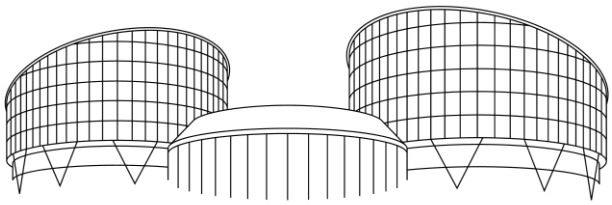
3. *Holds* that there has been a violation of Article 5 § 2 of the Convention;

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.

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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

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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

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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.

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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.

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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.

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[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